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February 2, 2017

Via Electronic Mail and Federal Express

Todd Anthony Bianco, 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 Mr. Bianco:

On behalf of Invenergy Thermal Development LLC and the Clear River Energy Project ("Invenergy"), please find enclosed an original and ten (10) copies of Invenergy's Objection to the Conservation Law Foundation's Supplement to its Motion to Dismiss.

Please let me know if you have any questions.

Very truly yours,

ALAN M. SHOER
ashoer@apslaw.com

Enclosures

cc: Service List

851303.v1-2/2/17

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**

INVENERGY THERMAL DEVELOPMENT LLC'S OBJECTION TO THE SUPPLEMENT OF THE CONSERVATION LAW FOUNDATION'S MOTION TO DISMISS THE APPLICATION AND CLOSE THE DOCKET

I. INTRODUCTION

Now comes Invenergy Thermal Development LLC ("Invenergy") and hereby objects to the January 30, 2017 Supplement of the Conservation Law Foundation ("CLF") to its Motion requesting the Rhode Island Energy Facility Siting Board ("EFSB" or "Board") dismiss Invenergy's EFSB Application ("Invenergy's Application" or "Application") and close this docket.

CLF contends that Invenergy's Application should be dismissed because the additional material provided by Invenergy since the Board's October 20, 2016 Order is allegedly "necessary but is not sufficient for [the] Board to do its job under the Energy Facility Siting Act [(the "Act")]." *See* CLF's Supplement, dated January 30, 2017 ("CLF's Supplement"), at 2. CLF also asserts that Invenergy's alleged failure to provide "useful answers to multiple agencies" "precluded the agencies and subdivisions from doing their jobs," purportedly "rob[bing] the EFSB of its ability to fulfil its statutory mandates[.]" *Id.* Further, CLF argues that the Application should be dismissed due to "noncompliance with statutory deadlines." *Id.* at 7.

Each of these assertions are incorrect. The Board has received extensive and highly detailed advisory opinions from all of the agencies, including agencies that CLF does not even acknowledge. *See* advisory opinions from the Public Utilities Commission ("PUC"); Office of

Energy Resources ("OER"); Office of Statewide Planning ("Statewide Planning"); and the Burrillville Tax Assessor, to name just a few. The Board has also received detailed and extensive advice and analysis, suggested conditions and further recommendations in the agency opinions that CLF does identify. CLF chooses to ignore that these agencies did offer substantial opinions and recommended conditions to assist the Board in its evaluation of the Clear River Energy Center ("CREC" or "Project").

CLF also fails to recognize that the recently filed water supply plan can now be reviewed, for supplemental opinions, by several of the agencies as the Board deems appropriate—the Rhode Island Department of Health ("RIDOH"), Rhode Island Department of Environmental Management ("RIDEM"), Rhode Island Department of Transportation ("RIDOT"), the Town of Burrillville's ("Town") Planning Department (expressed an interest in commenting on the revised water supply plan), to name a few possibilities. Moreover, CLF fails to recognize all the additional site planning materials, design documentation, supplemental information and reports that Invenergy has produced over the last several months, also available to be reviewed by the agencies (and the other parties), at the discretion and direction of the Board, along with the new water supply plan.[1]

The information already developed in this record—from the Application, reports, site

[1] CLF ignores all the additional information that Invenergy has provided to the Board that further supplements its Application materials and data responses: CREC's Wetlands Addendum, filed with the Board on August 30, 2016; RIDEM Major Air Permit Addendum Application, filed with the Board on September 15, 2016; Preliminary RIDEM/RIPDES Stormwater Management Plan, filed with the Board on September 27, 2016; Preliminary RIDEM/RIPDES Soil and Sediment Control Plan, filed with the Board on September 27, 2016; Tax Stabilization Agreement, filed with the Board on November 3, 2016; Decommissioning Agreement, filed with the Board on November 3, 2016; Property Value Agreement, filed with the Board on November 3, 2016; Supplemental Conceptual Plans and Drawings, delivered to the Town of Burrillville Building Inspector on October 14, 2016 and filed with the Board in Invenergy's December 12, 2016 Status Report; Supplemental Preliminary Soil and Sediment Control Drawing, delivered to the Town of Burrillville Building Inspector on November 02, 2016 and filed with the Board in Invenergy's December 12, 2016 Status Report; December 12, 2016 Status Report also noting, among other updates, that a Physical Alteration Permit ("PAP") was filed with the Rhode Island Department of Transportation ("RIDOT") on December 7, 2016; and Water Supply Plan and Traffic Study, filed with the Board on January 11, 2017.

drawings, expert opinions, expert reports, hundreds and hundreds of data responses—is quite voluminous. The information developed over the last several months further supplements and updates the application materials on file with the Board and makes adjustments to account for public comments received, to account for feedback from the agencies and to accommodate the latest design developments. All this updated material is intended to ensure that the Project is developed with as minimal an impact as reasonably possible, utilizing the most advanced and innovative technologies reasonably available, in order to meet the compelling market needs for highly efficient, clean burning and low cost energy generation, according to the priorities and policies set forth by the Act. *See* R.I. Gen. Laws 42-98-2(8).[2]

Invenergy's initial Objection to CLF's Motion to Dismiss, filed with the Board on September 26, 2016 ("Invenergy Objection I"), described in great detail the information—Invenergy's Application, data responses, testimony, expert reports and designs—that were available to all the agencies rendering advisory opinions to show how Invenergy complied with the Act and the EFSB Rules ("EFSB Rules" or "Board Rules" or "the Rules") during the advisory opinion process. *See* Invenergy's Objection to CLF's Motion for Summary Judgment, dated September 26, 2016 ("Invenergy Objection I"), at 5-18. Invenergy devoted over ten (10) pages in its Objection negating every false accusation made by CLF. *Id.* CLF ignores these important facts.

Also, CLF's Supplement fails to recognize that permitting processes are on-going and will occur along with the EFSB licensing process. CLF further fails to recognize that other

[2] The Act requires priority consideration for energy generation projects that (i) use natural gas as their primary fuel; (ii) maximize efficiency; (iii) use low levels of high quality water; (iv) use existing energy infrastructure sites; (v) produce low levels of air emissions; (vi) produce low levels of wastewater discharge; (vii) produce low levels of solid waste; and (viii) have dual fuel capacity. R.I. Gen. Laws § 42-98-2(8). CREC meets each and every one of these statutory criteria.

agencies (such as RIDEM) will be conducting their own permit reviews through their exclusive jurisdiction. CLF fails to appreciate that the EFSB Rules and procedures recognize that certain construction design approvals, before state and local agencies, are typically conducted during *post-EFSB licensing*, where licensing conditions and required alterations are incorporated into the final construction designs that need to be reviewed by building officials and state agencies at a later stage in licensing/permitting, such as RIDOT and RIDEM. *See* EFSB Rule 1.13(d) and EFSB Rule 1.14, as to post licensing processing of building, construction and other state permits.[3]

Further, EFSB precedent, the Board's own Rules and Rhode Island case law establish that the time limits in the Act are discretionary in order to help the Board manage the proceedings as expeditiously as possible while making adjustments when needed and appropriate. *See In Re Application of Ocean State Power*, SB-87-1, Order No. 7, dated Oct. 25, 1988; EFSB Rule 1.15(a)(6); *West v. McDonald*, 18 A.3d 526, 534 (R.I. 2011). Contrary to CLF's argument, the time frames are not so inflexible that the Board cannot accommodate the need, for good cause, to adjust the schedule to allow for further review of the water supply plan (or other information as needed) by the agencies before moving on to final hearings.

II. ARGUMENT

A. CLF's Supplement To Its Motion Dismiss Should Be Rejected Because Invenergy Complied With All Requirements Pursuant To The Act And EFSB Rules.

CLF's Supplement reiterates arguments asserted in its original Motion to Dismiss, stating

[3] EFSB Rule 1.13(d) provides: "The grant of a Board License in favor of the application shall constitute a granting of all licenses which would, absent the Act, be required for the facility *except for building, construction and occupancy permits for which final designs will not be executed until after the final decision is issued, and for other state or local licenses that may, by their nature, be applied for and/or received after a Board License is granted . . .*" (emphasis added). EFSB Rule 1.14 establishes an entirely separate process for post licensing state and local permits, including specifically the building permits associated with the Project.

that six agencies were allegedly not able "to render true advisory opinions due to inadequate information from Invenergy." CLF's Supplement, at 3; CLF's September 19, 2016 Motion to Dismiss, at 6. As discussed thoroughly in Invenergy Objection I, CLF is mistaken. Invenergy Objection I, at 6. CLF completely ignores the full scope of the opinions from all of the agencies, notably including the agencies that CLF does not even mention (e.g., the PUC (23 pages); OER (35 pages); Statewide Planning (44 pages), the Town Tax Assessor, etc.[4]). CLF never acknowledges that several agencies instituted further administrative proceedings specifically to receive written comments, oral testimony, data responses, expert reports and/or submissions and public comment—with full participation by Invenergy and without any issues as to lack of information or insufficient cooperation by Invenergy. Many advisory opinions did not include a single statement about a lack of relevant information. *See* Historic Preservation's Advisory Opinion; PUC's Advisory Opinion; OER's Advisory Opinion; Statewide Planning Advisory Opinion; PUD's Advisory Opinion and Town Tax Assessor's Advisory Opinion.

CLF's Supplement ignores Invenergy's thorough discussion, in Invenergy Objection I, addressing every CLF assertion that agencies were not able to render advisory opinions and explaining how CLF's assertions that these agencies offered "no opinion" were completely false. *See* Invenergy Objection I, at 6-18. CLF's Supplement does not acknowledge that much of its argument concerns the missing water supply information that could not be developed at the time the agencies were reviewing the Project as a result of PUD's decision to eliminate the use of its Well #3A.

Putting aside the water supply information, while some of the agencies indicated it would

[4] *See also* Pascoag Utility District's ("PUD's") opinion (although not relevant now) and Historic Preservation's opinion, both offering substantial advisory opinions and comments for the Board's consideration. None of these are mentioned in CLF's Motion to Dismiss or Supplemental Motion.

be helpful to see *more* information and *more* data (as to a few of the issues) when the permits are filed, beyond what is in the Application, that does not mean that these agencies could not offer advice and guidance to the Board, which they all did, based on the availability of information at that time and (in part) on further guidance on requirements to conform permit applications to specific agency or local requirements. The point is: Invenergy has never withheld nor refused to provide any of the agencies with any written request for additional information. CLF's views to the contrary are simply nonsensical.

Taken in its entirety, these opinions allow the Board to move forward, especially now that there is a new water supply plan, as well as additional supplemental information produced, notwithstanding the suspension period. The Board's Rules specifically allow for further agency review of new information received during a suspension period. *See* EFSB Rule 1.15(a)(6) (stating that "[a]fter a suspension is canceled, counting of the statutory time limits for beginning and completing hearings and for rendering decisions shall resume at the point in which the suspension occurred ***or, if the Board finds it necessary to the orderly conduct of the proceedings, at the beginning of any statutory time period***") (emphasis added); s*ee also In Re Application of Ocean State Power Corporation*, SB-87-1, Order No. 3, dated Jan. 14, 1988 (suspending final hearings in order to receive additional information and noting that time should be given for relevant state agencies to be involved in analyzing supplemental information). With the suspension period over, the Board has the ability to establish further time for the agencies to advise the Board as it deems necessary and appropriate.

Additionally, CLF's Supplement asserts that because Invenergy's December 11, 2016 Status Report stated that Invenergy will provide further information in the future and Invenergy has yet to provide the Board with the further information, dismissal is appropriate. CLF does not

cite any authority for this assertion. In fact, Board precedent indicates that the opposite is true. As discussed in Invenergy Objection I, the Board is authorized to allow supplemental and new evidence to be introduced that was not in the initial application and was developed as a result of changed circumstances or advice from the agencies.[5] For example, the Wetlands Permit, to accommodate the Army Corps and RIDEM filing requirements, requires a joint filing by both Invenergy and National Grid (as to its proposed new transmission line).[6] However, Invenergy filed a Wetlands Addendum with the Board, to supplement its Application as it relates to the specific property associated with CREC. Lighting specifics are also being designed to incorporate into site plans in order to respond to concerns raised by the agencies and other parties.[7]

In short, the EFSB process is an on-going and iterative process, with concurrent processing going on before the Board and other agencies at the same time. Incorporating feedback is important to the applicant, which this process is designed to accomplish, so as to allow for design improvements to be made during the EFSB review process and also, as necessary or appropriate, for final review by building officials and agencies. CLF's Supplement ignores all of these concerns.

Regardless of CLF's unrealistic belief that no project (it opposes) should appear before

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[5] *See* R.I. Gen. Laws § 42-98-11 (stating that "[t]he board at this [final] hearing may, at its discretion, allow the presentation of new evidence by any party as to the issues considered by the agencies designated under § 42-98-9"); *Manchester Street: Final Decision and Order*, Order 12, Docket No. SB-89-1, Dec. 17, 1990 (amending and/or supplementing an application does not render the application incomplete under the Act and is not grounds for dismissal, as the applicants in *Manchester Street* supplemented their original application by revising, among other items, the net generating capacity of the facility, as well as the amount of water consumption needed for the project due to feedback and comments developed during the EFSB process).

[6] There have been a number of agency meetings with Army Corp and RIDEM to review the filing requirements, and with the permit application materials being prepared at this time by Invenergy and National Grid.

[7] A nighttime visual simulation of lighting was just completed by Invenergy's consultants and is being reviewed for filing with the Board as a supplement to the lighting details in the Application.

the EFSB until each and every other permit is secured, the EFSB licensing process typically requires adjustments and supplemental filings to reflect the most up-to-date information, especially for new major energy generating facilities.[8] The Board's process is designed to accommodate the time needed for agencies, and the parties, to review any changes so as to have time to prepare for final hearings, which have not even been scheduled yet.

B. CLF's Supplement To Its Motion To Dismiss Should Be Denied Because Invenergy's Application Is Complete.

CLF's Supplement asserts that Invenergy's Application should be dismissed because it is allegedly incomplete. *See* CLF's Supplement, at 4. CLF also argues that Invenergy allegedly "deprived the agencies of the information they needed to render advisory opinions[.]" *Id.* at 5. CLF's assertions are incorrect. On January 11, 2017, Invenergy filed its revised water supply plan with the Board, and it is now available for the agencies and the parties to review. When it filed the revised plan, it cured the defect in Invenergy's Application concerning information sufficient to move forward on with the EFSB licensing process.

Additionally, Invenergy has not deprived the agencies of the information they need to render advisory opinions. As discussed thoroughly in Invenergy Objection I and Section A above, Invenergy responded to each and every written request from every agency rendering an advisory opinion with the best available information it had at the time the request was made. The advisory opinions rendered addressed a substantial amount of the issues requested by the Board. With regard to the water supply, the revised water supply plan provides the information

[8] CLF's Supplement continues its consistent and erroneous theme, announced at the outset of this proceeding, that the Board should not allow a licensing review until all other permits are obtained first and that dismissal is required until all other permits are secured. *See* EFSB Order denying CLF Motion to Dismiss, Order No. 81, dated Mar. 10, 2016, at 2 (stating that "[t]here is no requirement . . . that an applicant obtain all necessary DEM permits or that the applications for such permits be complete prior to the Board's issuance of a license" and noting that the Board in prior proceedings "granted licenses conditioned upon an applicant obtaining all necessary permits").

requested by a number of agencies, i.e. RIDOH, RIDEM and the Town. Invenergy has not, and is not, objecting to the Board allowing the relevant agencies to perform a review of the revised water supply plan and render supplemental advisory opinions as to issues related to water, or any other issue that the Board has identified for agencies to advise upon. It is important to stress that the Board's Rules and precedent provide adequate guidance to help the Board manage the next steps in this licensing review process. *See* EFSB Rule 1.15(a)(6); *In Re Application of Ocean State Power*, SB-87-1, Order No. 7, dated Oct. 25, 1988.

Accordingly, as Invenergy's Application is complete and as Invenergy is not depriving any agency or any party from having an opportunity to analyze the revised water supply plan, or any other important issue, the Supplement to CLF's Motion should be denied.

C. CLF's Supplement To Its Motion To Dismiss Should Be Denied Because It Incorrectly Interprets The Language In The Act.

CLF further asserts that Invenergy's application should be dismissed because "as a result of Invenergy's [alleged] failures, the Board cannot meet its deadlines under the Energy Facility Siting Act." CLF's Supplement, at 7. Specifically, CLF cites to R.I. Gen. Laws § 42-98-11(a), which states that within forty-five (45) days after the final submission of advisory opinions, the Board shall convene final hearings. Because advisory opinions were due on September 13, 2016, CLF alleges that final hearings were to commence no later than January 30, 2017, if the Board were to consider the statutory deadline tolled for ninety (90) days while the docket was suspended. *Id.* at 8 & 8 n.3. However, CLF chooses to ignore EFSB procedure, EFSB precedent and Rhode Island case law that allow the Act's time frames to be adjusted or extended for good cause.

As identified above, EFSB Rule 1.15(a)(6) specifically allows the Board to adjust the statutory time period, "[a]fter a suspension is canceled, counting of the statutory time limits for

beginning and completing hearings and for rendering decisions shall resume at the point in which the suspension occurred ***or, if the Board finds it necessary to the orderly conduct of the proceedings, at the beginning of any statutory time period.***" (Emphasis added.) Additionally, Rule 1.18(b) provides the Board with the ability to extend the time fixed or the period of time prescribed by the Rule and the Statute "for good cause." EFSB precedent also acknowledges that time frames and limits can be extended for good cause. In *In Re Application of Ocean State Power*, SB-87-1, Order No. 7, dated Oct. 25, 1988, the Board noted that it "was compelled to suspend hearings on various occasions to comply with the statutory sixty day hearing limit." The Board further noted that "this was the most practical way to balance the timeliness with a comprehensive review of all issues." *Id.*[9]

Additionally, the Act's forty-five (45) day time frame is directory, not mandatory.[10] Specifically, the Rhode Island Supreme Court stated that "'the absence of a sanction' rendered the 'requirement directory as opposed to mandatory.'" *West*, 18 A.3d at 534 (quoting *New England Development, LLC v. Berg*, 913 A.2d 363, 372 (R.I. 2007)). There is no sanction in R.I. Gen. Laws § 42-98-11. Further, the Court has held that statutory provisions requiring pubic officials to take actions within specific time periods are directory, not mandatory. *See Washington Highway Dev., Inc. v. Bendick*, 576 A.2d 115, 117 (R.I. 1990) (holding that a statutory provision requiring a decision on a wetland application be rendered within six weeks is

[9] It should also be noted that CLF never mentions any of the EFSB precedent sited in Invenergy Objection I. Specifically, CLF ignores the flexibility provided to the Board through the post-licensing process under EFSB Rules 1.13(d) and 1.14. *See* Invenergy Objection I, at 20 (citing *Narragansett Electric Company (J-188) Transmission Line Improvement Project: Final Order*, Order 29, Docket No. SB-94-2, Jan. 4, 1996 and noting that the Board did not dismiss an application where a building inspector failed to issue an advisory opinion because an applicant had yet to file its Erosion and Sediment Control Plan, but rather treated this as a permit under the post-licensing procedure in Rule 1.14).

[10] Which CLF acknowledged in its Supplemental Motion. *See* Supplemental Motion, at 8 (citing *West v. McDonald*, 18 A.3d 526, 534 (R.I. 2011)).

directory); *Beauchesne v. David London & Co.*, 118 R.I. 651, 661, 375 A.2d 920, 925 (R.I. 1977) (holding that statutory provisions governing workers' compensation were designed to expedite justice and that a failure to comply therewith would not void any action taken); *Providence Teachers Union, Local 958 v. McGovern*, 113 R.I. 169, 177, 319 A.2d 358, 363-64 (R.I. 1974) (holding that the statutory time provision for arbitrators to call hearings was designed to "secure order, system and dispatch," and was not mandatory).

CLF's argument ignores the flexibility provided to the Board to manage this process. *See In Re Application of Ocean State Power*, SB-87-1, Order No. 7, dated Oct. 25, 1988 (stating that suspending hearings on several occasions was "the most practical way to balance the timeliness with a comprehensive review of all issues"). CLF's assertion ignores the tolling allowed by the Board's Rule regarding suspensions. *See* EFSB Rule 1.15(a)(6). CLF further ignores the Board's ability to "re-set" a statutory period when necessary. *Id.* ("***... if the Board finds it necessary to the orderly conduct of the proceedings, at the beginning of any statutory time period***") (emphasis added).

Accordingly, CLF's assertion that Invenergy has not complied with statutory deadlines is incorrect and emphasizes CLF's misunderstanding of the Act, the Board's Rules and EFSB precedent.

III. CONCLUSION

For the foregoing reasons, dismissing Invenergy's Application and closing this docket defies EFSB rules and precedent and is completely unwarranted. Therefore, Invenergy respectfully requests that the Board deny CLF's requests in its Supplement to its Motion to Dismiss so the parties can move forward to the next phase of these proceedings.

With a new water supply plan on file, the Board should allow these licensing proceedings

to continue and allow the agencies an opportunity to supplement their opinions upon a review of the new water supply plan, and any other matter that the Board has requested, so that the Board will have the benefit of the latest analysis and guidance possible before it commences final hearings on this application.

Respectfully submitted,

INVENERGY THERMAL DEVELOPMENT LLC

By Its Attorneys:

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Dated: February 2, 2017

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2017, I delivered a true copy of the foregoing document to the Energy Facilities Siting Board via electronic mail to the parties on the attached service list.

/s/ Alan M. Shoer

SB-2015-06 Invenergy CREC Service List as of 01/27/2017

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