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

CONSERVATION LAW FOUNDATION'S REPLY TO INVENERGY'S OBJECTION TO CLF'S MOTION FOR SUPPLEMENTAL ADVISORY OPINIONS, DISCOVERY, AND SUPPLEMENTAL EXPERT TESTIMONY

Introduction

On November 1, 2017, Invenergy notified the EFSB that it (Invenergy) had been disqualified from participating in FCA-12.[1] Pursuant to the ISO Tariff, Section III.13.1.1.2.8, Invenergy had actual notice of its disqualification no later than October 1, 2017. During the intervening month when Invenergy failed to notify the EFSB or the parties of the disqualification, Invenergy had its outside consultants prepare an analysis reflecting Invenergy's view of what the disqualification meant.

On November 3, 2017, in response, CLF filed and served a Motion (CLF's Nov.3 Motion) seeking supplemental advisory opinions, leave to take additional discovery, and leave to file supplemental expert testimony.

On November 8, 2017, Invenergy filed and served its Objection (Invenergy's Nov. 8 Objection). Invenergy objected to CLF's request for additional discovery and supplemental advisory opinions; Invenergy did not object to the parties filing additional expert testimony.

[1] In this Reply, CLF uses the same defined terms as in its November 3 Motion.

CLF now respectfully files its Reply to Invenergy's Objection.

Background

In Invenergy's Nov. 8 Objection, Invenergy correctly identified the central matter at issue: the degree to which Invenergy's recently disclosed disqualification from FCA-12 does (or does not) constitute a material change in circumstance. Invenergy's view is that:

> CLF's hyperbole notwithstanding, the ISO-NE's recent determination *does not* change "the fundamental basis of Invenergy's entire application." When Invenergy filed its Application, it had not yet secured a CSO for Unit 1 or Unit 2. Invenergy's Application noted that it planned to participate in upcoming FCA's to secure a CSO for both units. To date, Invenergy has secured a CSO for Unit 1, but has not yet secured a CSO for Unit 2. In the information filing Invenergy submitted to the Board on November 1, 2017, Invenergy stated that the ISO-NE's determination "does not have an impact on CREC's ability to participate in future FCA's (e.g., FCA 13 or beyond)." [Citation omitted] Accordingly, CLF's statement that ISO-NE's recent determination changes the "fundamental basis" of Invenergy's application is untrue.

Invenergy's Nov. 8 Objection, at 5 (emphasis and internal quotation marks as in original).

However, while Invenergy has correctly identified the central issue (has there been a change in the fundamental basis of Invenergy's application?), its conclusion is mistaken for several reasons.

First, when Invenergy filed its original EFSB application over two years ago, on October 29, 2015, Invenergy had two turbines, both of which were qualified to participate in the ISO's Forward Capacity Market (FCM). Today, Turbine Two has been disqualified from participation in the FCM; and Turbine One is a Non-Commercial Resource pursuant to the ISO's Tariff, because it will not be operational at the start of the relevant Capacity Commitment Period beginning on June 1, 2019. Although the matter is not clear due to Invenergy's failure to provide

the relevant documents to the EFSB and the parties, it appears that the ISO Tariff Section III.13.3.4(c) allows the ISO to involuntarily terminate Invenergy's 485 MW Capacity Supply Obligation (CSO) for Turbine One in the relatively near future if Turbine One is forced to sell out of its CSO in a second Annual Reconfiguration Auction (ARA). This eventuality (Invenergy's forced sale of its 485 MW CSO in the next ARA) now appears a virtual certainty.

In order to avoid the involuntary termination provisions of Section III.13.3.4(c), Invenergy would have to achieve all eight of the Critical Path Scheduling (CPS) milestones described in the ISO Tariff Section III.13.1.1.2.2.2, subparts (a) through (h), no later than June 1, 2020. In practical terms, in order for all eight CPS milestones to be met by June 1, 2020, the first three CPS milestones would have to have been achieved by January 1, 2018. Those first three CPS milestones are: (a) Invenergy has obtained all major permits required by law; (b) Invenergy has closed on project financing; and (c) Invenergy has executed contracts for all major equipment. As of the date of this filing, November 14, 2017, the Final Hearing in the Invenergy Docket has not yet commenced. In this context, it is inconceivable that Invenergy will have achieved <u>any one</u> of these three CPS milestones – let alone all three – by January 1, 2018. Importantly, the major delays in this docket have occurred on account of Invenergy's missteps, including its decision to file its initial permit application before it had entered into a firm contract for water. This led to the EFSB's decision to suspend the docket for months while Invenergy obtained a source of water. EFSB Order 103, dated October 20, 2016, effective October 13, 2016.

The ISO has already disqualified Invenergy's Turbine Two from FCA-12; the ISO will soon have the ability to involuntarily terminate Invenergy's existing CSO for Turbine One. In this context, it is not at all hyperbole to say that there has been a change in "the fundamental basis of Invenergy's entire application."

Second, it is certainly true that "Invenergy stated that the ISO's determination 'does not have an impact on CREC's ability to participate in future FCA's (e.g., FCA 13 or beyond).'" Yes, Invenergy said this, but Invenergy is mistaken. Where, as here, a previously qualified Resource is disqualified from the FCM for failure to meet CPS milestones, there is a huge impact on the Resource's ability to participate in future FCAs. For starters, that Resource needs to go back to the very beginning of the FCM qualification process. That means that the Resource must resubmit a "New Capacity Show of Interest Form" pursuant to ISO Tariff Section III.13.1.1.2.1; and resubmit a "New Capacity Qualification Package" pursuant to ISO Tariff Section III.13.1.1.2.2. Additionally, the disqualified Resource must satisfy the previously unsatisfied CPS milestones. There is no evidence before the EFSB that Invenergy's Turbine Two will ever be able to be re-qualified. Invenergy's statement that its disqualification from FCA-12 does not affect its participation in future auctions is neither supported by record evidence nor supportable based on the ISO's Tariff.

Third, ISO's disqualification of Invenergy's Turbine Two from FCA-12 may undermine Invenergy's ability to obtain financing for Turbine One (that has a CSO of 485 MW from FCA-10).

CLF's Three Requests

A. Additional Discovery – Invenergy objects to additional discovery because Invenergy claims that "it has provided CLF and the Town, as well as the parties in the proceeding, with all the relevant data and PA analysis required as a result of ISO-NE's determination." Invenergy's Nov. 8 Objection, at 4.

While it is certainly true that Invenergy has provided an analysis of its own outside consultants, that is not "all of the relevant data" needed. The EFSB and the parties need to see the underlying correspondence and documents between the ISO and Invenergy pertaining to the disqualification. For example, the ISO's Market Rule Section III.13.3.3 provides that, in such a circumstance, "the ISO may require the Project Sponsor [Invenergy] to submit a written report to the ISO each month" detailing its progress toward becoming operational. To date, not one of those documents is in the record. Invenergy's expert, Ryan Hardy, had access to the ISO-generated documents disqualifying Invenergy from participation in FCA-12; discovery is needed so that the EFSB and the other parties (and the testifying expert witnesses of the other parties) can have access to the same documents.

Of central importance, both to the EFSB and to the parties, will be Invenergy's correspondence to the ISO seeking to dissuade the ISO from its disqualification determination.[2] These are highly relevant documents that Invenergy has failed to disclose. Indeed, Invenergy

[2] Referenced in John Niland's November 1, 2017 letter to the EFSB, at 1, ¶ 2.

may today be plying some of the same arguments that it used with the ISO – arguments already rejected by the ISO – in its (Invenergy's) efforts to persuade the EFSB to grant it a permit.

The short of it is that it is not for Invenergy to tell the EFSB and the parties that all anyone needs to see is the analysis of Invenergy's own expert. Basic principles of fairness – and the Board's interest in getting its decision right – require that other parties be afforded a similar opportunity to see the same evidence that Invenergy relied upon (as well as the evidence Invenergy possessed but chose not to rely upon) in presenting its analysis to the Board.

B. Supplemental Advisory Opinions – Invenergy offers two reasons for its objection to supplemental advisory opinions. First, Invenergy contends that supplemental advisory opinions are not needed because nothing has really changed; CLF "merely repeats the same arguments made on essentially the same material facts that existed" before. Invenergy's Nov. 8 Objection, at 5-6. Second, Invenergy argues that supplemental advisory opinions are not needed because Invenergy has already told the EFSB that Invenergy's own "findings remain unchanged." Id., at 6.

Respectfully, Invenergy is mistaken as to both reasons.

As discussed, Ihvenergy's first reason (nothing has really changed) is untrue. When previous Advisory Opinions were submitted, both of Invenergy's turbines were qualified to participate in the FCM. Today, Turbine Two is disqualified (and there is no evidence that it can ever be re-qualified); and Turbine One is a Non-Commercial Resource under the ISO's Tariff, which means its current CSO could soon be involuntarily terminated by the ISO.

Invenergy's second reason (Invenergy's opinion remains unchanged) is of no legal consequence. Invenergy's opinion remains unchanged, but the issue posed by CLF's motion is whether the fundamental change in circumstances has changed the opinion of the agencies in question. Specifically, the two agencies identified in Invenergy's letter to the EFSB are the Division of Planning and the Office of Energy Resources. Niland Letter, at 1, ¶ 3. That is why CLF requested Supplemental Advisory Opinions from these two agencies.

Invenergy argues that the two agencies are "not likely to change" their Advisory Opinions based on new evidence. Invenergy's Nov. 8 Objection, at 6. However, Invenergy cannot speak for the agencies. First, these agencies should be provided with the newly available evidence. Then, the agencies should be asked by the EFSB to review the new information and provide their opinions.

C. Supplemental Expert Reports – CLF is pleased that "Invenergy does not object to the Board allowing the parties an opportunity to submit limited supplemental expert testimony, related solely to the ISO-NE's determination to disqualify Unit 2 from participating in FCA 12 . . . ." Invenergy's Nov. 8 Objection, at 7. However, for this exercise to be meaningful, CLF (and other parties) must be afforded the opportunity to conduct limited discovery pertaining to the ISO's decision to disqualify Turbine Two. CLF is willing to submit its discovery requests to Invenergy pertaining to this issue on a highly expedited basis. In addition, CLF is willing to submit its expert testimony related solely to the recent disqualification within 45 days of receiving complete discovery responses from Invenergy.

Invenergy had written notice of the ISO's disqualification of Invenergy's Turbine Two for at least a full month – and possibly for far longer – before notifying the EFSB and the parties of that fact. ISO Market Rule Section III.13.1.1.2.8. In this circumstance, Invenergy cannot now be heard to object to the other parties having a similar amount of time to address the information that Invenergy has belatedly disclosed.

CLF's Additional Request

Independent Financial Analyst – The disqualification of Invenergy's Turbine Two from the FCM may have a material effect on Invenergy's ability to secure financing for its Turbine One. CLF respectfully requests that the EFSB hire its own, independent, neutral, unbiased energy market financial analyst to assess this issue. EFSB Rules of Practice and Procedure 1.12(g) and 1.21(a) expressly provide that the EFSB may hire and hear such an expert witness at Invenergy's – not taxpayers' – expense. ISO-NE's disqualification of Turbine Two will have consequences, and the EFSB is far more likely to credit the conclusions of its own, independent energy market financial analyst regarding the nature and extent of those consequences than it is to credit the opinions of any party – whether that party be Invenergy, CLF, or any other.

Conclusion

WHEREFORE, CLF respectfully requests that: (a) the EFSB re-open discovery on the limited issue of Invenergy's recent disqualification from FCA-12; (b) the EFSB seek supplemental advisory opinions from the Division of Planning and OER on the limited issue of

Invenergy's recent disqualification from FCA-12;[3] (c) all parties be given the right to submit expert witness testimony on the limited issue of Invenergy's recent disqualification from FCA-12; and (d) the EFSB hire its own, independent energy market financial analyst to advise the Board on the consequences of the disqualification of Turbine Two on Invenergy's proposed plant, including on its ability to obtain project financing for Turbine One.

CONSERVATION LAW FOUNDATION,
by its Attorneys,

Jerry Elmer (# 4394)
Max Greene (# 7921)
CONSERVATION LAW FOUNDATION
235 Promenade Street, Suite 560
Mailbox 28
Providence, RI 02909
Telephone: (401) 228-1904
Facsimile: (401) 351-1130
E-Mail: JElmer@CLF.org
E-Mail: MGreene@CLF.org

[3] CLF also has pending a motion that the EFSB request a Supplemental Advisory Opinion from the Department of Environmental Management "on the effects of the contract with the Narragansetts on Charlestown's sole source water aquifer."

CERTIFICATE OF SERVICE

I certify that the original and three copies of this Response were hand delivered to the Energy Facility Siting Board, and electronic copies were served via e-mail on the entire service list. I certify that the foregoing was done on November 14, 2017.