

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

IN RE: INVENERGY THERMAL DEVELOPMENT LLC :
APPLICATION TO CONSTRUCT AND :
OPERATE THE CLEAR RIVER ENERGY : **SB-2015-06**
CENTER, BURRILLVILLE, RHODE ISLAND :
CONSERVATION LAW FOUNDATION :
MOTION TO DISMISS :

DECISION AND ORDER

This matter came before the Energy Facility Siting Board (Board or EFSB) on a Motion to Dismiss filed by the Conservation Law Foundation (CLF). CLF first asserts that Invenergy Thermal Development LLC (Invenergy) failed to provide adequate information to a number of designated agencies, undercutting their ability to make recommendations to the Board. CLF also argues that the Board cannot address advisory opinions that do not exist and cannot make a finding of compliance absent advisory opinions. Therefore, the matter must be dismissed. The Board will address these two substantive arguments together.

While the law allows the Board to ask agencies for advisory opinions, it does not require the Board to adopt the findings of those agencies.¹ If an agency does not complete its charge, the exercise of the function charged reverts to the Board, and the Board is responsible for determining the issue it had assigned to that agency.² The Board’s Rules and Regulations also allow it to designate additional agencies to render advisory opinions subsequent to the preliminary hearing.³

The burden of proof for the issuance of a license is on the applicant to establish all of the elements set forth in the law.⁴ If the applicant doesn’t meet its burden, the EFSB will not grant a

¹ R.I. Gen. Laws §42-98-10, Rules of Practice and Procedure 1.13(c)(2)(i).

² R.I. Gen. Laws §42-98-10(a)

³ Rules and Regulations 1.9(f).

⁴ R.I. Gen. Laws 42-98-11(b). A license shall be granted only if the applicant shows that: 1) construction of the proposed facility is necessary to meet the needs of the state and/or region for energy of the type to be produced by the proposed facility; 2) the proposed facility is cost-justified, and can be expected to produce energy at the lowest

license. Thus, even if there are gaps in a number of the advisory opinions, that would not justify dismissal of the application. The applicant still has the burden and the Board cannot determine whether the applicant has met its burden until after the final hearings. Gaps in evidence may be filled over the course of the proceedings, including at the final hearing.⁵

Contrary to CLF's assertion, the Board can make findings absent advisory opinions. Indeed it may do so when an advisory opinion is not issued or when the Board rejects or modifies the advisory opinion.⁶ In those instances, the Board must exercise the function of the agency in evaluating and resolving the question(s) it had asked of the agency. The Board must make the appropriate findings and determinations that the agency was charged with making. Those findings and determinations must be supported by evidence in the record.

CLF also filed a supplement to its motion, maintaining the same arguments as its original motion and asserting that the revised water plan posed new questions instead of addressing the gaps and deficiencies in the advisory opinions. The Board noted that a water plan has been filed by Invenenergy and that the Board may require additional and/or supplemental advisory opinions to address certain aspects of that water plan.

At this point in the proceedings, dismissal is not warranted. CLF, like any party, has the right to file data requests and retain experts to present evidence to the Board at the final hearings to support its position and/or rebut the position of the applicant.

After hearing argument, the Board ruled unanimously to deny CLF's motion to dismiss.

reasonable cost to the consumer consistent with the objective of ensuring that the construction and operation of the proposed facility will be accomplished in compliance with all of the requirements of the laws, rules, regulations, and ordinances, under which, absent [the] chapter, a permit, license, variance, or assent would be required, or that consideration of the public health, safety, welfare, security and need for the proposed facility justifies a waiver of some part of the requirements when compliance cannot be assured; 3) the proposed facility will not cause unacceptable harm to the environment and will enhance the socio-economic fabric of the state.

⁵ R.I. Gen. Laws §42-98-11(a). The Board, in its discretion, may allow the presentation of new evidence at the final hearings on issues considered by the agencies.

⁶ See R.I. Gen. Laws §42-98-10(a)

Accordingly, it is hereby

(106) ORDERED:

The Conservation Law Foundation's Motion to Dismiss is denied.

EFFECTIVE AT WARWICK, RHODE ISLAND, FEBRUARY 16, 2017. WRITTEN ORDER
ISSUED MARCH 28, 2017.

ENERGY FACILITY SITING BOARD



Margaret E. Curran

Margaret E. Curran, Chairperson

Janet Coit

Janet Coit, Member

Parag Agrawal

Parag Agrawal, Member