**UNITED STATES OF AMERICA**
**BEFORE THE**
**FEDERAL ENERGY REGULATORY COMMISSION**

**ISO New England Inc.** **Docket No. ER18-2457-000**

## MOTION TO INTERVENE AND PROTEST OF CLEAR RIVER ENERGY LLC AND INVENERGY ENERGY MANAGEMENT LLC

Pursuant to Rules 211, 212 and 214 of the Federal Energy Regulatory Commission's ("FERC" or "Commission") Rules of Practice and Procedure,[1] Clear River Energy LLC and Invenergy Energy Management LLC (collectively "Clear River") hereby move to intervene in the above-captioned proceeding and protest ISO New England Inc.'s ("ISO-NE") September 20, 2018 filing ("September 20 Filing") seeking to terminate the Capacity Supply Obligation ("CSO") assigned to Unit 1 of Clear River's planned 1080 MW generation facility (the "Project").

ISO-NE submitted its termination request pursuant to Section III.13.3.4(c) of its Tariff[2] which allows, but does not require, ISO-NE to terminate a CSO if the Project Sponsor has covered its CSO for two Capacity Commitment Periods ("CCPs") or, if the date by which the resource will achieve all of its critical path schedule ("CPS") milestones is beyond the CCP of the applicable CSO. ISO-NE requests that the Commission accept the termination filing based on (1) ISO-NE's conclusion that "little progress has been made to commence construction" and

[1] 18 C.F.R. §§ 385.211, 212 and 214 (2018).

[2] Capitalized terms used but not otherwise defined have the meanings ascribed thereto in ISO-NE's Transmission, Markets and Services Tariff (the "Tariff").

(2) the COD "is currently reported to be later [by 6 months] than June 1, 2021", the commencement of the applicable CCP.[3]

Clear River requests that the Commission deny ISO-NE's request. Clear River understands the challenges faced by ISO-NE when the Tariff, instead of specifying bright line metrics, for the most part provides only that ISO-NE will exercise discretion as to certain of its actions. In such circumstances, it is oftentimes, if not always, the case that any choice it makes will be opposed by those claiming they might be adversely affected by these choices. Here, in deciding to file to terminate Clear River's CSO – though ultimately a decision reserved to the Commission – ISO-NE apparently has concluded that its discretionary authority does not extend so far as to permit it to take into account various factors that Clear River believes should also have been considered in light of the circumstances present here, principal among which is the fact that Clear River is still awaiting a decision, which had been imminent, on its now going on 3-year-old application before the Rhode Island Energy Facility Siting Board ("EFSB") to construct the Project.[4]

ISO-NE has reiterated that termination of a CSO is reserved for "only the most egregious cases."[5] However, as discussed below, such is not the case here unless an egregious permitting delay should, by definition and under all circumstances, constitute such a case. On the other hand, the consequences of the termination here most certainly would be egregious – not simply on account of the disproportionate financial hit to the Project, but because ISO-NE acknowledges that "the disconnect between the [Forward Capacity Market] rules and the length of the state

[3] September 20 Filing at 3.

[4] The applicant in the EFSB proceeding is Clear River's affiliate, Invenergy Thermal Development LLC, which, as context may require, is included within references to Clear River herein.

[5] *ISO New England Inc.*, Docket No. ER14-2440-000, "Revisions to Allow a Non-Commercial Capacity Resource to Seek a One-Year Deferral," at 1 (July 16, 2014) ("Deferral Filing").

siting and environmental permitting process can be expected to continue to interfere with the ability of new generation projects to become commercial."[6]

Clear River's circumstances prove the point. Clear River submitted its siting application to the EFSB in October 2015, prior to participating in the 10th Forward Capacity Auction ("FCA-10"), anticipating that the EFSB would complete its proceedings leaving ample time to achieve commercial operation by the 2019-2020 CCP. However, as further described herein, the EFSB proceedings have been delayed extensively and for reasons entirely beyond Clear River's reasonable control. As a result, Clear River was forced to cover its FCA-10 and FCA-11 CSOs. It is indeed ironic, and most unfortunate, that now -- just about 30 days short of three years from the date Clear River submitted its application -- and just when the EFSB hearings had reached their final phase, with a decision anticipated in January 2019, that proceeding has now been further delayed until the Commission issues an order in the instant termination proceeding.[7]

To be clear, Clear River understands how ISO-NE believes, in complete good faith, that it should terminate the CSO because the Project may not be on schedule to achieve commercial operation prior to June 2021. ISO-NE is doing what it believes it must, in accordance with, and as constrained by the Tariff. But the Commission is the ultimate decisionmaker here, and able to look both at the Tariff's language and ambiguities as to how that language should be applied in different circumstances, as well as the policy implications of the ISO's decision under the circumstances here. And what is clear, though, is the fact that the EFSB proceeding is, and

[6] "Motion for Leave to Answer and Answer of ISO New England Inc.," Docket No. ER14-2440-000, at 5 (Aug. 21, 2014) ("2014 ISO-NE Answer").

[7] On September 26, 2018, based on the parties' stipulation, the EFSB continued the hearing process pending the Commission's determination in this docket. Hearings are currently scheduled to resume on November 27 and continue through February 7, 2019.

always has been, the gating item as to the Project's construction but this proceeding is now in its final phase and anticipated to resume later this year and conclude early next year.

In any event, the fact that "little progress has been made to commence construction"[8] should not be ascribed as a basis to terminate the CSO in this particular case. Rather, "progress" should be viewed in full context. As also detailed herein, Clear River already has expended $44 million on pre-plant construction development and engineering and design activities. Clear River respectfully submits that these expenditures represent about as much progress in developing the Project as reasonably could be expected prior to its receiving a construction permit.

More fundamentally, however, while ISO-NE states that Clear River has reported a COD of December 31, 2021, that date also must be considered in context. When Clear River submitted its September 2018 monthly report via ISO-NE's Critical Path Schedule ("CPS") software, it was required to submit the revised dates that National Grid had recently provided that reflected its determination that one of the Capacity Network Resource Interconnection Service ("CNRIS") upgrades, the West Farnum upgrade, was extended by six months and could not be completed until December 31, 2021. As a consequence, the CPS software, in turn, automatically extended the COD date to December 31, 2021 even though the CNRIS upgrades do not even need to be completed in order for Clear River to achieve commercial operation by June 2021 (only the Network Resource Interconnection Service ("NR Interconnection Service") upgrades are required; and, under National Grid's revised schedule, all these NR Interconnection Service upgrades will be completed by June 2021).

[8] September 20 Filing at 3.

In other words, once informed by National Grid that the completion date -- still only an estimate -- for this upgrade had to be extended from June 2021 to December 2021, the Project's COD was automatically extended to the end of December 2021. Now, unfortunately, ISO-NE's filing of a request to terminate Clear River's CSO here has resulted in yet a further delay of the EFSB proceeding which all but ensures that Clear River will not be able to meet a June 1, 2021 COD and will need to cover at least some months of its FCA-12 CCP. Clear River nonetheless urges the Commission not to terminate Clear River's FCA-12 CSO because termination would not impact the auction results, and even under the new EFSB schedule and National Grid's updated schedule for the West Farnum upgrade, Clear River still will be in service by the time the FCA-13 CCP commences.

Lastly, and in the long-run, perhaps most significantly, ISO-NE's September 20 Filing has quite unintentionally given new life to the opponents of natural gas power plant development, the parties responsible for the very delays upon which ISO-NE's filing ultimately is based. Aside from it further delaying the EFSB proceeding in the short-term thereby contributing to ISO-NE's decision to terminate Clear River's CSO in furtherance, unintentionally, of the Project's opponents' objectives, over the longer term, the filing will send an unintended message to all those parties who oppose gas-fired generation, in general – generation that time and again is claimed to be sorely and critically needed – that, as long as they can cause enough of a ruckus, they can wait out the Project Sponsor and effectively let the Tariff do their bidding. Clear River respectfully suggests that the Commission consider this broader policy issue as well.

To be sure, the issue is not whether Clear River has experienced an especially litigious permitting process in today's environment, but that its opponents' tactics are increasingly

common and, as such, these types of extensive delays are now the norm in New England and elsewhere. It is essential, then, that the Tariff be applied in a manner that recognizes that such delays are the norm, and not the egregious case warranting termination.

In any event, regardless of the policy and messaging considerations here, neither of the cited factors describes a situation so egregious as to warrant termination of Clear River's CSO. Indeed, the particular circumstances here mirror the very challenges identified by ISO-NE years ago, challenges that continue to be faced by developers because of the disconnect between the FCM rules and the vagaries of state permitting proceedings. Accordingly, Clear River respectfully asks that the Commission permit Clear River's CSO to be maintained.

## I. MOTION TO INTERVENE

Clear River Energy LLC, through its Project Sponsor, Invenergy Energy Management LLC, is developing an approximately 1080 MW natural gas-fired electric generation facility located in Burrillville, Rhode Island (the "Facility" or "Project) that holds the CSO that ISO-NE has here asked the Commission to terminate. Clear River Energy LLC and Invenergy Energy Management LLC, therefore, have a direct and substantial interest in the matters at issue in this proceeding that cannot be adequately represented by any other party and they respectfully request the Commission grant their timely filed motion to intervene.

## II. COMMUNICATIONS

Please address all notices and communications regarding this proceeding to the following persons who are also designated for service in this proceeding:

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## III. PROTEST

### A. Development of the Clear River Facility

Clear River is developing a 1080 MW natural gas generation facility located in Burrillville, Rhode Island (the "Project"), consisting of two state of the art, single shaft, highly efficient, air-cooled GE 7HA.02 generating units – Unit 1 and Unit 2 – each using an air cooled condenser, and thereby reducing water consumption by more than 90% as compared to a traditional water cooled plant. The Project will have one of the lowest heat rates in New England, support the growing volume of renewable energy generation facilities, and displace older, far less environmentally friendly generation.

The Project will directly contribute to minimizing New England's fuel security concerns.[9] Each turbine will be duel fueled and, when necessary, able to run on ultra-low sulfur diesel stored on site in a two million gallon tank. It will connect directly to both of the main gas transmission lines owned by Algonquin Gas Transmission ("AGT") -- at a location that is far

[9] *See e.g., ISO New England Inc.*, 152 FERC ¶ 61,190 (2015), *reh'g denied*, 154 FERC ¶ 61,133 (2016).

superior than those where projects can connect only indirectly to the AGT main line via taps or laterals .

Aside from its capacity and environmental benefits, the upgrades that Clear River will fund include approximately $44 million in replacements of existing equipment, further strengthening the transmission grid. Additionally, while Clear River will fund a new 6.8 mile generation tie line for its exclusive use presently (6 miles of which will be owned by National Grid and 0.8 miles of which will be owned by Clear River), National Grid will have an option to acquire Clear River's 0.8 mile segment should it choose to convert the line into network facility to serve regional transmission needs in the future, thereby further strengthening the grid.

Clear River has been actively developing the Facility since 2014. It secured the Facility's site in late 2014; in 2015, it submitted its interconnection application, filed an air permit application, submitted and obtained a Minimum Offer Price Rule floor price waiver from the ISO-NE's internal market monitor and obtained capacity qualification from ISO-NE allowing Clear River to participate in FCA-10, and applied to the EFSB for a construction permit.[10] In February of 2016, Clear River obtained a CSO for 485 MW in FCA-10. However, progress has been substantially and unexpectedly delayed on account of a small number of very vocal, well-funded opponents intent, from day one, on simply causing the clock to run out on Clear River by requiring it to swat back seemingly any conceivable argument that, while possibly creative, almost invariably was shown to be legally infirm.

[10] An additional EFSB proceeding is addressing National Grid's and Clear River's joint application to construct portions of the generation tie line that will connect the Project with the Sherman Road Substation. That hearing was scheduled for January and February 2019. In light of the continuance of the Project's EFSB hearing, it is now expected that the hearing on the tie line will take place in April or May 2019. Pre-engineering work is nevertheless proceeding, and it is not anticipated that this minor delay will impact the Project's overall schedule. The tie line application proceeding has not entailed anything close to the level of controversy and amount of delay attendant to the EFSB proceeding, and is by no means a gating issue with respect to the Project's operation.

Initial local support resulted in a tax and property value agreement with the Town of Burrillville (which was executed in November 2016), and on March 6, 2015, Clear River entered into a letter of intent ("LOI") with the Pascoag Utility District ("PUD") to develop a water supply plan for the project; then, on September 25, 2015, Clear River and the PUD entered into a second LOI to develop a more detailed plan to design and install a treatment system to reactivate a contaminated local well for Clear River's sole use. However, almost a year later, after an aggressive campaign by local and outside parties, the PUD Board voted to terminate the LOI in August of 2016.[11] This, coupled with delays in obtaining an alternate water source (resulting from the same opposition efforts) created an approximately one year delay in the EFSB permitting process.[12]

Even absent a construction permit, Clear River has continued to fund development activities, including $44 million spent on pre-construction, development and security postings (of which only $9 million is refundable should the Commission authorize ISO-NE to terminate Clear River's CSO); but Clear River could not prudently have agreed to fully fund every last dollar of all of the requisite network upgrades (the costs of which total $60 million as required for construction of those upgrades to commence).

As noted, before ISO-NE submitted its termination request, the EFSB proceeding was in the midst of hearings with a decision expected as early as January 2019. However, the EFSB

[11] *See* Attachment A ("Invenergy's Proposed New Fossil Fuel Plant May Have Difficulty Finding Water to Use," Conservation Law Foundation (Aug. 31, 2016)).

[12] Project opponents, taking advantage of the situation they had created, sought and obtained a stay of the EFSB permitting process until a new water source could be obtained and which also includes a redundant back up source. That delay was compounded by the opposition's active interference with Clear River's efforts to obtain a new water source. The opposition insisted that Clear River file an interim report with the EFSB and that report had to identify the alternative water sources that the opposition then aggressively approached with the intent to prevent any agreement from being finalized.

hearings have since been stayed pending Commission resolution of ISO-NE's termination request in this proceeding.

### B. Clear River Has Made Reasonable Progress

ISO-NE based its decision to request termination of Clear River's FCA-12 CSO on (1) its conclusion that little progress has been made to commence construction and (2) the COD currently is reported to be later than June 1, 2021.[13] These conclusions do not support termination of Clear River's CSO in light of both ISO-NE's and the Commission's prior statements as to (a) what should constitute reasonable progress under given circumstances;[14] (b) their respective acknowledgements that three years does not provide enough time to develop gas fired generation in New England; and (c) the fact that the timing of major permits is for the most part (and here was entirely) beyond the control of the developer.

#### 1. The Relevant, And Totality of, Applicable Circumstances

As stated by ISO-NE, if the Commission accepts this termination filing, ISO-NE will terminate the CSO, draw down the associated financial assurance, and remove the resource's qualified capacity, thereby rendering it ineligible to participate in the upcoming FCA-13.[15] Should the Project's right to any payments associated with its CSO be eliminated, the financial hit on Clear River attributable to the forfeiture of security would be $10.2 million and, even

[13] September 20 Filing at 2-3.

[14] *See e.g.*, *Virginia Electric and Power Company*, 110 FERC ¶ 61,039 at P 14 (2005) (stating that "the Commission traditionally has favored the granting of reasonable extensions "to create an opportunity for generation to develop under certain circumstances" and noting that "[e]xtensions allow flexibility to meet the needs of all generators, who must deal with the changing nature of business realities."); *American Electric Power Service Corporation*, 111 FERC ¶ 61,418 at P 12 (2005) (rejecting notice of cancellation and noting that "the proposed generating facility will be an integrated gasification combined-cycle generating facility that will supply clean efficient energy that will benefit the City and the industrial base in Ohio. AEP's proposed cancellation of the IA would delay development of this facility.").

[15] September 20 Filing at 2-3.

though the Project can and will still move forward,[16] the $25 million already spent but not refundable might prove to have been entirely unnecessary in light of the Project's having to take a new queue position for CSO deliverability studies.[17] In total, then, termination of the CSO could cost Clear River upwards of $35 million.

Importantly, ISO-NE says it will terminate a CSO "only in the most egregious cases."[18] Plainly, egregious cases are not the norm. Yet, as noted above, permitting delays have become the norm -- and unless an egregious permitting delay should, by definition and under all circumstances, constitute such a case, the Commission should grant Clear River's request for waiver.

The metaphorical elephant in the room is, as ISO-NE has acknowledged, that "the approximately three and-a-half year planning period between the FCA and the associated [CCP] may not be sufficient to ensure that participants are able to permit, finance, and construct a new power plant by the start of the relevant commitment period."[19] As early as 2014, ISO-NE explained that "it has become apparent that, in some circumstances, the 39-month planning period may not be sufficient."[20] ISO-NE likewise noted that its experience with, and the comments of, state authorities had confirmed that "the disconnect between the FCM rules and

[16] Contrary to Conservation Law Foundation's accusations otherwise, *see* Attachment A hereto, Clear River can and will move forward.

[17] This is not to mention potentially impacting Project's Unit 2 FCM eligibility for FCA-13 based on ISO-NE's assessment that in light of its September 20 Filing that there is now significant uncertainty with respect to the schedule for Unit 2 going forward; a conclusion that does not take into account the fact that with the imminent conclusion of the EFSB hearings, both units are on schedule to be in-service before commencement of the FCA-13 CCP.

[18] "Revisions to allow a Non-Commercial Capacity Resource to Seek a One-Year Deferral," *ISO New England Inc.*, Docket No. ER14-2440-000, at 3 (July 16, 2014) ("Deferral Filing").

[19] Deferral Filing, Testimony of Robert G. Ethier at 3.

[20] Deferral Filing at 1.

the length of the state siting and environmental permitting process can be expected to continue to interfere with the ability of new generation projects to become commercial."[21]

The challenges affecting gas-fired generation development have not abated in the years since ISO-NE made these observations. Indeed, the challenges facing new infrastructure construction were prominent in ISO-NE's 2017 Regional System Plan, where ISO-NE concluded:

> Difficulties in obtaining siting and permitting approvals present risks to infrastructure development. As a result, the region may be subject to construction delays of natural gas pipelines, generation resources, and transmission facilities.[22]

ISO-NE went on to explain:

> The ISO monitors closely the build out of all new, noncommercial resources in anticipation that some may be early or others late. To date, the tendency has been toward new demand resources being available as much as a year in advance of their expected in-service date while generation has been delayed due to permitting and transmission construction issues.[23]

In that same report, ISO-NE identified the adverse impacts to New England:

> Siting and permitting new dual-fuel facilities that have sufficient operating flexibility when access to natural gas is limited remains challenging. Similarly, siting new gas pipelines can be a long and difficult process and will not address short-term needs. Fuel constraints physically challenge the reliable operation of the system and result in increased prices for electricity whenever natural gas is in shorter supply to the region, especially during the winter months.[24]

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[21] "Motion for Leave to Answer and Answer of ISO New England Inc.," *ISO New England Inc.*, Docket No. ER14-2440-000, at 4-5 (Aug. 21, 2014) ("2014 ISO-NE Answer").

[22] ISO New England Inc., 2017 Regional System Plan at 11, available at: https://www.iso-ne.com/static-assets/documents/2017/11/rsp17_final.docx ("2017 Regional System Plan").

[23] *Id.* at 50.

[24] *Id.* at 110.

Moreover:

> Siting and environmental permitting requirements for new or existing transmission and generation are often complex and may involve multiple federal and state regulatory entities, all of which can delay or jeopardize the planning, development, or the implementation of proposed transmission and generation improvements. Compliance with environmental requirements may involve major capital investments for new projects, remediation measures, or changes in generator operations.[25]

Clearly, while ISO-NE's adoption of a three-year planning period for the FCM reflected a good faith assumption that it would be adequate, it was not based on specific evidence of its being sufficient to obtain all permits and complete construction. Over time, those opposed to new infrastructure have realized that, given the tight Tariff timelines, delay can serve as the primary weapon when trying to kill a new project. Indeed, the current market rules and timelines provide incentives for opponents to delay a project through permitting appeals in the hope (potentially to be realized here with respect to Clear River) that ISO-NE will be required to apply strict deadlines that prevent a project from being constructed.

The reasons for the disconnect between the time allotted for a new resource to be completed after clearing a FCA are directly related to the numerous—and often interdependent—local, state and federal permits required to build and operate a new resource. As a result of this misalignment, the Tariff, instead of serving as a gatekeeper, becomes the unintended yet effective accomplice of those who seek to eliminate all fossil fuel-sourced generation, period.

Importantly, most permitting process delays are outside of a resource's reasonable control. Certainly, the delays relevant here were beyond Clear River's control. The many state

[25] *Id.* at 111.

and local agencies and courts with oversight don't tie themselves to ISO-NE's market rule timelines. And when permits are finally obtained, virtually anyone may appeal regardless of their claim's legitimacy. The ineluctable conclusion is that overloaded tribunals oftentimes are incapable of acting quickly enough so as not to jeopardize the 39-month planning period. So, a permit process originally envisioned to take just one year out of the 39-month planning period in fact will end up taking over three years, at least insofar as Clear River's construction permit is concerned.

Delay, then, is the weapon of choice: delay the permitting process and you thereby jeopardize the project's meeting the Tariff-required milestones. Delay enough, and failure to meet those milestones can be terminal.

But it gets worse. Adding to the challenges is the Catch-22 facing developers like Clear River when the project's opponents argue that permitting agencies are looking (when erroneously urged by intervenors) to view whether a project has cleared in the auction as a factor to be considered in their need determinations.[26] Plainly, it would waste scarce administrative and judicial resources to require that every project planning to offer into the FCA complete its permitting process, including all potential appeals, prior to entering the auction. And, on the flip side, that approach would increase the risk that the millions of dollars in development costs

[26] The opposition's erroneous "mantra" is that ISO-NE's request to terminate the CSO stems from a determination that the Clear River Project is not needed. (As an example, see the article included at Attachment B). Need was not a factor considered by ISO-NE. To assess the need, one must look no further than last Labor Day weekend when the Southeast New England ("SENE") zone, the import constrained zone in which the Project will be located, experienced a shortage event. *See* "Labor Day scorcher tested New England's power system with capacity shortfall," S&P Global (Sep. 10, 2018) (included as Attachment B). The SENE zone also includes a number of generation units that are older, more polluting and at risk of retirement. And, ISO-NE clearly has a need for more dual-fueled units, like Clear River, and, even with respect to its primary fuel (gas), Clear River's interconnection is highly reliable since the Project connects at multiple points with an adjacent pipeline. These facts are highly relevant to the need for the Clear River Project.

incurred to obtain permits would be wasted if, upon receiving the permit, the project did not clear the FCA.

As the State of Massachusetts explained in an earlier proceeding involving the FCM:

> The delays [in obtaining permits] that result are unpredictable and will vary on a case-by-case basis. Market rules should be designed to provide sufficient flexibility to allow for such delays. To have a resource development project terminate solely because siting, zoning, permitting, and appellate processes could not be completed within the 39-month development period would be an unintended result and a waste of the state regulatory agencies' time and resources.[27]
>
> **If, under the system as currently designed, a new capacity resource is unable to be built through no fault of its own, then there is more at stake than the fate of just one resource: The viability of the whole FCM is called into question.[28]**

It is against this backdrop that ISO-NE's request to terminate Clear River's CSO must be evaluated. Accordingly, where permitting delays **are** responsible for a participant's **not** being able to start physical construction at least 36 months before the start of the relevant commitment period, this does **not** constitute the egregious case in New England unless perhaps it can be shown that the developer itself reasonably could have and should have avoided such delays. But such has not been the case here, and nothing else makes Clear River's case so egregious as to justify the requested CSO termination.

The most important conclusion here is not so much that Clear River has experienced an especially litigious permitting process from today's standpoint, but that its opponents' tactics are

[27] "Massachusetts Attorney General's Motion to Intervene and Comments," *ISO England Inc.*, Docket No. ER14-2440-000, at 3-4 (Aug. 6, 2014).

[28] "Notice of Intervention and Comments of the Massachusetts Department of Public Utilities," *ISO England Inc.*, Docket No. ER14-2440-000, at 5 (Aug. 6, 2014) (emphasis added).

increasingly common and, as such, these types of extensive delays are now the norm in New England and elsewhere. It is essential, then, that the Tariff be applied in a manner that recognizes that such delays are not the egregious case that allows termination.

**2. Clear River's Circumstances**

The focus here should not be on the commencement of construction. The gating item for construction to commence is having to secure the EFSB's approval to do so. In other words, the circumstances here are precisely those described by ISO-NE as illustrating the "disconnect between the FCM timeline and the time actually required to site and permit new resources."[29] Significantly, though, this gating item was, and still is, close to being resolved, notwithstanding the Project's opponents' efforts to use this very termination filing as "evidence" (albeit legally and factually incorrect) of the Project not being needed.

Clear River is not a paper project. Clear River already has spent $44 million in development costs, including costs necessary to commence such activities as are required to construct the CNRIS network upgrades. Clear River also is committed to funding an additional $60 million in upgrades to National Grid's transmission system, most of which involve replacements and enhancements to existing facilities that will further strengthen New England's existing grid.

In sum, Clear River respectfully submits that under the totality of circumstances presented here -- some of which circumstances ISO-NE might not even have thought it was authorized to consider -- its CSO should not be terminated, even if it is now the case that the Project's COD will be delayed. The Project has done everything it reasonably should have done under the circumstances, and perhaps even more, in order to move forward.

[29] 2014 ISO-NE Answer at 4-5.

### 3. Reliance On The Reported Delay Of Clear River's COD Must Also be Considered In Context

Clear River is ready, willing and able to complete the Project. No reasonable developer would spend as much money as Clear River already has were this not the case. The COD ISO-NE references as having been "reported" was not specifically reported, but the date required by ISO's CPS monitoring system to be reported on the basis of a change in an earlier milestone. The database simply would not allow Clear River to continue to show a June 2021 COD once Clear River reported that the estimated in-service date of one of the required CNRIS upgrades was extended by six months.

Because Clear River had covered its CSO, it was required under Section III.13.3.3 of the Tariff, to report changes in any of its development milestones, one of which is the date by which the last of the CNRIS upgrades is to be completed (namely, the West Farnum substation). On September 4, 2018, National Grid issued a revised upgrade schedule providing an estimated completion date that was six months later than June, 2021. Clear River was required to report this revised date. However, upon making that change, the CPS monitoring system automatically extended the COD by the same amount of time, and it would not allow any COD to be entered that was earlier than the revised in-service date for West Farnum, the last of the National Grid CNRIS upgrades to be constructed.

Importantly, though, even this potential delay of the West Farnum upgrade (which Clear River believes still might be avoided) directly results from the delays in the EFSB proceedings. The fact is that while Clear River has already spent $44 million to develop the Project, it cannot rationally post an additional $60 million in security for the network upgrades until the EFSB permit is issued.

### C. The Commission Should Order That Clear River's CSO Be Maintained Under The Circumstances Presented Here.

The issue in this case is whether a delay attributable solely to the state permitting process over which Clear River has no control -- should be the basis for terminating Clear River's CSO. Ours is not the egregious case. Moreover, FCA-12 auction results will not be affected by termination of Clear River's FCA-12, and even under National Grid's revised schedule and the present schedule for the EFSB to complete the hearing, once resumed this still would permit a COD in advance of the FCA-13 CCP. And the fact that Clear River may need to cover a portion of its CSO should not be considered an adverse consequence of maintaining Clear River's CSO. These are the Tariff procedures the Commission has approved to ensure that there is not a shortfall in capacity during any portion of the relevant CCP, and to allow generation resources that have surplus capacity to meet that need through the reconfiguration auction when, as here, there is no reasonable basis to terminate a CSO when a project's COD is delayed.

It is unfortunate, indeed ironic, that the Tariff could be read to require that, in order for Clear River to maintain its CSO, it had to have spent not only its pre-construction development costs (already $44 million) but also to spend upwards of $60 million, in order to commence actual construction of network upgrades prior to its having obtained a state permit to construct the plant for which the upgrades are required. Now, if terminated, in order for Clear River to receive that permit, it must overcome the arguments posed in the EFSB proceeding by those opposed to any gas-fired power plant development that the permit be denied on the grounds that Clear River no longer has a CSO and that this means -- although surely it does not -- that the plant is not needed. It is further ironic, and unfortunate, that just when the EFSB proceeding, having commenced just 30 days short of three years ago, finally had reached its final phase, with a decision anticipated in January 2019, the proceeding has now been continued until the

Commission issues an order in this proceeding.[30] So ISO-NE's filing has quite unintentionally given new life to the very parties responsible for the delays upon which ISO-NE's filing in this proceeding ultimately is based. In the short term then, the filing is but serving these opponents' objectives. But over the longer term, it sends a message to those opposing gas-fired generation – generation that time and again is claimed to be sorely and critically needed – that, as long as they can cause enough of a ruckus, they'll prevail because soon enough the Tariff rules will kick in, thereby effectively doing their bidding.

## IV. CONCLUSION

Clear River requests that the Commission allow Clear River's CSO to be maintained. Alternatively, if the Commission determines that the more appropriate means by which it could grant such relief is via a grant of waiver of the Tariff, Clear River respectfully requests that the Commission grant the waiver request Clear River has filed separately today, and dismiss ISO-NE's termination request as moot.

Respectfully submitted,

*/s/ Larry F. Eisenstat*

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October 11, 2018

[30] As noted *supra*, Clear River joined in the stipulation that resulted in the EFSB delay.

# ATTACHMENT A

# The competitive market has determined that Invenergy's proposed power plant is not necessary

October 5, 2018 Steve Ahlquist 0


I'm going to hit you with a lot of jargon in this piece, but I hope to explain as I go:

On September 20, in the midst of the **Energy Facility Siting Board (EFSB)** hearings to determine the fate of **Invenergy**'s $1 billion fracked gas and diesel oil burning power plant aimed at the pristine forests of northwest **Rhode Island**, Invenergy dropped a bombshell: For the first time in its 22 year history, **ISO-New England** cancelled a **Capacity Supply Obligation** (**CSO**). Specifically, it cancelled Invenergy's CSO for **Turbine 1** of it's proposed power plant.

A little over a week later ISO New England did what everyone expected them to do and disallowed Invenergy proposed second

turbine from participating in **Forward Capacity Auction (FCA) 13.**

The way energy works in Rhode Island is that ISO New England, a non-profit that manages New England's electrical grid, holds annual Forward Capacity Auctions. FCA 13, to be conducted on February 4, 2019, will determine the suppliers and prices of electricity in New England for the period from June 1, 2022 to May 31, 2023.

About three years ago, when they announced that they wanted to build a two turbine power plant in Burrillville, Invenergy began to bid into these auctions, with the expectation that they would have a functioning power plant when it came time to deliver. Due to delays, Invenergy does not have a power plant, so Invenergy sold their commitments (CSOs) – at a profit.

It is estimated that Invenergy made about $22 million in profit by selling their CSOs and that they were on track to make an additional $20 million this year, until ISO New England pulled the plug on this scheme by cancelling the CSO.

Without a CSO, the very reason for Invenergy's power plant to exist goes away. If the plant is not needed to satisfy New England's electrical needs, then why build it? In fact, the question of need is central to the deliberations of the EFSB.

Invenergy understands the question of need very well. On August 18, 2016 the company filed a brief (see here) that declared that the, "competitive market will determine whether [the proposed power plant] is necessary to meet the needs of the region."

"ISO-New England evaluates the market and sets prices that

maintain system reliability while encouraging new efficient generation in the zones where needed," writes Invenergy in their brief. With the cancellation of the CSO for Turbine 1 and Turbine 2 being disallowed in the upcoming auction, it looks like the competitive market has spoken.

**Conservation Law Foundation** (**CLF**), which is battling Invenergy at the EFSB, has filed a motion to bring Invenergy's filing to the attention of the board. CLF also motioned the board to admit the **Qualification Determination Notification** (**QDN**) for Forward Capacity Auction 13 (FCA-13), which was issued by ISO New England when they disallowed Invenergy's Turbine 2. The QDN is the document from ISO New England that will outline the reasons for the disqualification of Turbine 2.

The QDN document is not reviewable by the public, ostensibly because it contains information of a confidential nature, "trade secrets" and information Invenergy may not want its competition to know about.

**Jerry Elmer**, Senior Attorney at CLF, characterizes the QDN as first, "further evidence that the electricity to be produced by Invenergy is not wanted and not needed by the ISO" and second, "the QDN provides evidence of the degree to which Invenergy has misstated facts to the EFSB, ISO New England, and the public."

Elmer has long made the case that Invenergy has been dishonest with the public, the media and the EFSB about its proposed power plant.

"And 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," said Elmer during his opening statement before the EFSB on April 26, 2018.

Since it was revealed that ISO New England cancelled Invenergy's CSO, the EFSB hearings have once again been delayed, most likely until after Thanksgiving. In the meantime, though, all parties will be before the EFSB on Wednesday, October 31 to hear Burrillville's pending motion to reject the **Rhode Island Public utilities Commission (PUC)** Advisory Opinion. (See here)

Attorney Elmer explains:

> *"Burrillville's Motion is simple and logical: the PUC Advisory Opinion, which opines that the Invenergy power plant is needed, was based largely on the fact that Invenergy held a CSO from the ISO. But that is no longer true. Since the main basis of the PUC Advisory Opinion is now invalid, Burrillville argues that the Advisory Opinion should be rejected. The **Energy Facility Siting Act (EFSA)**, which created the EFSB, gives the EFSB the power to accept, reject, or modify any Advisory Opinion. Burrillville's motion asks the EFSB to reject the PUC Advisory Opinion (saying that the plant is needed) because the Advisory Opinion is badly outdated and no longer valid.*
>
> *"Invenergy is fighting hard against Burrillville's motion – for obvious reasons. If the EFSB grants Burrillville's motion, that will be another significant nail in Invenergy's coffin. In the past, Invenergy's two strongest arguments in favor of the plant were: (a) that it had a CSO; and (b) that it had a favorable PUC*

> *Advisory Opinion. The CSO is already gone; if the PUC Advisory Opinion is rejected, Invenergy will be further harmed."*

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**See also:**

[EFSB hears opening statements on proposed Invenergy power plant]

[Without a power plant, Invenergy is making millions off New England ratepayers]

[Burrillville files motion to reject PUC's advisory opinion on Invenergy plant]

[Jerry Elmer: We don't need modern energy plant]

[Ed Achorn: Loss of plant would hurt]

[Paul Roselli: ProJo's power plant editorial based on 'misinformation and distortions']

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# Invenergy's Proposed New Fossil Fuel Plant May Have Difficulty Finding Water to Use

AUG 31, 2016 | JERRY ELMER (/ABOUT/OUR-TEAM/JERRY-ELMER)

Invenergy's (https://www.clf.org/blog/update-on-the-invenergy-power-plant/) inability to obtain water for its proposed 1,000-megawatt fossil-fuel plant in Burrillville, Rhode Island, may prove to be a significant obstacle to the plant's proponents.

By way of background, Invenergy's pending permit application to the Rhode Island Energy Facility Siting Board (EFSB) calls for Invenergy to acquire well water from Pascoag Utility District (PUD) Well 3A, which was closed more than a decade ago due to contamination. There was a major lawsuit in the early 2000s about the contaminated well. One of Invenergy's "selling points" to the Town of Burrillville was that the company would de-contaminate the well (for the "benefit" of the Town) – and also utilize the newly de-contaminated well water.

In addition, an April 22, 2004, Court Order from that earlier Superior Court lawsuit about the PUD's contaminated Well 3A requires PUD to get prior written approval from the neighboring Harrisville water district before PUD allows any "non-trivial increase" in PUD's own water usage.

On August 9, 2016, under significant pressure from local opponents of Invenergy, Harrisville turned down any increase in water usage by PUD for Invenergy.

Then, on August 19, 2016, PUD, also under tremendous pressure from local opponents of Invenergy, voted to deny Invenergy the use of PUD water, including water from Well 3A.

Taken together, these decisions mean two things. First, it shows that concerted citizen pressure can sometimes be effective in eliciting governmental action. Second, as of this writing, Invenergy has no source of water for its proposed power plant.

It is too early to tell whether or not the August actions by PUD and Harrisville will be enough to kill the Invenergy proposal. On Monday, August 22, Invenergy sent a letter (http://www.ripuc.ri.gov/efsb/efsb/SB2015_06_Inv_Ltr1.pdf) to the EFSB saying that it was going to prepare "supplemental information" to submit to the EFSB on its new plans for providing water for the proposed plant. Invenergy has stated that it has a "third option," but it has never even hinted at what that might be (and it is difficult to imagine what that might be).

Nevertheless, there has been growing media interest (http://www.providencejournal.com/news/20160819/proposed-power-plant-faces-lack-of-water) in the matter, and folks are beginning to realize that Invenergy may be in real trouble.

# ATTACHMENT B

S&P Global

# Labor Day scorcher tested New England's power system with capacity shortfall

**Monday, September 10, 2018 4:21 PM CT**

By Andrew Coffman Smith

Hotter-than-expected weather and unplanned generator outages on Labor Day forced the regional power grid operator ISO New England to take emergency action to shore up capacity.

ISO-NE said in an online post that temperatures for Boston, Mass., on Sept. 3 soared beyond an expected high of 89 degrees F and an expected dew point, which measures humidity, of 70 degrees F to an actual high of 94 degrees F and an actual dew point of 73 degrees F. The regional transmission operator explained that consumer demand for electricity is typically lower on holidays but the heat and humidity on Labor Day led to people "cranking up their air conditioning to deal with the swampy air."

"When the dew point is above 70, every one-degree increase can cause load to rise by about 500 megawatts," ISO-NE said. "Similar effects on load are caused by rising temperatures."

As a result of the increased air conditioning use on Sept. 3, New England experienced its highest ever-recorded peak demand for electricity for a Labor Day holiday, at about 23,106 MW for five minutes at 5:50 p.m. For the hour from 5 p.m. to 6 p.m., demand peaked at about 22,956 MW, about 2,400 MW higher than expected when the day began, based on forecast weather conditions. The peak on Sunday, the day before, was just 16,752 MW, typical of holiday-weekend power loads, ISO-NE said.

Coupled with the high peak demand were unplanned forced generation outages that cut into the region's mandated operating reserves. In total, several power plants generating about 1,600 MW went offline throughout Labor Day, ISO-NE said. "To make up for the generation outages, some resources that had been providing reserves began generating electricity, and as a result, the power system dropped below the required operating reserve requirements," the RTO said.

ISO-NE implemented five of 11 measures available under its "Operating Procedure 4 Action During a Capacity Deficiency" contingency plan to shore up the region's deficient capacity. The procedure remained in place for the bulk power system from about 3:30 p.m. to 8 p.m., including the roughly two hours and 40 minutes during which New England was in a "capacity scarcity condition."

Under New England's new Pay-for-Performance market design, which went into effect June 1, if a generator fails to perform as promised during a capacity scarcity condition it must pay the other generators that made up for the shortfall by performing above their own capacity supply obligations.

The grid operator said that the emergency actions on Labor Day enabled the purchasing of emergency energy from neighboring New York state and the province of New Brunswick. Those actions also included keeping market participants informed about stressed system conditions and asking market participants to reduce energy consumption at their own facilities.

The ISO-NE said it would have also considered issuing a request for voluntary conservation on Sept. 3 if conditions had deteriorated further. But the RTO said conditions improved steadily as offline generators came back online to restore operating reserves and demand began to decline throughout late afternoon.

New England's use of power reserves to keep the lights on Labor Day also spurred wholesale electricity prices to rise as high as about $2,454/MWh during the peak demand hour from 5 p.m. to 6 p.m. In comparison, prices were about $68/MWh during the hour beginning at 9 p.m. after the operating reserve shortage had been resolved. The average hourly price for the entire day was about $262/MWh.

According to ISO-NE, the pay-for-performance penalty is $2,000/MWh for failing to meet obligation during energy shortfalls and are paid by the resources, not electricity ratepayers. In contrast, resources that overperform, including resources with no obligations, receive $2,000/MWh of additional revenue. The grid operator did not reveal which generators underperformed or overperformed on Labor Day. The performance payment and penalty rates are scheduled to increase to $5,455/MWh over the next six years.

## CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of October, 2018, a copy of the foregoing document has been electronically served upon each person designated on the official service list in this proceeding.

*/s/ Diana Jeschke*
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