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

Memorandum of Law Pertaining To Relevance
Of Cross-Examination Seeking To Impeach Invenergy's Credibility

During its cross-examination of Invenergy spokesperson John Niland, Conservation Law Foundation (CLF) will seek to impeach the credibility of Invenergy. "Credibility is always relevant, because credibility is always an issue." United States v. Repak, 852 F.3d 230, 250 (3d Cir.2017).

Undisputed Facts

Invenergy seeks to build a $1 billion power plant in Burrillville, R.I.

Invenergy's proposal is controversial.

Under the Energy Facility Siting Act (EFSA), R. I. Gen Laws § 42-98-1, et seq., Invenergy has the burden of proof on every issue, including that "the proposed facility is necessary" (EFSA § 11(b)(1)) and that "the proposed facility will not cause unacceptable harm to the environment." (EFSA § 11(b)(3)).

The parties have disagreed sharply as to whether Invenergy's proposed plant is needed and whether it would cause unacceptable environmental harms. Invenergy says that the plant is needed and would not cause unacceptable environmental harm; CLF (and other parties, including

Burrillville) believe that the plant is not needed and would cause unacceptable environmental harm.

Under the EFSA, it is the responsibility of the EFSB to resolve these issues.

Discussion

In resolving the issues of whether or not the plant is needed, and whether or not the plant would cause unacceptable environmental harm, the EFSB may properly evaluate the credibility of the parties.

In its opening statement on April 26, 2018, CLF told the EFSB that one important reason that the EFSB should deny a building permit to Invenergy is that Invenergy is a company that cannot be trusted. CLF's attorney referred to "the record of lies told by Invenergy to the EFSB, to the ISO, and to the public." April 26, 2018 Transcript at page 80, lines 4-7; and stated that "even if a power plant were needed, which it is not, this would not be the company to build the plant because you can't give a permit to a company that can't be honest with the ISO, with the EFSB, and with the public." April 26, 2018 Transcript, at page 80, line 4 to page 86, line 7.

Of course, the arguments of counsel are not evidence. Martin v. Howard 784 A.2d 291, 298-299 (R.I. 2001) ("Arguments of counsel are not evidence.") On this point, CLF and Invenergy seem to agree. See October 31, 2018 Hearing Transcript at 65 (Invenergy's counsel discussing generally the difference between witness testimony and statements of counsel).

Because the arguments of counsel are not evidence, CLF now seeks to demonstrate through sworn witness testimony (in this case, of Invenergy's project manager and spokesperson, Mr. Niland) evidence of lies told by Invenergy to the EFSB, the public, the ISO, and to the

Federal Energy Regulatory Commission (FERC). Specifically, CLF intends to show through its cross-examination of Mr. Niland, the following material, knowing misstatements made by Invenergy:

- On March 31, 2016, at an EFSB meeting in Burrillville High School, in front of over 700 people, Mr. Niland stated that there would be cost savings to ratepayers of $280 million from this plant – at a time when Invenergy knew that this figure was false.

- Invenergy told the EFSB and the PUC that its proposal would have no cost to ratepayers -- yet Invenergy had two lawsuits at FERC seeking to improperly transfer $164 million in interconnection costs to ratepayers, which lawsuits Invenergy failed to inform the EFSB of.

- Invenergy falsely told the EFSB that its plant would be operational on June 1, 2021, when Invenergy knew with certainty that the ISO's Stability System Impact Study Report (dated September 12, 2016) made this an impossibility.

- On November 9, 2018, in a filing with FERC, Invenergy falsely told FERC that this docket was the only permitting yet required by Invenergy, when Invenergy knew there is a separate interconnection docket (2017-01); as well as necessary Clean Air Act Major Source Permit and wetlands alteration permit needed.

- Invenergy gave false information to the ISO on monthly Forward Capacity Tracking System (FCTS) filings. FCTS filings are of critical importance to the ISO because it provides information on a Resource's Commercial Date of Operation (COD). Invenergy gave information to the ISO on FCTS forms, which information Invenergy had actual knowledge was false.

Evidence that goes to the credibility of a party is always relevant. U. S. Aviation Underwriters v. Pilatus Business Aircraft, Ltd., 582 F.3d 1131, 1148 (10th Cir. 2009) ("[C]redibility of a party is certainly relevant . . .").

Cross-examination is the proper technique for eliciting evidence "bearing on the credibility of a party." Lewis v. Baker, 526 F.2d 470, 475 (2d Cir. 1975) (citing Alford v. United States, 282 U.S. 687, 694 (1931) and other cases).

To take the matter of the first bullet point above, Invenergy may argue that Mr. Niland's false statement on March 31, 2016 is not relevant, because since that time Invenergy has given subsequently changed, corrected, updated information to the EFSB. But CLF will elicit from Mr. Niland that Invenergy knew the statement was false at the time he spoke. This goes to the credibility of Invenergy; and credibility of a party is always relevant.

To take the matter in the second bullet point, above, FERC cases ER 18-349 and EL 18-31, Invenergy may argue that those cases are now closed and that, therefore, reference to the cases is no longer relevant. Again, the point of the cross-examination is to show that Invenergy was seeking to transfer $164 million in interconnection costs to ratepayers at the time it was telling the EFSB that there would be no costs to ratepayers. Again, this goes to the credibility of Invenergy; and credibility of a party is always relevant.

Conclusion

CLF well understands why Invenergy will object to evidence being introduced that shows that Invenergy has knowingly told untruths to the EFSB, to the parties, to the ISO, and to FERC. Throughout this case, Invenergy has made a myriad of promises: that it will timely make tax-treaty payments to Burrillville; that it will not build over a water aquifer; that it will abide by noise limits set by ordinance. However, if the EFSB is persuaded that Invenergy's promises are not to be trusted, it is unlikely that the EFSB will grant Invenergy a permit.

This is the reason that courts uniformly hold that the credibility of a party is always relevant, and is a proper subject for cross-examination.

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CERTIFICATE OF SERVICE

I certify that the original and seven hard copies of this document were hand delivered to the Energy Facility Siting Board and served electronically on the service list of this docket on March 22, 2019.