ADLER POLLOCK & SHEEHAN P.C.

One Citizens Plaza, 8th Floor
Providence, RI 02903-1345
Telephone 401-274-7200
Fax 401-751-0604 / 351-4607

175 Federal Street
Boston, MA 02110-2210
Telephone 617-482-0600
Fax 617-482-0604

www.apslaw.com

October 30, 2017

Via Electronic Mail and Federal Express

Todd Anthony Bianco, PhD, EFSB Coordinator
RI Energy Facility Siting Board
89 Jefferson Boulevard
Warwick, RI 02888

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 Dr. Bianco:

On behalf of Invenergy Thermal Development LLC and the Clear River Energy Center Project ("Invenergy"), please find enclosed an original and three (3) copies of Invenergy's Objection to the Conservation Law Foundation's Motion for Oral Argument and Formal Ruling.

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 CLEAR RIVER ENERGY CENTER IN BURRILLVILLE, RHODE ISLAND	**)** **)** **)** **)**	**Docket No. SB-2015-06**

OBJECTION OF INVENERGY THERMAL DEVELOPMENT LLC
TO THE CONSERVATION LAW FOUNDATION'S
MOTION FOR ORAL ARGUMENT AND FORMAL RULING

Now comes Invenergy Thermal Development LLC ("Invenergy") and hereby objects to the Conservation Law Foundation's ("CLF's") motion requesting the Rhode Island Energy Facility Siting Board ("EFSB" or "Board") "permit oral argument" and a "formal ruling" on Invenergy's October 19, 2017 request for an additional public comment hearing in the host community, the Town of Burrillville, pursuant to R.I. Gen. Laws § 42-98-9.1 ("CLF's Motion" or the "Motion"). *See* CLF's October 23, 2017 Motion ("CLF Mot."), at 1.

As discussed thoroughly below, CLF's Motion should be denied for the following reasons: (1) R.I. Gen. Laws § 42-98-9.1 does not require oral argument or formal ruling on an applicant's request to meet its statutory obligation and provide presentation at a public comment hearing in a host community; (2) because no party (including CLF) objected to Invenergy's request for an additional public comment hearing in the host community, neither oral argument nor a formal ruling is required or necessary; (3) R.I. Gen. Laws § 42-98-9.1 does not require that an applicant must first make "material changes" in its application in order to request an additional public comment hearing in the host community; and (4) because nothing substantially related to the Water Supply Plan has changed since the Board previously denied CLF's motions to dismiss and motion for additional advisory opinions, CLF's Motion is an improper attempt to use Invenergy's request for a hearing in the host community as an opportunity to reassert

arguments raised, and rejected, by this Board. If CLF has questions about Invenergy's Water Supply Plan, as supplemented, those questions can be raised during final hearings.

Accordingly, Invenergy respectfully requests that the Board deny CLF's Motion.

I. BACKGROUND

Pursuant to the Act, Chapter 42-98, *et seq.* of the General Laws of Rhode Island and the EFSB Rules, Invenergy filed its Application to seek the approval of the Board to site and construct the Clear River Energy Center, an approximately 850-1000 MW combined cycle electric generating facility on Wallum Lake Road in Burrillville, Rhode Island ("CREC" or "Project" or "Facility"). The Application was reviewed by the Board for completeness in accordance with Rule 1.7 and deemed complete as it provided the required contents set forth in the EFSB Rules. The Application was docketed on November 16, 2015.

When Invenergy's Application was deemed complete, it contained the best available information at the time on all support facilities, including water. At that time, Invenergy had a letter of intent with the Pascoag Utilities District ("PUD") for the use of Well 3A. During public comment, concerns were raised regarding Invenergy's use of Well 3A, including recommendations from many commenters, including the Town's expert before the Planning Board Advisory Opinion process, that Invenergy not use Well 3A and seek alternate supply options. Following public comments, the PUD terminated its letter of intent on August 19, 2016 and later issued an advisory opinion opposing the use of Well 3A.

Upon notification that the PUD terminated the letter of intent, Invenergy timely notified the Board of the PUD's decision. *See* Invenergy's Notification Letter to the EFSB, dated August 22, 2016. Subsequently, a local supplier, the Harrisville Fire District ("Harrisville"), considered supplying water to Invenergy, but voted against providing water to CREC. Invenergy then filed

a Motion for Extension on September 9, 2016, requesting that the Board extend the dates listed in the procedural schedule to allow Invenergy an opportunity to negotiate and contract with a different water supply entity.

After a hearing on Invenergy's request, the Board ordered that the Application proceedings be suspended for ninety days and ordered Invenergy to submit a revised water plan by January 11, 2017. *See* Docket SB-2015-06, Order No. 103, dated Oct. 20, 2017, effective Oct. 13, 2016); Docket SB-2015-06, Order No. 107, dated Mar. 28, 2017, effective Feb. 16, 2017).

On January 11, 2017, Invenergy filed its revised Water Supply Plan with the Board. The Water Supply Plan stated that Invenergy had greatly reduced CREC's water needs so that trucking water to the Facility was now feasible. *See* Water Supply Plan, dated Jan. 11, 2017. The Water Supply Plan explained that Invenergy has an agreement with the Town of Johnston to truck water to the Project as CREC's primary water supply source. *Id*. The Water Supply Plan also identified Benn Water & Heavy Transport Corp. ("Benn Water") as a contingent/redundant supplier. *Id*.

After Invenergy filed its Water Supply Plan with the Board, CLF renewed and supplemented a motion to dismiss that it filed on September 16, 2016, asserting that "Invenergy's failure to provide adequate information violated the Energy Facility Siting Act, it precluded the agencies and subdivisions from doing their jobs, it robs the EFSB of its ability to fulfil its statutory mandates, and it required dismissal[.]" CLF's Jan. 30, 2017 Supplement to its Motion to Dismiss, at 2. The Board denied CLF's motion to dismiss, stating that "the Board cannot determine whether the applicant has met its burden until after the final hearings" and that *"[g]aps in evidence may be filled over the course of the proceedings, including at the final*

hearing." Order No. 107, dated Mar. 28, 2017, effective Feb. 16, 2017.

On September 28, 2017, Invenergy filed a supplement to its Water Supply Plan (the "Supplement"), further explaining Invenergy's arrangement with Benn Water as its contingent/redundant supply source and attaching a confidential agreement between Benn Water and Invenergy.[1] The confidential agreement between Benn Water and Invenergy provided the Board with information regarding Benn Water's supply sources, including Fall River, Massachusetts.[2] The Supplement also identified the Narragansett Indian Tribe ("the NIT") as its *additional* contingent/redundant water supply source ("back-up to a back-up").

Subsequently, the Town of Charlestown moved to intervene and was granted limited intervention status to address issues regarding the revised Water Supply Plan. The Board directed Invenergy to hold a public comment hearing and make a presentation to Charlestown in

[1] CLF's Motion falsely asserts that under the Supplement, "Benn Water was no longer the contingent back-up trucker of water for Invenergy; instead, Benn now became for the first time the principal trucker of water to Invenergy." CLF Mot., at 6. The Supplement does not state that Benn Water is no longer the contingent. To the contrary, the Supplement specifically states that "Benn Water will supply water to the Facility for process water makeup, *as a contingent water supply*[.]" *See* Invenergy's Supplement, dated Sept. 28, 2017, at 1 (emphasis added).

[2] CLF claims that "Invenergy has not informed the EFSB of the existence of the contract between Fall River and Benn [Water] to this day." CLF's Mot., at 5. First, Invenergy did not reach an agreement with the City of Fall River; Benn Water entered into an agreement with the City of Fall River. Second, Invenergy did reach an agreement with Benn Water, and Invenergy filed that agreement with the Board as a confidential attachment to the Supplement. The confidential agreement included additional details regarding the City of Fall River supply source, including costs per 1000 gallon for different volumes. Third, Invenergy specifically informed the Board that the City of Fall River is a supply source for Benn Water and that the City of Fall River had an agreement with Benn Water, in redacted text of the Supplement filed on September 28, 2017. Water Supply Plan Supplement, dated Sept. 28, 2017 (stating "Benn Water subsequently executed a long-term firm reserve capacity water supply *agreement* with the City of Fall River") (emphasis added). CLF ignores that relevant and timely disclosure.

accordance with R.I. Gen. Laws 42-98-9.1, inclusive of the Water Supply Plan filed on January 11, 2017 and the Supplement filed on September 28, 2017. In order to ensure that R.I. Gen. Laws 42-98-9.1 has been satisfied, Invenergy filed a letter with the Board requesting an opportunity to make that same presentation to the host community, the Town of Burrillville.

Neither CLF nor any other party objected to Invenergy's request. It appears that CLF is using Invenergy's request as an opportunity for CLF to request a re-hearing on previous CLF motions of which the Board already denied. CLF's Motion seeks a second "bite at the apple" on similar grounds asserted in CLF's supplemental motion to dismiss. For the reasons articulated below, CLF's latest Motion is meritless and should be denied.

II. ARGUMENT

A. CLF's Motion Should be Denied Because R.I. Gen. Laws § 42-98-9.1 Does Not Require Oral Argument or Formal Ruling on an Applicant's Request to Meet its Statutory Obligation.

CLF's Motion requests that the Board "permit oral argument" and "requests a formal ruling" on Invenergy's request for an additional public comment hearing in the host community, the Town of Burrillville. CLF Mot., at 1. Because R.I. Gen. Laws § 42-98-9.1 does not require oral argument or formal ruling on Invenergy's request to meet its statutory obligation, CLF's Motion should be denied.

Pursuant to R.I. Gen. Laws § 42-98-9.1, the Board "shall have at least one public hearing in each town or city affected prior to holdings its own hearings and prior to taking final action on the application." R.I. Gen. Laws § 42-98-9.1(b). The applicant is also required to make a presentation at the town or city hearings for public comment regarding "[a]ll details of acceptance for filing in § 42-98-8(a)(1)-(a)(6)[.]" *Id*. The statute does not, however, require the Board hear oral argument or issue a formal ruling before holding a public comment hearing in an

affected community.

Here, when the Board granted the Town of Charlestown's Intervention Motion, the Board directed Invenergy to make a presentation to Charlestown in accordance with R.I. Gen. Laws 42-98-9.1, inclusive of the Water Supply Plan filed on January 11, 2017 and the Supplement filed on September 28, 2017. In order to ensure that R.I. Gen. Laws 42-98-9.1 has been satisfied, Invenergy filed a letter with the Board requesting an opportunity to make that same presentation to the host community, the Town of Burrillville.

Although CLF has not objected to Invenergy's request for a public comment hearing, CLF requests an opportunity for oral argument and requests the Board issue a formal ruling on Invenergy's request for a public comment hearing in the host community. CLF failed to provide any statutory basis to support its request. The Board is required to hold a public comment hearing in the town or city affected, and Invenergy, as the applicant, is required to make a presentation regarding "[a]ll details of acceptance for filing in § 42-98-8(a)(1) – (a)(6)[.]" R.I. Gen. Laws § 42-98-9.1(b). The statute does not require that the Board hold a hearing and/or issue a formal decision on an applicant's request to meet its statutory obligations and no such hearing has been had in this matter.

Because Invenergy requested the public comment hearing in order to ensure compliance with its statutory requirements and because there is no statutory requirement that the Board hold a hearing on Invenergy's request for a public comment hearing in the host community, CLF's Motion should be denied.

B. CLF's Motion Should be Denied Because No Party (Including CLF) Objected to Invenergy's Request for a Public Comment Hearing in the Host Community, the Town of Burrillville.

Because neither CLF nor any other party objected to Invenergy's request for a public

comment hearing, there are no outstanding issues for the Board to hear oral argument and/or make a formal ruling.

In CLF's Motion, it never objects to Invenergy's request for a public comment hearing in the host community, the Town of Burrillville. Instead, CLF—*without objecting*—requests oral argument and a formal ruling on Invenergy's statutory request. CLF argues that "[a] written Order, after full hearing, is necessary in order to create a clear record[.]" CLF Mot., at 1. Without an objection being filed, there is absolutely no reason for the Board to hear oral argument on Invenergy's uncontested request.

As neither CLF nor any other party objected to Invenergy's request to fulfill its statutory obligation, CLF's request for oral argument and a formal ruling is baseless and may serve only to delay this process. Accordingly, the Board should deny CLF's Motion.

C. CLF's Motion Should be Denied Because R.I. Gen. Laws § 42-98-9.1 Does Not Limit an Applicant's Ability to Make a Presentation to the Host Community.

CLF's Motion incorrectly argues that the host community is entitled to an additional public comment hearing only if the revised Water Supply Plan and its Supplement constitute alleged "material changes to the application." CLF Mot., at 8. CLF fails to provide any support for this unfounded assertion. Because R.I. Gen. Laws § 42-98-9.1 does not require that an applicant must first make "material changes" in an application in order to request an additional public comment hearing in a host community, CLF's Motion should be denied.

As discussed above, when the Board granted the Town of Charlestown's intervention motion, pursuant to R.I. Gen. Laws § 42-98-9.1, it directed Invenergy to make a presentation to the Town of Charlestown, inclusive of its revised Water Supply Plan and Supplement. Subsequently, Invenergy requested an opportunity to make that same presentation to the host community, the Town of Burrillville. To date, the host community, the Town of Burrillville, has

not observed Invenergy's presentation concerning the most current information regarding its water supply.[3] CLF's contention that Invenergy should make that presentation only if there has been "material changes to the application" is not supported by the language in R.I. Gen. Laws § 42-98-9.1. Indeed, R.I. Gen. Laws § 42-98-9.1 does not limit an applicant's ability to make a presentation regarding its application to the host community. To the contrary, R.I. Gen. Laws § 42-98-9.1 states that the Board "shall have *at least* one public hearing in each town or city affected." R.I. Gen. Laws 42-98-9.1(b)(emphasis added). CLF's assertion that absent a material change, Invenergy's request is "baseless" is, therefore, absurd and contrary to R.I. Gen. Laws § 42-98-9.1.

Because R.I. Gen. Laws § 42-98-9.1 does not limit an applicant's ability to make a presentation at an additional public comment hearing in the host community, CLF's Motion should be denied.

D. CLF's Motion Should Be Denied Because it is Nothing More than an Improper Attempt to Request a Re-hearing on Motions Previously Denied by this Board.

CLF's request for "reconsideration of the denial of its earlier motions for dismissal or for additional Advisory Opinions" is improper and unwarranted because nothing has changed since the Board previously ruled upon and denied these motions. *See* CLF Mot., at 8; Order No. 106, dated Mar. 28, 2017, effective Feb. 16, 2017; Order No. 110, dated and effective Apr. 13, 2017.

In CLF's Motion, it notes that on September 16, 2016 it filed a Motion to Dismiss the Application and Close the Docket. CLF Mot., at 2. On January 11, 2017, Invenergy filed its revised Water Supply Plan. *See* Water Supply Plan, dated Jan. 11, 2017. Subsequently, CLF

[3] The initial presentation at the first public hearing in the Town of Burrillville discussed the PUD as the source of water for CREC, using a new dedicated pipeline. As the Board is aware, Invenergy's water supply plan has been updated.

supplemented its Motion to Dismiss to incorporate additional arguments that Invenergy's Application should be dismissed, even with the filing of its revised Water Supply Plan. CLF Mot., at 2. CLF also filed a motion requesting additional advisory opinions on February 24, 2017. The Board heard oral argument on these motions on February 6, 2017 and March 21, 2017. One of the arguments asserted by CLF was that the Water Supply Plan rendered Invenergy's application a "new proposal." *Id*. at 3. Invenergy objected, arguing that a change in the water supply source does not render the application a new proposal. *Id*. After the Board heard oral argument, it denied both of CLF's motions. *See* Order No. 106, dated Mar. 28, 2017, effective Feb. 16, 2017; Order No. 110, dated and effective Apr. 13, 2017.

At the time the Board denied CLF motions, Invenergy had filed its revised Water Supply Plan with the Board. *See* Water Supply Plan, dated Jan. 11, 2017. The Water Supply Plan identified the Town of Johnston as its primary water supply source. *Id*. The Water Supply Plan also specifically identified Benn Water as its contingent/redundant water supply source. *Id*. The Water Supply Plan also stated that "[b]ack-up or contingent water will be supplied by private trucking supplier(s) who draw their water from the CREC source *and/or other potable water sources*." *Id*. at 1 (emphasis added).

On September 28, 2017, Invenergy filed a Supplement to its Water Supply Plan, attaching Invenergy's confidential agreement with Benn Water, which specifically lists (confidentially) the municipalities from which Benn Water obtains water. *See* Supplement, dated Sept. 28, 2017, Appendix H.[4] One of the confidential municipalities identified in the Invenergy-

[4] Invenergy filed a Motion for Protective Treatment with the Board on September 27, 2017, requesting this information be kept confidential because "[d]isclosing this information, especially the business relationship and supply source locations of Benn Water, would be anticompetitive and could disadvantage the commercial interest of Benn Water." *See* Invenergy's Sept. 27, 2017 Motion for Protective Treatment, at 3. The Board granted the Motion

Benn Water agreement was the City of Fall River. *Id*. Additionally, the Supplement further informed the Board of an agreement it reached with an additional contingent/redundant water source, the NIT.

The Supplement merely provided further details regarding the specifics about Invenergy's contingent/redundant water supply sources. Invenergy has now identified numerous water supply options, including its primary supplier, the Town of Johnston, its back-up contingent/redundant supplier, Benn Water via Benn Water's numerous supply options (including Fall River), and an additional back-up contingent/redundant supplier, the NIT. The Supplement in no way changes the circumstances that were presented to the Board when it denied CLF's earlier motions. The Supplement offers further details about Invenergy's contingent/redundant water supply sources, but in no way "materially changes" Invenergy's Application or its Water Supply Plan. In fact, when the Board denied CLF's motion to dismiss, it stated that "[g]aps in evidence may be filled over the course of the proceedings, including at the final hearing." Order No. 106, dated Mar. 28, 2017, effective Feb. 16, 2017, at 2. Instead of changing its Application, Invenergy's Supplement simply provides additional information and details about its contingent/redundant water supply sources to fill in any gaps in order to satisfy its burden in accordance with the Energy Facility Siting Act.

Accordingly, because the arguments made by CLF in its earlier motions are based on the same Water Supply Plan, a re-hearing is unwarranted and CLF's Motion should be denied.

III. CONCLUSION

For the reasons set forth herein, Invenergy hereby requests that the EFSB deny CLF's

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for Protective Treatment orally on October 17, 2017. Despite the confidentiality, the City of Fall River was recently publically identified as a source of water for Benn Water.

Motion.

Respectfully submitted,
INVENERGY THERMAL DEVELOPMENT, LLC
By Its Attorneys:

/s/ Alan M. Shoer
Alan M. Shoer, Esq. (#3248)
Richard R. Beretta, Jr. Esq. (#4313)
Elizabeth M. Noonan, Esq. (#4226)
Nicole M. Verdi, Esq. (#9370)
ADLER POLLOCK & SHEEHAN, P.C.
One Citizens Plaza, 8th Floor
Providence, RI 02903-1345
Tel: 401-274-7200
Fax: 401-351-4607

Dated: October 30, 2017

CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2017, I delivered a true copy of the foregoing document via electronic mail to the parties on the attached service list.

/s/ Alan M. Shoer