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For a thriving New England

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January 8, 2018

Energy Facility Siting Board
89 Jefferson Blvd.
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To the Energy Facility Siting Board:

Re: Invenergy Application, Docket SB 2015-06

Conservation Law Foundation (CLF) and the Town of Burrillville (Town) respectfully request that the Energy Facility Siting Board (EFSB) take administrative notice of Invenergy's Motion To Intervene and Comments (Invenergy's Motion To Intervene), filed at the Federal Energy Regulatory Commission (FERC) on January 4, 2018 in Calpine v. ISO-New England, EL18-53 (the Calpine Lawsuit). Invenergy's Motion To Intervene may be found in FERC's e-Library, here: https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14791135. For the sake of clarity, we refer in this letter to the various Invenergy-related entities, including Clear River Energy Center LLC, as "Invenergy."

Background

On December 11, 2017, CLF and the Town jointly wrote to the EFSB to advise the EFSB of the pendency of two lawsuits at FERC: cases ER18-349 and EL18-31. We refer herein to that previous letter as the December 11 Letter. Our December 11 Letter asked the EFSB to schedule a hearing where Invenergy would be obligated to show cause why this EFSB Docket 2015-06 should not be suspended pending the resolution of the two cases at FERC. On December 12, 2017, the next day, the EFSB voted unanimously to schedule the Show Cause Hearing. That hearing is now scheduled for Tuesday, January 30, 2018.

On December 22, 2017, CLF and the Town jointly wrote to the EFSB asking the EFSB to take administrative notice of a third pending case at FERC, the Calpine Lawsuit. We said: "The Calpine Lawsuit asks FERC to order ISO-NE to not treat Invenergy's Turbine One as an Existing Capacity Resource in the upcoming Forward Capacity Auction 12 (FCA-12), to be conducted on February 5, 2018, because 'the unit [Invenergy's Turbine One] cannot reasonably

be expected to be operational before the 2021-2022 Capacity Commitment Period.' Calpine Lawsuit, at 2, lines 3-4." (December 22, 2017 Letter, at 2, ¶ 6.)

In today's letter, CLF and the Town request that the EFSB take administrative notice of Invenergy's January 4, 2018 Motion To Intervene in the Calpine Lawsuit. Specifically, on page 6 of Invenergy's Motion To Intervene, Invenergy discusses its permitting delays in this EFSB docket and states: "Clear River has faced such delays due in large measure to the unceasing, and in Clear River's view, entirely uninformed and harmful opposition by a few well-funded 'just say "no" to any gas-fired generation development in New England' groups." Ironically, the accompanying footnote 8 cites a blog article on the CLF website. The CLF blog to which Invenergy refers can be found here: https://www.clf.org/blog/invenergy-is-a-zombie/.

Blaming Opponents for Delays

Blaming power plant opponents for delays in permitting is a recurring theme in Invenergy's January 4, 2018 Motion To Intervene in the Calpine Lawsuit. In addition to the statement quoted above, Invenergy states: "The permitting delays the Project faces are not of Clear River's making, and have extended much longer than anyone reasonably should have expected." Invenergy's Motion To Intervene, at 15.

Invenergy's statement is false.

The longest single delay in this Docket occurred on October 13, 2016 – a year after the docket was opened – when the EFSB issued Order 103 suspending the docket until Invenergy had a water plan. The reason for this suspension was that Invenergy had the bad judgment to file a permit application with the EFSB before it (Invenergy) had a firm water contract.

The EFSB has already recognized that Invenergy's delays have been caused by Invenergy itself. See November 27, 2017 EFSB Hearing Transcript, page 91, lines 8-23: "I think the delays in the permitting process are in relation to the way it's been handled. It was a full year after the application was submitted that we ended up, without your objection, suspending . . . We suspended the process because you didn't have a water plan.. . . . So just for the record, I do not think the delays in the permitting process are about the way the Board has handled things but about the way that you've handled things." (Director Coit speaking; emphasis supplied.)

Crucially, all three of the major delays cited by the ISO in its QDN disqualification letter to Invenergy dated September 29, 2017 are solely due to bad planning and missteps made by Invenergy. We attach a copy of the ISO's September 29, 2017 QDN Letter hereto. [The QDN Letter is being provided to the EFSB, but not to the full service list because the document is covered by the Non-Disclosure Agreement in the case.]

CLF and the Town respectfully refer the EFSB to the QDN Letter, page 2, the yellow highlighted text next to the hand-written marginal notation (right side) that says "# 1." The matter to which the ISO refers to here was a major contributing factor in the ISO's decision to disqualify Invenergy's Turbine Two from FCA-12. This was a huge delay in the case caused solely by Invenergy's poor planning and poor navigation of regulatory requirements. This major delay was not caused by plant opponents.

CLF and the Town respectfully refer the EFSB to the QDN Letter, page 2, the yellow highlighted text next to the hand-written marginal notation (right side) that says "# 2." The matter to which the ISO refers to here was a major contributing factor in the ISO's decision to disqualify Invenergy's Turbine Two from FCA-12. This was a huge delay in the case caused solely by Invenergy's lack of proper planning and poor navigation of regulatory requirements. This major delay was not caused by plant opponents.

CLF and the Town respectfully refer the EFSB to the QDN Letter, page 3, the yellow highlighted text next to the hand-written marginal notation (right side) that says "# 3." The matter to which the ISO refers to here may be the largest single factor in the ISO's decision to disqualify Invenergy's Turbine Two from FCA-12. This was a huge delay in the case caused solely by conscious, deliberate policy decisions made by Invenergy. In retrospect, Invenergy's choices may seem unwise in the extreme, but Invenergy should not be heard to blame plant opponents for Invenergy's own bad choices. Indeed, neither CLF nor the Town were even aware of this major issue until very recently. This major delay was not caused by plant opponents.

CLF and the Town respectfully remind the EFSB that the ISO's QDN Letter was provided to the EFSB by Invenergy, as part of Mr. Niland's November 20, 2017 testimony. All three of the major delays discussed in the QDN Letter were caused solely by Invenergy. Neither CLF nor the Town nor any other objector contributed in any way to these major delays. The ISO's explicit discussion of the multiple delays caused solely by Invenergy was reviewed at the EFSB's November 27, 2017 hearing, and is in the Record. See November 27, 2017 Hearing Transcript, page 71, line 4 to page 72, line 14.

<u>Invenergy's Delay in Apprising the EFSB of the Interconnection Dispute</u>

Recent filings at FERC in the several lawsuits pertaining to Invenergy reveal additional delays brought on Invenergy by Invenergy. A brief chronology helps explain.

Invenergy knew of its legal obligation under the FERC-approved ISO Tariff to pay for its interconnection costs on January 8, 2015. Testimony of Alan McBride on Behalf of ISO in ER18-349, at 4, lines 11-14.

Fully 10 months later, on October 28, 2015, Invenergy filed its permit application with the EFSB. For this discussion, Invenergy's original October 28, 2015 EFSB filing included two salient features:

- John Niland's cover letter stated: "Invenergy respectfully requests an expedited review of this application and a Final Decision on its approval no later than September 15, 2016." Niland Letter at 5 (emphasis supplied).

- Invenergy stated that there will be no cost to ratepayers. Invenergy Application, Section 4.1 Project Cost, at 20. Specifically, Invenergy stated: "The Project is being privately financed, without ratepayer funds . . . ." Id.

We now know that the second statement is false (or at least that Invenergy is working to make it false). As the ISO explains in its November 29, 2017 FERC filing in ER18-349, Invenergy is attempting to shirk its financial responsibilities under the Tariff and shift its financial obligations to ratepayers "without any justification or explanation . . . ." ISO's Nov. 29 FERC Filing, at 2, ¶ 2; 14, ¶ 2; 17 ¶ 4.

Importantly, if the EFSB had granted Invenergy's request for expedited review, Invenergy would have had its EFSB permit before Invenergy disclosed the material fact that it was seeking to shift hundreds of millions of dollars to Rhode Island and New England ratepayers. This is the very definition of bad faith. See, e.g., Northwestern Mut. Life Ins. Co. v. Babayan, 430 F.3d 121, 124 (3d Cir. 2005) (material omissions constitute bad faith as a pure matter of law).

Two other crucial points must be emphasized.

First, Invenergy only informed the EFSB of the pendency of the two FERC lawsuits after CLF and Burrillville informed the EFSB of the interconnection issue. See, [redacted] (as to CLF); November 27, 2017 Hearing Transcript, at 75, lines 15-19 (as to Burrillville).

Second, Invenergy told the EFSB that the reason it was informing the EFSB of the pending lawsuits is because their existence had already been revealed by CLF and Burrillville. Mr. Niland's December 1, 2017 Letter to the EFSB states: "The purpose of this letter is to advise the EFSB of recent developments [sic] and to address several comments that were made by CLF and the Town of Burrillville during the hearing held on Monday, November 27, 2017, where it was stated that Invenergy had 'failed to reach agreement with National Grid', on the LGIA . . . ." Niland December 1, 2017 Letter, at 1, ¶ 1 (emphasis supplied).

Regardless of any post hoc spin that Invenergy may try to put on its three-year-long misrepresentation to the EFSB, the PUC, all the parties in both dockets, and the public, the simple facts are these:

- Invenergy knew on January 8, 2015 of its legal obligation under the long-standing, FERC-approved ISO Tariff to pay for the interconnection costs.

- In October 2015, Invenergy told the EFSB in October 2015 that its project would have no cost to ratepayers and requested expedited review of its application.

- In July 2016, Invenergy told the PUC in July 2016 that its Project would have no cost to ratepayers.

- Invenergy did not inform the EFSB of its (Invenergy's) efforts to shift hundreds of millions of dollars in interconnection costs to ratepayers until December 2017 – three years after Invenergy knew of this obligation and only after the situation had first been revealed to the EFSB by CLF and Burrillville.

- If the EFSB had granted Invenergy's request for expedited review, Invenergy may have received its permit before either the EFSB or the PUC could have known of Invenergy's attempt to evade the ISO Tariff and shift hundreds of millions of dollars to ratepayers.

CLF and the Town respectfully submit that the foregoing is probative of Invenergy's bad faith toward the EFSB, the parties, and the public. On November 27, 2017, Invenergy's counsel stated:

> I should also point out that this is not a ratepayer subsidized project. It is not a project that you'll be asking ratepayers to incur financing for which might suggest the need to have a further – a further evaluation about project financing.

November 27, 2017 Hearing Transcript, at 90, lines 17-22.

Though Invenergy's counsel may not have realized it at the time, this statement was false. Moreover, the false statement was made 10 days after Invenergy commenced Docket EL18-31 at FERC, seeking to transfer hundreds of millions of dollars in interconnection expenses to ratepayers. There is no evidence that Invenergy's counsel knew that his statement was false (and we are not suggesting that counsel did know). However, Mr. Niland was present at counsel table when Invenergy's lawyer made the false statement and he did not correct the record (nor ask his attorney to do so).

Conclusion

On January 30, 2018, the EFSB is holding a Show Cause Hearing at which Invenergy must show cause why this docket should not be suspended pending the outcome of the pending FERC lawsuits. By this letter, CLF and the Town respectfully request that the EFSB take administrative notice of Invenergy's January 4, 2018 Motion To Intervene in the Calpine Lawsuit.

In that Motion To Intervene, Invenergy seeks to blame plant opponents for delays in this docket: "The permitting delays the Project faces are not of Clear River's making . . . ." Motion To Intervene, at 15; "Clear River has faced such delays due in large measure to the unceasing . . . uninformed . . . opposition by a few well-funded . . . groups . . . ." Id., at 6.

Invenergy is mistaken. The problems that Invenergy faces at the January 30, 2018 Show-Cause Hearing are solely of Invenergy's own creation. Three years ago, on January 8, 2015, Invenergy knew of its legal obligations to pay interconnection costs under the FERC-approved ISO Tariff. Invenergy has belatedly chosen to mount a legal challenge at FERC, in which Invenergy argues that it should not be obligated to pay the interconnection costs routinely borne by every other project developer in New England. That is Invenergy's right. But after Invenergy spent three years withholding from the EFSB and the parties the crucial information that it intended to shift those costs to ratepayers, Invenergy should not be heard to object to the EFSB staying these proceedings pending the outcome of the FERC lawsuits.

We note in passing that today, January 8, 2018, is the three-year anniversary of the latest possible date on which Invenergy knew of its legal obligation to cover costs that it is now seeking to shift to Rhode Island (and all New England) ratepayers.

Respectfully submitted,

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Certificate of Service

I certify that an original, plus three hard copies, were hand delivered to the EFSB, with the attached QDN. I further certify that electronic copies were served on the entire service list in this Docket, without the QDN, as that document is subject to the NDA. I certify that the foregoing was done on January 8, 2018.