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May 3, 2017

Dr. Todd Bianco, Coordinator
Energy Facility Siting Board
89 Jefferson Boulevard
Warwick, RI 02888

Re: Invenergy Thermal Development LLC – Clear River Energy Center
Docket No. SB-2015-06

Dear Dr. Bianco:

Enclosed for filing in this matter are an original and 10 copies of a Motion of the Town of Burrillville and the Conservation Law Foundation to Modify Procedural Schedule.

Electronic copies have been sent to the service list.

If you have any questions, please feel free to call.

Very truly yours,

Michael R. McElroy

MRMc/tmg

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
ENERGY FACILITY SITING BOARD

IN RE: Application of
Invenergy Thermal Development LLC
Proposal for Clear River Energy Center

Docket No. SB 2015-06

MOTION OF TOWN OF BURRILLVILLE AND CONSERVATION LAW FOUNDATION TO MODIFY PROCEDURAL SCHEDULE

INTRODUCTION

The Town of Burrillville (Town) and Conservation Law Foundation (CLF) respectfully move for a modification of the Procedural Schedule in this case that was presented to the parties on April 26, 2017 so that the Town and CLF can review the Supplemental Advisory Opinions before filing their witness testimony and in order to give them adequate time to prepare cross-examination of adverse witnesses. Specifically, for the reasons set forth below, the Town and CLF request that the deadline by which the non-Invenergy parties (including both the Town and CLF) must pre-file the testimony of their expert witnesses be moved from July 7, 2017 to September 7, 2017, and that each subsequent deadline in the current Procedural Schedule be adjusted by the same length of time.

The Town and CLF request oral argument before the Energy Facility Siting Board (EFSB) on this Motion.

BACKGROUND

On April 26, 2017, the EFSB Coordinator and EFSB counsel held a scheduling conference with counsel for the parties, at which a pre-printed schedule of deadlines was distributed. Although counsel for the Town and CLF objected to the Procedural Schedule on substantive legal grounds, only several minor adjustments of dates were made. These minor adjustments were made primarily to account for non-substantive matters such as legal holidays and court excusals of counsel.

The current Procedural Schedule requires the non-Invenergy parties to file the direct testimony of their witnesses on July 7, 2017, five weeks before agency Supplemental Advisory Opinions are due to be submitted (on August 15, 2017). This arrangement presents two distinct problems. First, and most immediately, this schedule effectively precludes the non-Invenergy parties and their experts from using facts, analysis, arguments, conclusions, or data taken from the Supplemental Advisory Opinions in the Direct Testimony of their witnesses. In addition, this Procedural Schedule seriously truncates the time available to non-Invenergy parties to prepare for trial, especially time to prepare effective cross-examination of Invenergy's expert witnesses. Thus, this inappropriately accelerated Procedural Schedule prevents the non-Invenergy parties from fully and fairly preparing for and presenting their case. This is a due process violation.

Counsel for CLF and the Town raised these objections at the April 26 scheduling conference. When EFSB counsel declined to make the requested changes, CLF's counsel advised all present (EFSB Coordinator, EFSB counsel, and counsel for the parties) that this Motion would be filed. May 10, 2017 was set as the deadline for the filing of this Motion.

DISCUSSION

The Town and CLF propose two related adjustments to the current Procedural Schedule: (a) moving the July 7 deadline for non-Invenergy parties to file direct testimony to two months later (September 7, 2017); and (b) adjusting all subsequent deadlines two months later.

The Current Schedule Runs Afoul of Procedural Due Process

Failure to modify the Procedural Schedule will prejudice the Town's and CLF's ability to prepare adequately for trial in at least two distinct ways: (a) by preventing the Town and CLF from filing expert testimony that accounts for and addresses the various Supplemental Advisory Opinions; and (b) by not providing adequate time to prepare cross-examination. It is well settled in Rhode Island "that due process in administrative procedures requires the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Millett v. Hoisting Engineers' Licensing Division of Dept. of Labor, 377 A.2d 229, 236 (R.I. 1977) (quoting Raper v. Lucey, 488 F.2d 748, 753 (1st Cir. 1973)).

In addition, Rhode Island's Administrative Procedures Act (APA) mandates that "Opportunity shall be afforded to all parties to respond and present evidence and argument on all issues involved" in any contested case. R.I.Gen.Laws § 42-35-9(c). This APA statutory directive is incorporated into the EFSB's Rules. Under EFSB Procedural Rule 1.23(a)(4), "Parties shall have the right of presentation of evidence, cross examination, objection, motion and argument."

These requirements, arising as they do in the Due Process clauses of the U.S. and Rhode Island Constitutions, are neither new nor unique to Rhode Island. The opportunity to be heard must be an opportunity to be heard fully and fairly. Mullane v. Central Hanover Bank & Trust

Co., 339 U.S. 306, 313 (1950). Failure to allow civil litigants to prepare a case and plan trial strategy with full knowledge of the facts before the tribunal is reversible error. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973). Here, the Town and CLF are asking nothing more than sufficient time to adequately prepare their respective witnesses and cases.

The 45-Day Requirement in the Statute

When CLF's counsel raised the Constitutional procedural due process issue at the April 26 conference, the EFSB's attorney stated that the provisions of R.I. Gen. Laws §42-98-11(a) require that the EFSB commence the final hearing no more than 45 days of the submission of the Advisory Opinions. Respectfully, there are two reasons why this argument is mistaken.

First, the statutory deadline referenced is directory, not mandatory. West v. McDonald, 18 A.3d 526, 534 (R.I. 2011). For good cause shown, the EFSB may adjust those dates in order to allow parties sufficient time to prepare their case. As is shown below, Invenergy's counsel agrees with the Town and CLF on this important point.

It is undisputed that this is a complicated case. On April 7, 2017, Invenergy identified no fewer than 19 expert (not fact) witnesses whom it intends to present at the Final Hearing It is reversible error not to allow parties adequate time to prepare for trial, especially in the case of expert, rather than fact, witnesses. Scott & Fetzer Co. v. Dile, 643 F.2d 670, 673 (9th Cir. 1981) ("We note that the need for preparation for cross-examination is even more compelling where expert testimony is involved."). Here, the Town and CLF are asking for the opportunity to prepare their case in response to Invenergy's cast of 19 experts.

Importantly, there is a second compelling reason that Section 11(a) of the Energy Facility Siting Act (EFSA) does not preclude the granting of this Motion. As the EFSB is aware, January 30, 2017, CLF filed and served a Supplemental Memorandum in support of a previously filed Motion to Dismiss (CLF's January 20 Memo). An entire section of CLF's Memo was entitled "The application should be dismissed due to noncompliance with statutory deadlines." CLF's January 20 Memo, at 7. CLF cited and relied upon precisely the same section of the EFSA that states that the final hearing should commence within 45 days of receipt of Advisory Opinions.

Following oral argument on CLF's Motion to Dismiss on February 6, 2017, the EFSB denied CLF's Motion to Dismiss. During oral argument, Chairperson Curran pointed out to CLF's counsel that the 45-day deadline under Section 11(a) as cited in CLF's papers was not mandatory. February 6, 2017 Transcript, page 49, lines 3 – 16. Invenergy's own counsel stated: "As to the statutory timelines, we agree that those timelines are directory and not mandatory and that those timelines are there and they're in there for the Board's purpose of managing this process as the Board sees fit . . . ." February 6, 2017 Transcript, page 57, lines 3-8.

If the EFSB does not grant the Town's and CLF's instant Motion, the following issues would be presented on appeal: In February 2017, the EFSB ruled that the 45-day limit in Section 11(a) was not mandatory when a contrary holding would have hurt Invenergy by requiring the dismissal of the case; yet, in April 2017, the EFSB found the same provision to be mandatory when the non-Invenergy parties sought sufficient time to adequately prepare a complex case.

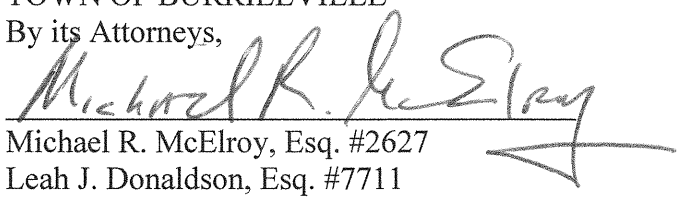
R.I. Gen. Laws § 42-98-11(a) cannot be both non-mandatory in February and absolutely mandatory in April. The Board had it right on February 6. The 45-day deadline is not mandatory. The Board may manage the process as it sees fit.

CONCLUSION

Failing to adjust the procedural deadline as requested by the Town and CLF will result in violation of the procedural due process rights of those parties, because they will be forced to file witness testimony before reviewing Supplemental Advisory Opinions and will have insufficient time to prepare cross-examination.

WHEREFORE, for the foregoing reasons, the Town and CLF respectfully request that the Procedural Schedule in this docket be amended to effect two changes, as follows: (a) move the July 7 deadline for non-Invenergy parties to file direct testimony by two months to September 7, 2017; and (b) adjust all the subsequent deadlines to be similarly two months later.

TOWN OF BURRILLVILLE
By its Attorneys,



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CERTIFICATE OF SERVICE

I certify that the original and ten photocopies of this Motion were filed by U.S. Mail, postage prepaid, with the Coordinator of the EFSB, 89 Jefferson Boulevard, Warwick, RI 02888. In addition, electronic copies of this Motion were served via email on the service list for this docket. I certify that all of the foregoing was done on May 3, 2017.

SB-2015-06 Invenergy CREC Service List as of 04/17/2017

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