

# Schacht & McElroy

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July 5, 2016

Luly Massaro  
Clerk  
Public Utilities Commission  
89 Jefferson Boulevard  
Warwick, RI 02888

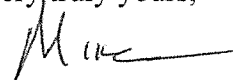
Re: Invenenergy Thermal Development LLC – Clear River Energy Center – PUC  
Docket No. 4609

Dear Luly:

Enclosed for filing in this matter are an original and nine copies of an Objection being filed by the Town of Burrillville in this docket. Copies have been served on the service list.

If you need any further information, please do not hesitate to contact me.

Very truly yours,



Michael R. McElroy

MRMc:tmg

*Burrillville Invenenergy 4609 Objection*

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS  
PUBLIC UTILITIES COMMISSION

IN RE: INVENERGY THERMAL DEVELOPMENT LLC'S :  
PROPOSAL FOR CLEAR RIVER ENERGY CENTER : DOCKET NO. 4609

**OBJECTION TO A SINGLE COMMISSIONER ADVISORY**

The Town of Burrillville (“the Town”), by and through its undersigned counsel, hereby respectfully objects to a single commissioner conducting an investigation and rendering an advisory opinion to the Rhode Island Energy Facility Siting Board (“EFSB”) in this docket.

**I. BACKGROUND**

This docket relates to a matter pending before the EFSB, in which Invenergy is proposing to build a new energy facility to be located in the Town. The purpose of this docket is for the PUC to “conduct an investigation [...] and render an advisory opinion as to the need for the proposed facility.” R.I.G.L. § 42-98-9. Moreover, the EFSB Preliminary Decision and Order designates the PUC to “render an advisory opinion as to (i) the need for the proposed Facility; (ii) whether it is cost-justified to the consumer consistent with the object of ensuring that the construction and operation of the Facility will be accomplished in compliance with all of the requirements of the laws, rules, and regulations; and (iii) whether cost effective efficiency and conservation opportunities provide an appropriate alternative to the proposed Facility.”

As the PUC is aware, the EFSB consists of three members, including “the chairperson of the public utilities commission, who shall serve as chairperson of the siting board...” R.I.G.L. § 42-98-5. As a result, Chairperson Curran recused herself from the PUC proceeding, because she is serving as chairperson of the EFSB.

In addition, Commissioner Gold – newly appointed to the PUC – has recused herself due to her previous role as the Commissioner of the Office of Energy Resources (“OER”). OER is a

party to the proceedings before the EFSB, and has been directed by the EFSB to participate in the related PUC proceedings pursuant to R.I.G.L. § 42-98-9(d). *See* EFSB Preliminary Decision and Order. Commissioner Gold’s recent appointment to the PUC moved her from the role of a party to the role of adjudicator on the same matter. The Town respects Commissioner Gold’s decision to recuse and understands her underlying reasoning.

The recusal of two of the three PUC commissioners seemingly leaves Commissioner DeSimone as the sole commissioner remaining to preside over this docket. However, with all due respect, the Town objects to a single commissioner advisory for the reasons set forth below.

The Town wishes to emphasize that its objection to a single commissioner acting on this docket is in no way directed toward Commissioner DeSimone. To the contrary, the Town holds Commissioner DeSimone in the highest regard. He is an experienced commissioner and attorney, and serves the ratepayers of Rhode Island with diligence and great care.

However, the Town maintains that – as a purely legal matter – a single commissioner acting in this docket would be insufficient under the governing statute and rules. Further, should the EFSB rely on an advisory opinion from a single commissioner of the PUC, the EFSB’s decision could be challenged as that decision may rest on an error of law.

## II. ARGUMENT

### A. Two commissioners are required to transact business.

R.I.G.L. § 39-1-8 sets forth, in part, that “[t]wo (2) commissioners shall constitute a quorum **for the transaction of business**, except as provided in § 39-1-11.” (Emphasis added.)<sup>1</sup>

R.I.G.L. § 39-1-11 creates an exception allowing one commissioner to “constitute a quorum at

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<sup>1</sup> In addition, Rule 1.2(d) states that “Except as otherwise permitted by law, two (2) Commissioners shall constitute a quorum for the transaction of any business.” *See Great American Nursing Centers, Inc. v. Norberg*, 567 A.2d 354, 357 (R.I. 1989) (holding that legislative rules have the force and effect of law and such rules are entitled to a presumption of validity).

all hearings provided that the concurrence of a majority of the commission shall be required for the rendering of a decision.”

The statutes above set forth three categories of actions to be taken by the PUC – transacting business, conducting hearings and rendering decisions. Clearly, only one commissioner is necessary to conduct a hearing. However, two commissioners are required to “transact business,” as well as to “render a decision.”

In this docket, the PUC is directed to “conduct an investigation” and “render an advisory opinion.” *See* R.I.G.L. § 42-98-9. Neither of these tasks fall into the specific categories of “conducting a hearing” or “rendering a decision.” Therefore, by process of elimination, these tasks fall into the broader category of “transacting business.” Under R.I.G.L. § 39-1-8, two commissioners are required to transact business. Therefore, by statute, a minimum of two commissioners are required to proceed in this docket.

**B. Chairperson Curran could recuse herself from the EFSB proceeding instead.**

The Commission has alternatives available in this situation. One option is that Chairperson Curran could recuse herself from the EFSB proceeding, and participate in this PUC docket instead.

R.I.G.L. § 42-98-5(a) provides, in part, that “any member of the [EFSB] who recuses him or herself shall designate his or her own successor from his or her respective agency.” Therefore, if Chairperson Curran recuses herself from the EFSB, she could designate her own replacement to the EFSB from the PUC. Note that her successor need not be a commissioner.

Doing so would allow Chairperson Curran to resume her seat on the PUC, and increase the PUC to the two commissioners needed to transact business.

**C. The PUC could forego its right to issue an advisory opinion to the EFSB.**

A second option available in this situation is the PUC could forgo its right to issue an advisory opinion as to the need, costs and alternatives for the proposed facility. In lieu of a PUC investigation and advisory opinion on these issues, a full investigation and determination as to the need, costs and alternatives for the facility would be conducted by the EFSB itself. See R.I.G.L. § 42-98-10.

Under R.I.G.L. § 42-98-11(a), parties generally may not present evidence at the EFSB hearing if that evidence was previously introduced at a hearing before any advising agency, including the PUC. Therefore, if the PUC proceeds to an evidentiary hearing with a single commissioner, the parties will rarely, if ever, be permitted to present evidence to the EFSB on those issues to avoid repetition and cumulative evidence. The EFSB would rely on the PUC's investigation, including its review of all presented evidence at the hearing.

However, if the PUC refrains from conducting a hearing and investigation and issuing an advisory opinion, there would be no constraint on the parties presenting evidence on those issues directly to the EFSB. The EFSB would be free to directly hear and evaluate all evidence on the issues of need, costs and alternatives.

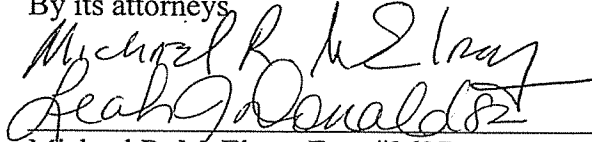
**III. CONCLUSION**

WHEREFORE, for the foregoing reasons, the Town respectfully objects to a single commissioner conducting an investigation and rendering an advisory opinion to the EFSB in this docket.

Dated: 7/5/16

TOWN OF BURRILLVILLE

By its attorneys



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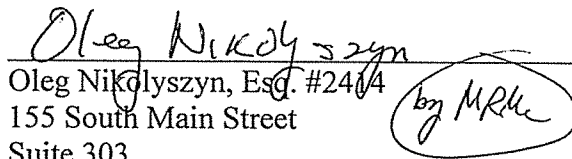
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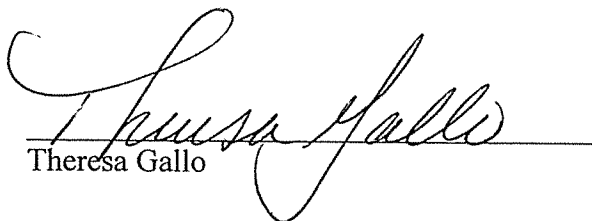
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**CERTIFICATE OF SERVICE**

I certify that the original and four photocopies of this Motion were filed by U.S. Mail, postage prepared, with the Clerk of the Public Utilities Commission, 89 Jefferson Boulevard, Warwick, RI 02888. In addition, electronic copies of this Motion were served via email on the service list for this Docket. I certify that all of the foregoing was done on July 5, 2016.

  
Theresa Gallo

**Docket No. 4609 – PUC Advisory Opinion Regarding Need to Construct the Clear River Energy Facility Service List as of 6/24/16**

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