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

MOTION OF CONSERVATION LAW FOUNDATION TO DISMISS THE APPLICATION AND CLOSE THE DOCKET

Intervenor Conservation Law Foundation (CLF) respectfully joins the Town of Burrillville and requests that the Energy Facility Siting Board (EFSB or Board) issue an Order dismissing Invenergy Thermal Development LLC's (Invenergy) Application to Construct the Clear River Energy Center (Application) and closing this Docket.

I. Background

A. Invenergy's Application

On October 29, 2015, Invenergy filed its Application with the EFSB seeking a permit to build a 1,000 MW fossil-fuel-fired electricity-generating facility in Burrillville, Rhode Island.

On November 17, 2015, in response to Invenergy's filing, the EFSB opened this Docket. On November 18, 2015, CLF intervened in the Docket. On January 4, 2016, CLF filed a Motion to Close the Docket due to the incompleteness of Invenergy's Application. By written order dated March 10, 2016, the EFSB denied CLF's Motion to Close the Docket, finding that the Board had sufficient information to docket the Application.

B. Advisory Opinions Are Unavailable Due to Inadequate Information from Invenergy

Also on March 10, 2016, the EFSB issued its Preliminary Order, directing twelve "agencies and subdivisions of state and local government" to render advisory opinions regarding the Application.[1] Preliminary Order at 13. Specifically, the EFSB required opinions of: the Burrillville Zoning Board, the Burrillville Building Inspector, the Rhode Island Historical Preservation & Heritage Commission, the Rhode Island Department of Transportation (RIDOT), the Rhode Island Department of Environmental Management (RIDEM), the Rhode Island Public Utilities Commission (RIPUC), the Statewide Planning Program (Statewide Planning), the Rhode Island Department of Health (RIDOH), the Burrillville Planning Board, the Rhode Island Office of Energy Resources (OER), the Burrillville Tax Assessor, and the Pascoag Utility District. *Id.* at 13-17. With respect to several of these agencies and subdivisions,[2] the EFSB ordered that "the subject agency may request, and the Applicant shall provide, any information or evidence deemed necessary to support the subject opinion." *Id.* at 15 (emphasis added). The EFSB further ordered that "The Applicant shall provide information in a timely manner" and "shall remain responsible for ensuring that the information provided to the Board and the various agencies remains consistent and up-to-date." *Id.* The due date for advisory opinions was six months from the issuance of the order; because September 10, 2016 was a Saturday, the resulting due date was September 12, 2016. *Id.* at 13; *see also* EFSB Rule 1.18(a).

[1] The Preliminary Order is available at http://www.ripuc.ri.gov/efsb/efsb/SB2016_01_order_pre.pdf.
[2] Specifically: RIPUC, Statewide Planning, RIDOH, the Burrillville Planning Board, OER, the Burrillville Tax Assessor, and the Pascoag Utility District.

On or before September 12, 2016, all of the twelve designated agencies and subdivisions filed advisory opinions with the EFSB. Of the resulting twelve advisory opinions, six – three state agencies and three subdivisions of local government – declared that no opinion was possible due to Invenergy's failure to provide adequate information.

The Burrillville Zoning Board wrote that "the lack of information provided to us by Invenergy, as well as the unknown crucial factor of the use and discharge of water, is of such importance, that we cannot adequately evaluate this project and provide the EFSB with reasoned judgment as to the effect of this Facility upon our community." Advisory Opinion to the Energy Facility Siting Board from the Burrillville Zoning Board at 1. Indeed, after a formal process, "[t]he Board voted unanimously that under the circumstances as presented, and without the benefit of reviewing ACTUAL plans and the proposed utilization of water or its discharge, this Zoning Board cannot evaluate this application." *Id.* at 11.

The Burrillville Building Inspector addressed the two issues directed to him by the EFSB, finding with respect to the first issue that due to "lack of information, under the Town's Erosion and Sediment Control Ordinance, I would have to judge the application as incomplete and consider the delay, or withholding, grounds for disapproval." Advisory Opinion to the Energy Facility Siting Board from the Burrillville Building Inspector at 4.

RIDOT noted that "[t]o date, Invenergy has not filed any applications for permits with RIDOT," and concluding that "[u]ntil applications with the detailed design plans and required documentation are submitted by Invenergy, there will be no formal review done by RIDOT." Rhode Island Department of Transportation Advisory Opinion at 1 & 2.

RIDEM considered several issues and concluded with respect to most that it had inadequate information to offer an opinion. Regarding compliance with Oil Pollution Control regulations, RIDEM wrote that "at the time of this Advisory Opinion the Applicant had not completed the design of the fuel oil piping, pumping and storage tank systems" and that "[a]s a result, further evaluation of the fuel oil [aboveground storage tanks] and appurtenances cannot be completed." Department of Environmental Management's Advisory Opinion to the Energy Facility Siting Board Pursuant to the Notice of Designation Issued March 10, 2016 and as Amended on July 1, 2016 at 6. Regarding groundwater impacts, RIDEM wrote that "[a]s of the date of this opinion, Invenergy has not supplemented its application with information regarding the source of its water supply" and concluded that "[i]f and when Invenergy supplements its application with a proposed water supply source, DEM can evaluate the impacts of that water supply." *Id.* at 8. With respect to biodiversity impacts, RIDEM wrote that "[c]onsidering the scale and scope of the Project and the anticipated impacts on a large area of intact forest habitat, more survey and analysis of environmental impacts, including wildlife and plant community impacts, needs to be conducted in order for DEM to provide anything more than a generalized opinion on the impacts of the Facility on fish and wildlife." *Id.* at 22. RIDEM added:

> DEM cannot, with such little site-specific information, make conjectures on the full suite of species that would be impacted by the project and the exact nature and extent of those impacts. It can, however, reasonably assume that the further fragmentation of one of the largest remaining intact forests in the State will negatively impact area fish and wildlife, including interior forest specialists listed as Species of Greatest Conservation Need in the state's Wildlife Action Plan.

Id. at 23. Regarding overall harm to the environment, RIDEM wrote that:

> Currently, the application for an air pollution control permit is under review by DEM. The Department has not received any other permit applications for the Facility. The source of cooling water for the Facility is currently unknown. Based on these current conditions, DEM cannot yet render an opinion as to whether the Facility presents an unacceptable harm to the environment.

Id. at 30. With respect to impacts on recreation and cumulative impacts on the environment, RIDEM wrote that, though its information was incomplete in several respects, there was enough information to find that the Facility would be harmful in several ways, *see id.* at 32-38.

RIDOH identified several concerns, including some based on inadequate information. For example, RIDOH noted that "[s]ince no process water source is currently under public consideration, RIDOH asks to assess the impact of any future water source proposal on drinking water quality" and that it did not have "sufficient information for evaluation of impacts of potential nighttime lighting of the facility." Rhode Island Department of Health Energy Facility Siting Board Advisory Opinion: Clear River Energy Center at 35.

The Burrillville Planning Board wrote that "we must unfortunately provide this Advisory Opinion without having seen either the complete engineering design for the CREC or permits from other state agencies." Advisory Opinion of the Burrillville Planning Board to the Energy Facility Siting Board at 8. The Planning Board further expressed concern regarding Invenergy's candor: "It is also our opinion that many of the data responses we received from Invenergy were incomplete and at times evasive." *Id.* at 9. Like RIDEM, the Planning Board did not have enough information to offer a full and complete opinion, but did have enough information to find that the Facility would be harmful in several ways. *Id.*

C. The Town Moves to Dismiss

On the afternoon of Friday, September 9, 2016, Invenergy filed a motion requesting that the EFSB extend the current procedural schedule by thirty days. CLF responded that same afternoon to the service list that it had no objection to Invenergy's motion, writing that "if Invenergy intends, as it says, to submit an 'alternative water supply plan,' the EFSB and the parties will need appropriate time to review that new plan." Invenergy's motion remains pending, and no alternative water supply plan has yet been provided.

In the meantime, on September 13, 2016, the Town of Burrillville filed a Motion to Dismiss Invenergy's Application. The Town argues that "Invenergy's failure to provide the EFSB, the Town and its Entities with requested information regarding its proposed water supply renders its application incomplete." Town's Motion at 3. CLF agrees with the Town and goes one step further: Invenergy's failure to provide enough information for fully half of the agencies tasked with preparing advisory opinions to do their job adequately has not only deprived all parties of the opportunity to participate fully in this docket, but it has also deprived the EFSB of information it needs to comply with the Energy Facility Siting Act, R.I. Gen. Laws § 42-98-1, *et seq.*, and requires dismissal of Invenergy's Application.[3] *See New England Telephone & Telegraph Co. v. Public Utilities Commission*, 446 A.2d 1376, 1385 (R.I. 1982) (affirming

[3] CLF agrees with the Town that Invenergy's failure to provide information has denied the Town "a meaningful opportunity to fully evaluate and be heard on Invenergy's Application" in violation of due-process principles. Town's Motion at 4. Indeed, for the reasons expressed in the Town's Motion, all the parties to the docket have been denied the opportunity of full participation. CLF therefore expressly joins in the Town's motion and adopts the Town's reasoning without repeating it in this memorandum.

RIPUC's dismissal of an application where the applicant's failure to provide adequate evidence "rendered the 'picture' unacceptably incomplete").

II. Legal Standards

CLF agrees with the legal standards expressed in the Town's motion.

The Energy Facility Siting Act sets forth additional grounds for dismissal. Section 42-98-9(b) says the EFSB "shall consider as issues in every proceeding the ability of the proposed facility to meet the requirements of the laws, rules, regulations, and ordinances under which, absent this chapter, the applicant would be required to obtain a permit, license, variance, or assent." That section continues: "The agency of state government or of a political subdivision of the state which, absent this chapter, would have statutory authority to grant or deny the permit, license, variance, or assent, shall function at the direction of the board for hearing the issue and rendering an advisory opinion thereon."

Section 42-98-10 governs advisory opinions and provides at subsection (d) that "[f]ailure or refusal of the applicant to provide requested information may be considered as grounds for recommending denial." And section 42-98-11 establishes the standards the EFSB must apply in reaching a final decision. The EFSB cannot grant a license unless it finds 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 this chapter, a permit license, variance, or assent would be required." R.I. Gen. Laws § 42-98-11(b)(2).

Most importantly, the EFSB "shall explicitly address each of the advisory opinions received from agencies, and the board's reason for accepting, rejecting, or modifying, in whole or in part, any of those advisory opinions." R.I. Gen. Laws § 42-98-11(c).

And finally, the Energy Facility Siting Act provides that "[f]ailure to comply with any promulgated board rule, regulation, requirement or procedure for the licensing of energy facilities shall constitute grounds for suspension or dismissal." R.I. Gen. Laws § 42-98-16(a).

III. Discussion

Because Invenergy precluded fully half of the agencies and subdivisions tasked with creating advisory opinions from actually doing so, the EFSB cannot comply with its statutory mandate to "address each of the advisory opinions received from agencies" before issuing a decision. R.I. Gen. L. § 42-98-11(c). Additionally, the EFSB cannot make a finding of compliance with all applicable "laws, rules, regulations, and ordinances" where, again, Invenergy precluded fully half of the agencies and subdivisions tasked with commenting on the applicable "laws, rules, regulations, and ordinances" from actually doing so. R.I. Gen. L. §§ 42-98-9(b) (requiring advisory opinions from agencies on compliance), 42-98-11(b)(2) (requiring the EFSB to make a finding on compliance). Moreover, Invenergy's failure to comply with the EFSB's Preliminary Order and Rules of Practice and Procedure by providing information to the agencies and subdivisions tasked with preparing advisory opinions is grounds for dismissal under R.I. Gen. L. § 42-98-16(a).

For all these reasons, CLF agrees with the Town that the EFSB should dismiss Invenergy's Application and close the docket.

A. The EFSB Cannot Address Advisory Opinions That Do Not Exist

Because Invenergy's failure to provide information precluded six agencies and subdivisions tasked with creating advisory opinions from rendering required opinions, the EFSB cannot comply with its statutory mandate to address advisory opinions before issuing a decision.

The Energy Facility Siting Act provides that the EFSB "**shall** explicitly address each of the advisory opinions received from agencies, and the board's reason for accepting, rejecting, or modifying, in whole or in part, any of those advisory opinions." R.I. Gen. Laws § 42-98-11(c) (emphasis added). The Act's language is mandatory – if the Board cannot address the agencies' advisory opinions, then it cannot issue a decision.

In order to carry out its statutory mandate, the Board issued its Preliminary Order directing twelve agencies and subdivisions to prepare advisory opinions. Each of the twelve agencies and subdivisions responded in compliance with the Preliminary Order, but several professed that they were unable to offer opinions on the matters directed to them by the Board due to Invenergy's failure to provide them with necessary information.[4]

So, for example, the Burrillville Zoning Board wrote that due to "the lack of information provided to us by Invenergy," the board "cannot adequately evaluate this project and provide the EFSB with reasoned judgment as to the effect of this Facility upon our community." Advisory Opinion to the Energy Facility Siting Board from the Burrillville Zoning Board at 1. RIDEM's relatively lengthy opinion ticks off several areas where it was unable to obtain adequate

[4] By providing documents styled as "Advisory Opinions" even without being able to offer the opinions requested by the EFSB, the agencies and subdivisions avoided forfeiting the right to provide an opinion to the EFSB. R.I. Gen. Laws § 42-98-10(a).

information from Invenergy – wetlands impacts (page 9), facility lighting (pages 14-15), water supply (pages 17-18), invasive species impacts (page 18), and biodiversity impacts (page 21), for example – and concluded that "[b]ased on these current conditions, DEM cannot yet render an opinion as to whether the Facility presents an unacceptable harm to the environment." *Id.* at 30. The Burrillville Planning Board echoed these concerns, identifying a host of areas where it lacked sufficient information to offer an informed opinion, including engineering designs, air quality, wetlands impacts, wildlife and biodiversity impacts, lighting impacts, traffic impacts, and public safety issues involving storage of hazardous materials. Advisory Opinion of the Burrillville Planning Board to the Energy Facility Siting Board at 8-9.

These serious gaps in the record are not a reflection of a lack of due diligence on the agencies' part. To date, the Town has submitted sixteen sets of data requests to Invenergy; RIDEM has submitted three, the third set of which contained sixty separate requests. The problem is Invenergy's responses. Indeed, the Burrillville Planning Board's Advisory Opinion explicitly expressed concern regarding Invenergy's candor: "It is also our opinion that many of the data responses we received from Invenergy were incomplete and at times evasive." Advisory Opinion of the Burrillville Planning Board to the Energy Facility Siting Board at 9. As a result of this lack of candor, the EFSB has been deprived of the advisory opinions necessary for it to fulfill its statutory mandate. *See* R.I. Gen. Laws § 42-98-11(c).

The situation here goes beyond what is contemplated by section 42-98-10(d), which provides that "[f]ailure or refusal of the applicant to provide requested information may be considered as grounds for recommending denial." Recommending denial is not remedy enough

for the pervasive failure at issue here. Read again the list of topics on which Invenergy has failed to provide sufficient information to inform the agencies and subdivisions tasked with submitting advisory opinions: wetlands impacts, facility lighting, invasive species impacts, biodiversity impacts, engineering designs, air quality, traffic impacts, and public safety issues involving storage of hazardous materials. Invenergy's thorough failure does more than provide grounds for the Board to deny its Application as suggested by section 42-98-10(d). It undermines the entire EFSB process and precludes the Board from meeting the requirements of the statute. *See* R.I. Gen. Laws § 42-98-11(c).

Where Invenergy has prevented agencies and subdivisions from submitting actual advisory opinions, the Board cannot address those advisory opinions and therefore cannot issue a decision. *Id.* Accordingly, Invenergy's Application should be dismissed.

B. The EFSB Cannot Make a Finding of Compliance Absent Advisory Opinions

Because Invenergy's failure to provide information precluded several agencies from providing informed opinions on Invenergy's compliance with all applicable laws, the EFSB cannot make a finding that Invenergy has complied with all applicable laws and cannot issue Invenergy a license.

Section 42-98-7(a) of the Rhode Island General Laws removes permitting authority from most agencies and local-government subdivisions and vests that authority in the EFSB. Thus section 42-98-7(a)(2) highlights the importance of the agencies' advisory opinions, requiring such agencies to "sit and function at the direction of the board," follow their usual procedures,

and instead of issuing a final "permit, license, assent, or variance," forward their findings and recommendations to the EFSB.[5]

Section 42-98-9(b) says the EFSB "**shall** consider as issues in every proceeding the ability of the proposed facility to meet the requirements of the laws, rules, regulations, and ordinances under which, absent this chapter, the applicant would be required to obtain a permit, license, variance, or assent." That section continues: "The agency of state government or of a political subdivision of the state which, absent this chapter, would have statutory authority to grant or deny the permit, license, variance, or assent, shall function at the direction of the board for hearing the issue and rendering an advisory opinion thereon." The Energy Facility Siting Act underscores the importance of these opinions by providing that the EFSB may issue a license "**only** upon finding that the applicant has shown 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 this chapter, a permit license, variance, or assent would be required." R.I. Gen. Laws § 42-98-11(b)(2).

The Board's Preliminary Order directed several agencies and subdivisions to render advisory opinions on Invenergy's compliance with the laws under which those agencies and subdivisions would have authority to regulate Invenergy if the Energy Facility Siting Act did not exist. And again, each of the twelve agencies and subdivisions responded in compliance with the Preliminary Order, but several professed that they were unable to offer opinions on the matters

[5] Some of RIDEM's permit functions are explicitly exempted from this arrangement, R.I. Gen. Laws § 42-98-7(a)(3), but other agencies' functions – RIDOT's, for example – are not so exempted.

directed to them by the Board due to Invenergy's failure to provide them with necessary information.

Most notably, RIDOT's advisory opinion informed the Board that "[t]o date, Invenergy has not filed any applications for permits with RIDOT." Rhode Island Department of Transportation Advisory Opinion at 1. RIDOT added that multiple permits would be necessary: "Invenergy must submit a Physical Alteration Permit Application (PAPA) to RIDOT for review and approval" for "[a]lterations includ[ing] the proposed new driveway access to Route 100, traffic impacts and any alterations that affect the drainage within the State Highway Right of Way." *Id.* at 2. And RIDOT further stated that "Invenergy must also submit a Utility Permit Application to RIDOT for review and approval for the proposed sewer and water lines and for any other proposed utility lines (overhead and underground) along Route 100 and any other State road." *Id.* Absent applications for these permits, or similar material from Invenergy, RIDOT was unable to offer an opinion with respect to Invenergy's compliance with the law.

Other agencies identified gaps in Invenergy's information that kept them from offering opinions sufficient for EFSB to determine legal compliance as required by the Energy Facility Siting Act. *See, e.g.*, Advisory Opinion to the Energy Facility Siting Board from the Burrillville Zoning Board at 11.[6] But none so strongly undermined the process as Invenergy's complete failure to submit *anything* to RIDOT. Under the Act, the EFSB has the sole authority to

[6] The Burrillville Zoning Board "voted unanimously that under the circumstances as presented, and without the benefit of reviewing ACTUAL plans and the proposed utilization of water ot its discharge, this Zoning Board cannot evaluate this application." Advisory Opinion to the Energy Facility Siting Board from the Burrillville Zoning Board at 11.

determine compliance with RIDOT's permitting requirements, R.I. Gen. Laws § 42-98-7(a)(1), and the EFSB simply cannot do its job without an opinion from RIDOT on this question.[7] *See* R.I. Gen. Laws §§ 42-98-7(a)(2); 42-98-9(b); 42-98-11(b)(2).

Invenergy's failure to provide RIDOT with *anything* – and its failure to allow other agencies to offer informed opinions regarding Invenergy's compliance with other laws, rules, regulations, and ordinances – upends the entire statutory scheme of the Energy Facility Siting Act and utterly prevents the Board from performing its statutory function. Accordingly, Invenergy's Application should be dismissed.

C. Invenergy's Failure to Comply with the EFSB's Order and Rules Is Grounds for Dismissal

By withholding the information necessary for agencies and subdivisions to offer complete advisory opinions, Invenergy has failed to comply with the EFSB's Preliminary Order and EFSB Rules in violation of the Energy Facility Siting Act.

Rhode Island General Laws section 42-98-16, titled "Violations," provides that "[f]ailure to comply with any promulgated board rule, regulation, requirement or procedure for the licensing of energy facilities shall constitute grounds for suspension or dismissal." EFSB Rule 1.12(d)(1) says that "parties shall have the obligation to present all relevant testimony and evidence and to fully participate in designated agency proceedings held pursuant to a preliminary decision of the Board." And the EFSB's Preliminary Order in this Docket provides that "[f]or each non-jurisdictional advisory opinion, the subject agency may request, and the Applicant shall

[7] Indeed, the EFSB specifically acknowledged this legal reality in its Preliminary Order by listing RIDOT as a "jurisdictional agency," which "absent the Siting Act, would have the authority to act upon permits, licenses, assents, or variances required for the proposed Facility." Preliminary Order at 13 & 14.

provide, any information or evidence deemed necessary to support the subject opinion." Preliminary Order at 15.

Together, Rule 1.12(d)(1) and the Preliminary Order make it plain that Invenergy has a mandatory duty to provide the information necessary for the agencies and subdivisions to issue advisory opinions. At this point, CLF need not retread old ground. Invenergy failed to provide the agencies and subdivisions tasked with issuing advisory opinions with the information they needed. The result is a raft of agencies and subdivisions proclaiming in their advisory opinions that they were unable to formulate opinions due to Invenergy's failure – and a violation of EFSB Rule 1.12(d)(1) and the Preliminary Order. Under section 42-98-16(a), Invenergy's violation is grounds for dismissal.

Section 42-98-16(a) also provides that an applicant that has violated the Act "shall have a reasonable opportunity to show cause for and remedy the lack of compliance." Here, Invenergy has had its reasonable opportunity and its Application is ripe for dismissal. There is a strict statutory deadline of six months following the EFSB's preliminary order for agencies and subdivisions to provide advisory opinions. R.I. Gen. Laws § 42-98-10(a). The Act does not include wiggle room to expand that period – in fact, it only allows the EFSB to tighten the period to "any lesser time that the board may require." *Id.* Invenergy had *six months* to provide the agencies and subdivisions with enough information to do their jobs. But it failed to do so, violating the Act and depriving numerous arms of state and local government, including the EFSB, of the information necessary to act on its Application. Invenergy has tainted the process irredeemably – there is no remedy that would not involve further violations of the careful

procedures and precise timing set forth in the Act. For this reason, Invenergy's Application should be dismissed.

IV. Conclusion

Back in January, CLF argued that this docket should be closed due to inadequate information from Invenergy. Invenergy's Application lacked enough details for the parties, including CLF, to assess and respond to its proposal. The EFSB voted to let the process take its course. The Board noted that "further information" might at some point be "necessary to conduct a thorough review and make an informed decision." Decision and Order at 3. It added that discovery would be available as part of the process. *Id.* In the intervening eight months, twelve agencies and subdivisions have attempted to conduct the thorough reviews and make the informed decisions demanded of them by the Energy Facility Siting Act and the Board. Discovery has occurred. And Invenergy has failed to provide enough information for the agencies and subdivisions to issue fully informed advisory opinions. The process has taken its course, statutory deadlines have passed, and there still is not enough information for the Board to do its job. Invenergy's failure to provide adequate information violated the Energy Facility Siting Act, it precluded the agencies and subdivisions from doing their jobs, and it precludes the EFSB from fulfilling its statutory mandates. Enough is enough: Invenergy's application must be dismissed.

WHEREFORE, CLF respectfully requests that the Energy Facility Siting Board issue an order dismissing Invenergy's Application and closing this docket.

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CERTIFICATE OF SERVICE

I certify that the original and fourteen copies of this Motion were sent via U.S. Mail, postage prepaid, to the Energy Facility Siting Board on September 16, 2016. In addition, electronic copies were served by e-mail on the service list of this Docket on September 19, 2016.