

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
ENERGY FACILITY SITING BOARD

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

Docket No. SB 2015-06

**CONSERVATION LAW FOUNDATION'S MOTION
FOR SUPPLEMENTAL ADVISORY OPINIONS AND FOR LEAVE TO TAKE
DISCOVERY AND FILE SUPPLEMENTAL EXPERT TESTIMONY**

Introduction

Based on newly available information, Conservation Law Foundation (CLF) respectfully moves for: (a) two additional Supplemental Advisory Opinions to address the newly available information; (b) leave to take additional discovery to address the newly available information; and (c) leave to file supplemental expert testimony based on the new information. CLF requests oral argument on this Motion.

Facts

On November 1, 2017, Clear River Energy Center, LLC (Invenergy) informed the Energy Facility Siting Board (EFSB or Board) that it (Invenergy) had been disqualified from participation in Forward Capacity Auction-12 (FCA-12), to be conducted by the Independent System Operation-New England (the ISO) in February 2018.

Invenergy's letter acknowledged that this new information would affect "the analysis previously provided to the EFSB, the Statewide Division of Planning and the Office of Energy Resources." Invenergy Letter, at 1, ¶ 3.

Invenergy's November 1, 2017 filing also included a detailed analysis, performed by Invenergy's outside expert witness, setting forth in some detail Invenergy's view of the meaning of Invenergy's disqualification from the ISO auction.

The Standard Governing This Motion

Procedural due process requires that all parties have notice of the issues to be litigated and a full and fair opportunity to be heard on those issues. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). The same result obtains from Rhode Island's enactment of the Administrative Procedures Act, applicable to this proceeding. R. I. Gen Laws § 42-35-9(c). ("Opportunity shall be afforded to all parties to respond and present evidence and argument on all issues involved.")

Discussion

Since the inception of this Docket, Invenergy's application has been predicated on Invenergy's assertion that its proposed power plant would consist of two turbines that would produce 850 to 1,000 megawatts of electricity. Invenergy's newly announced disqualification from the ISO auction changes the fundamental basis of Invenergy's entire application.

A. As to Supplemental Advisory Opinions – Invenergy's November 1, 2017 letter acknowledged that this new information would affect "the analysis previously provided to the EFSB, the Statewide Division of Planning and the Office of Energy Resources." Invenergy Letter, at 1. Thus, CLF respectfully requests that the Division of Planning and Office of Energy

Resources be asked for Supplemental Advisory Opinions that properly take into account the new information.¹

The EFSB has broad power to direct state agencies to prepare Supplemental Advisory Opinions. R. I. Gen Laws §§ 42-98-7(a)(2), 42-98-9(b). It has used that power before when Invenergy’s project changed mid-stream, see EFSB Order 110, and it should do so again.

B. As to Leave To Take New Discovery—Invenergy’s November 1, 2017 letter states that Invenergy “attempted to dissuade their [the ISO’s] determination, prior to its being issued . . . Invenergy considered appealing this decision to the Federal Energy Regulatory Commission (“the FERC”) . . . [but] the likelihood that the FERC would overturn ISO-NE’s FCA qualification decision was determined to be remote.” Invenergy’s November 1, 2017 letter, at 1, ¶ 2.

CLF seeks the opportunity for all parties to take limited additional discovery pertaining only to this newly available information. Among other things, CLF will seek the underlying documents reflecting the ISO’s disqualification decision, and the correspondence between Invenergy and the ISO pertaining to Invenergy’s “attempt[s] to dissuade” the ISO from its disqualification decision.

¹ CLF also has pending a motion that the EFSB request a Supplemental Advisory Opinion from the Department of Environmental Management “on the effects of the contract with the Narragansetts on Charlestown’s sole source water aquifer.”

New information has come to light, and new discovery is needed to elucidate the new situation. Kleppinger v. Texas Dep't of Trans., 283 F.R.D. 330, 333 (S.D. Texas 2012) (Re-opening discovery is permitted where new information comes to light). The EFSB has the power to grant additional discovery and should exercise that power here. R. I. Gen Laws § 42-98-7(c) (establishing the EFSB's broad power to control its docket).

C. As to Leave To File Additional Expert Testimony – On November 1, 2017, Invenergy filed an analysis by its outside expert witness, Ryan Hardy, of PA Consulting Group, addressing what Invenergy believes is the meaning and import of the decision of the ISO to disqualify Invenergy from FCA-12. In fairness, other parties must be given the same opportunity to present testimony of their own witnesses pertaining to the same subject: the meaning and import of the ISO's recent decision to disqualify Invenergy from FCA-12. Again, the EFSB has the authority to authorize additional expert testimony and, under the circumstances, should exercise that authority. R. I. Gen Laws § 42-98-7(c).

Conclusion

WHEREFORE, based on newly available information, Conservation Law Foundation (CLF) respectfully moves for: (a) two additional Supplemental Advisory Opinions; (b) leave to take additional discovery to address the newly available information; and (c) leave to file supplemental expert testimony.²

² By this filing, CLF does not withdraw its filing of October 31, 2017 pertaining to Burrillville's Motion To Dismiss for Invenergy's failure to disclose the Fall River water contract.

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CERTIFICATE OF SERVICE

I certify that the original and three copies of this Motion were hand delivered to the Energy Facility Siting Board, and electronic copies were served via e-mail on the entire service list. I certify that the foregoing was done on November 3, 2017.

