

May 8, 2017

Via Electronic Mail and Federal Express

Todd Anthony Bianco, EFSB Coordinator
RI Energy Facility Siting Board
89 Jefferson Boulevard
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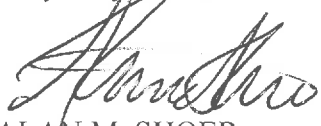
Re: Invenergy Thermal Development LLC's Application to Construct and Operate the Clear
River Energy Center in Burrillville, Rhode Island
Docket No.: SB-2015-16

Dear Mr. Bianco:

On behalf of Invenergy Thermal Development LLC and the Clear River Energy Project ("Invenergy"), please find enclosed an original and three (3) copies of Invenergy's Objection and Response to the Conservation Law Foundation and the Town of Burrillville's Motion to Modify Procedural Schedule.

Please let me know if you have any questions.

Very truly yours,



ALAN M. SHOER
ashoer@apslaw.com

Enclosures

cc: Service List

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
ENERGY FACILITY SITING BOARD**

**In Re: INVENERGY THERMAL DEVELOPMENT)
LLC’S APPLICATION TO CONSTRUCT THE) Docket No. SB-2015-06
CLEAR RIVER ENERGY CENTER IN)
BURRILLVILLE, RHODE ISLAND)**

**OBJECTION AND RESPONSE OF INVENERGY THERMAL DEVELOPMENT
LLC TO THE CONSERVATION LAW FOUNDATION’S AND THE TOWN
OF BURRILLVILLE’S MOTION TO MODIFY PROCEDURAL SCHEDULE**

Now comes Invenergy Thermal Development LLC (“Invenergy”) and hereby objects and responds to the Conservation Law Foundation’s (“CLF’s”) and the Town of Burrillville’s (“Town’s”) Motion to Modify Procedural Schedule (“Motion”) filed with the Rhode Island Energy Facility Siting Board (“EFSB” or “Board”) on May 3, 2017.

INTRODUCTION

CLF and the Town’s Motion asserts that the procedural schedule presented at the April 26, 2017 scheduling conference violates their due process because it “prevents the non-Invenergy parties from fully and fairly preparing for and presenting their case.” Motion, at 2. Specifically, CLF and the Town argue that the schedule: (1) “effectively precludes the non-Invenergy parties and their experts from using facts, analysis, argument, conclusions, or data taken from the Supplemental Advisory Opinions in the Direct Testimony of their witnesses”; and (2) “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.” *Id.* Respectfully, Invenergy disagrees.

First, the procedural schedule provides CLF and the Town with a meaningful opportunity to address the Supplemental Advisory Opinions, while accommodating the timelines to coordinate with the timing expectations set forth in the Energy Facility Siting Act. Second,

the time allocated in the procedural schedule allows for adequate time for all parties to prepare cross-examination and does not prevent any party from fully and fairly preparing for and presenting their cases.

Further, to ensure all parties have an opportunity to respond to or comment on any of the information included in the Supplemental Advisory Opinions, Invenergy proposes two alternative scheduling options that would: (1) provide a specific date for all parties to supplement direct or rebuttal testimony to respond to issues identified in the Supplemental Advisory Opinions or (2) have all parties' rebuttal and sur-rebuttal testimony deadlines shift to be due after the Supplemental Advisory Opinions are received, to allow all parties an opportunity to rebut any issues in the Supplemental Advisory Opinions.

ARGUMENT

I. The Procedural Schedule Complies with the Due Process Clause.

CLF and the Town assert that because the proposed procedural schedule does not provide CLF and the Town with the ability to file expert *direct testimony* that accounts for and addresses the Supplemental Advisory Opinions, their due process rights are violated. *Id.* at 2-3 (citing *Millett v. Hoisting Engineers' Licensing Division of the Dept. of Labor*, 119 R.I. 285, 296, 377 A.2d 229, 235–36 (1977); R.I. Gen. Laws § 42-35-9(c); Rule 1.23(a)(4) of the EFSB Rules of Practice and Procedure). In other words, CLF and the Town claim that the due process clause requires that they be able to delay providing any testimony, even as to subject matters that are outside the purview of the Supplemental Advisory Opinions, until all Supplemental Advisory Opinions are received. CLF and the Town claim that it would violate their due process rights to provide testimony regarding any of the other issues in the proceeding or the other advisory opinions that were previously completed before the Supplemental Advisory Opinions are

received. That is not necessary to meet the standard.

Invenergy agrees that the Rhode Island Supreme Court determined that “due process within administrative procedures requires the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Larue v. Registrar of Motor Vehicles, Dep't of Transp., Office of Operator Control*, 568 A.2d 755, 758 (R.I. 1990)(quoting *Millett*, 119 R.I. at 296, 377 A.2d at 235–36). However, the Rhode Island Supreme Court has never determined that a party must have an opportunity to defer filing its direct testimony on matters unrelated to Supplemental Advisory Opinions. All that is required under the law is that a party has an adequate opportunity to address the issues in the proceeding.

Additionally, there is nothing in the proposed procedural schedule that would prohibit a party from supplementing testimony in response to further developments, such as any specific issues or concerns raised from the Supplemental Advisory Opinions.¹ Also, if there is any question regarding whether supplementing testimony will be allowed in coordination with a procedural schedule to account for issues or concerns raised by one of the agencies, Invenergy’s Option A, as discussed in Section III below, provides for a specific designated date when all parties can supplement testimony, if necessary, to address any specific concerns raised by a Supplemental Advisory Opinion.

Accordingly, Invenergy submits that the procedural schedule provides CLF and the Town with an opportunity to be heard in a “meaningful time and in a meaningful manner” and does not violate CLF and the Town’s due process rights. Additionally, to provide all parties with the opportunity to comment separately on the Supplemental Advisory Opinions, only a slight shift in

¹ Board Rule 1.12(c) allows for the filing of “all direct testimony in writing” up to 10 days before the commencement of the final hearings.

the schedule would be required, as compared to a full shift of two months in the schedule as suggested in the Town's and CLF's Motion.

II. The Time Allocated In The Procedural Schedule Does Not Prevent Any Party From Fully And Fairly Preparing For And Presenting Their Cases.

CLF and the Town also contend that the procedural schedule does not provide adequate time to prepare cross-examination of Invenergy's witnesses. Motion, at 2. However, CLF and the Town have not set forth any evidence that the approximately three (3) month time frame between the date Invenergy's rebuttal testimony is due and the date final hearings are scheduled to commence does not provide adequate time to prepare cross-examination.² Additionally, last year's procedural schedule provided less than two (2) weeks between the date all rebuttal testimony was due and the date final hearings were set to commence. Neither CLF nor the Town objected then to less than two (2) weeks being insufficient to prepare effective cross examination of Invenergy's expert witnesses.

The opposing parties have been fully engaged in the proceedings to date and have already been provided with an enormous quantity of information about the Project. Indeed, CLF and the Town have received the application materials, supplemental filings, responses to specific data requests and advisory agency proceedings. Invenergy identified a list of expert witnesses, attaching each expert's curriculum vitae and listing each expert's testimony subject area, months ago, on September 12, 2016. The proposed schedule further allows for several months from the

² Based on the proposed procedural schedule, Invenergy's rebuttal testimony would be due on August 7, 2017 and the first date of final hearings would be scheduled for October 4, 2017. It should be noted that CLF and the Town would have approximately four (4) months from the date Invenergy's pre-filed direct testimony is due until final hearings are scheduled to commence. According to the procedural schedule, Invenergy's pre-filed direct testimony would be due on June 9, 2017.

filing of testimony to final hearings.

Because CLF and the Town failed to articulate any support for their contention that the procedural schedule does not provide adequate time to prepare effective cross-examination of Invenergy's expert witnesses, their arguments must fail.

III. Invenergy Submits Two Alternative Scheduling Options.

While being mindful of the time frames articulated in the Energy Facility Siting Act, Invenergy therefore submits the following alternative schedule options:

1. Set an additional date, after the date Supplemental Advisory Opinion are due, so that all parties can, if they deem necessary, supplement and/or address any aspects of the Supplemental Advisory Opinions³; or
2. Revise the procedural schedule so that all parties have an opportunity to respond to the Supplemental Advisory Opinions in their rebuttal and sur-rebuttal testimony.⁴

Invenergy respectfully requests that the Board consider these two alternative procedural schedule options.

CONCLUSION

For the foregoing reasons, Invenergy respectfully requests that the Board deny CLF and the Town's Motion and consider the attached alternative scheduling options.

³ See Option A in attached **Exhibit 1** for a proposed revised schedule.

⁴ See Option B in attached **Exhibit 1** for a proposed revised schedule.

Respectfully submitted,

INVENERGY THERMAL DEVELOPMENT LLC

By Its Attorneys:

/s/ Alan M. Shoer

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Dated: May 8, 2017

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2017, I delivered a true copy of the foregoing responses to the Energy Facilities Siting Board via electronic mail to the parties on the attached service list.

/s/ Alan M. Shoer

EXHIBIT 1

DRAFT PROCEDURAL SCHEDULE OPTIONS

OPTION A

Testimony	
June 9, 2017	Invenergy Direct Testimony
July 7, 2017	Other Parties Direct Testimony
August 7, 2017	Rebuttal Testimony
August 28, 2017	Sur-rebuttal Testimony
September 18, 2017	Last Day All Parties Can Supplement Testimony to Address Supplemental Advisory Opinions.
Discovery	
August 28, 2017	Discovery Closes
Witnesses	
September 1, 2017	Witness List with CVs identifying the witnesses area of expertise
Exhibits	
September 1, 2017	Exhibits Lists and a clean copy of the exhibit marked with the party name.
September 6, 2017	Objections to Exhibits and/or Witnesses and Supporting Memoranda or written confirmation that the exhibits provided by the other parties can be marked as full and witnesses and qualifications are acceptable.

OPTION B

Testimony	
June 9, 2017	Invenergy Direct Testimony
July 7, 2017	Other Parties Direct Testimony
August 31, 2017	Rebuttal Testimony (and to address Supplemental Advisory Opinions)
September 18, 2017	Sur-rebuttal Testimony (and to address Supplemental Advisory Opinions)
Discovery	
September 18, 2017	Discovery Closes
Witnesses	
September 20, 2017	Witness List with CVs identifying the witnesses area of expertise
Exhibits	
September 20, 2017	Exhibits Lists and a clean copy of the exhibit marked with the party name.
September 26, 2017	Objections to Exhibits and/or Witnesses and Supporting Memoranda or written confirmation that the exhibits provided by the other parties can be marked as full and witnesses and qualifications are acceptable.

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

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