STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
ENERGY FACILITY SITING BOARD

HEARING IN RE:

INVENERGY THERMAL DEVELOPMENT, LLC'S
APPLICATION TO CONSTRUCT THE CLEAR RIVER
ENERGY CENTER IN BURRILLVILLE, RHODE ISLAND

DOCKET NO. SB-2015-06

INVENERGY THERMAL DEVELOPMENT LLC'S MOTION TO STRIKE THE TESTIMONY OF ROBERT M. FAGAN

Invenergy Thermal Development LLC ("Invenergy") moves the Rhode Island Energy Facility Siting Board (the "Board"), pursuant to Rule 1.29(A), to strike the testimony of Robert M. Fagan ("Fagan") on the grounds of relevance and Fagan's failure to testify to facts sufficient to form a basis for the admission of an expert opinion on the issue of need as pursuant to the applicable standards and definitions established by the Rhode Island Energy Facility Siting Act (the "EFSA").

I. INTRODUCTION

Under Rule 1.29(A), evidence that is neither relevant nor material "shall be excluded". Relevant evidence under the Board's rules is evidence relevant to the grant or denial of a license from the Board. *See, e.g.,* Rule 1.12(D)(1, 2) Testimony that is relevant to the grant or denial of a license from the Board is governed by the applicable standards and definitions established by the EFSA. As to the issue of need, what is relevant to the grant or denial of a license is whether the construction of the proposed facility is necessary to meet the needs of the state and/or region for energy of the type to be produced by the proposed facility. Moreover, the policy established by the General Assembly makes it clear that the construction of a major energy facility shall be undertaken when that action is justified by long-term state and/or regional energy need forecasts.

Furthermore, the General Assembly tied the concept of analyzing long-term need to the planning exercises that are required by the EFSA, to be undertaken by Rhode Island Statewide Planning. Thus, the definition of long-term under the EFSA, as admitted by Fagan, necessitates a resource adequacy planning exercise based upon a minimum of a 20-year horizon.

The Board's authority to determine whether to consider testimony as being relevant to the grant or denial of a license is consistent with Rhode Island law that expert testimony must be "relevant to the task at hand" and supported by facts legally sufficient to form a basis for an opinion of such a relevant issue. Therefore, in order to be relevant to the issue of need as it relates to the grant or denial of a license from the Board, Fagan had to provide opinion testimony as to whether the construction of the proposed facility is necessary to meet the needs of the state and/or region for energy of the type to be produced by the proposed facility. That opinion had to be based on facts legally sufficient pursuant to an analysis of long-term state and/or regional energy need forecasts based upon a minimum 20-year horizon.

However, as made clear during the cross-examination of Fagan, his engagement was purposely structured to be limited to an analysis based upon, at most, a 10-year horizon and thus, such proffered expert testimony fails to meet the necessary relevance test under the rules governing Board procedure and Rhode Island law. Furthermore, even when he employed his own 10-year definition of "long-term", Fagan acknowledged need, but advocated that such need would be fulfilled exclusively by renewable energy facilities. Nevertheless, when Fagan was asked to explain such advocacy in light of the priorities established by the General Assembly, pursuant to R.I. Gen. Laws §42-98-2(8), Fagan admitted that the scope of his engagement by Intervenor, Conservation Law Foundation ("CLF"), did not allow him to consider such priorities.

Fagan admitted that R.I. Gen. Laws §42-98-2(2), which defines the assessment of need in the long-term, would require an analysis utilizing at least a 20-year horizon. Fagan admits that his testimony is inconsistent with the applicable EFSA standards and definitions. Indeed, it appears that the scope of Fagan's engagement was limited to considering "need" based upon a definition established by the State of Connecticut and not the State of Rhode Island. For all these reasons, as more fully set forth below, Fagan's testimony must be stricken.

II. STANDARD OF LAW WITH REGARD TO THE ACCEPTANCE OF EXPERT TESTIMONY

What is relevant to the Board's grant or denial of a license as to the issue of need is governed by Section 11(b)(1) of the EFSA, which provides that this Board "shall issue a decision granting a license only upon finding that the applicant has shown that…Construction of the proposed facility is necessary to meet the needs of the state and/or region for energy of the type to be produced by the proposed facility." *See* R.I. Gen. Laws §42-98-11(b)(1). The General Assembly has in turn defined the statutory concept of need by establishing the policy mandate that:

> (1) The facilities required to meet the energy needs of this and succeeding generations of Rhode Islanders are planned for, considered, and built in a timely and orderly fashion;
>
> (2) Construction, operation, and/or alteration of major energy facilities shall only be undertaken when those actions are justified by **long term state and/or regional energy need forecasts**….[Emphasis added]

R.I. Gen. Laws §42-98-2.

As will be set forth below and as admitted to by Fagan on cross-examination, such a long-term analysis is based at a minimum upon a 20-year horizon – an analysis that Fagan did not and could not perform because it was not within the scope of his engagement.

In light of the EFSA definition of "need" in the context of a new energy facility, what constitutes a relevance analysis as it pertains to proffered expert testimony has been defined by the Rhode Island Supreme and Superior Courts. The Rhode Island Supreme Court, in *Rodriquez v. Kennedy*, 706 A.2d 922 (R.I. 1998), outlined three (3) steps. The first step is a determination of whether the testimony is relevant. *Rodriquez v. Kennedy*, 706 A.2d at 922. The second step is to determine whether the testimony is within the witness' expertise. *Id.* The third step is whether the expert testimony is based on an adequate factual foundation. *Id.* Invenergy focuses on steps one and three.

Relevant evidence is defined as evidence that tends to make existence of any fact that is of consequence to the determination of the action more probable or less probable than it would have been without the evidence. *Id.* (citing *State v. Wheeler*, 496 A.2d 1382, 1388 (R.I. 1985)) Therefore, in this instance, as conceded by Fagan, relevant evidence would be evidence that tends to make the licensing of the major energy facility at issue more probable or less probable, and rests on a determination of long-term need, which must be analyzed based upon a 20-year horizon. In turn, "an expert's opinion must be predicated on facts legally sufficient to form a basis for his [or her] conclusion." *Id.* (quoting *Alterio v. Biltmore Construction Corp.*, 119 R.I. 307, 312 (1977)). For example, in *Gorham v. Public Building Authority of Providence*, 612 A.2d 708, 717 (R.I. 1992), the Rhode Island Supreme Court overturned a trial justice's acceptance of an expert's appraisal of real estate valuation, when the appraisal lacked the necessary consideration of developmental costs, business marketability, a feasibility analysis and cash-flow projections.

Here, as will be further addressed below, Fagan's proffered testimony cannot be accepted by this Board, when it admittedly fails to analyze long-term need as defined by the EFSA. The

Rhode Island Supreme Court has been absolutely clear that an expert's opinion must be logically tied to what that expert concedes to be the proper standard. *See Franco v. Latina*, 916 A.2d 1251, 1261 (R.I. 2007). This is what Superior Court Presiding Justice Gibney, in *Claiborne v. Duff*, 2015 R.I. Super. LEXIS 76, *26 (R.I. Super. 2015), referred to as expert testimony being "relevant to the task at hand".

As Superior Court Presiding Justice Gibney held in *Claiborne v. Duff*:

> This Court's "*Daubert* responsibilities, however, do not end with reliability, because the trial court's gatekeeping function also requires it to judge **whether an expert's testimony is 'relevant to the task at hand' in that it logically advances a material aspect of the proposing party's case.**" *Terry v. Caputo,* 115 Ohio St.3d 351, 2007 Ohio 5023, 875 N.E.2d 72, 78 (2007). "**Thus, even if an expert's proposed testimony constitutes scientific knowledge, his or her testimony will be excluded if it is not scientific knowledge for purposes of the case**." *In re Paoli R.R. Yard PCB Litig*., 35 F.3d 717, 743 (3d Cir. 1994); *see Terry,* 875 N.E.2d at 78. [Emphasis added]

Claiborne v. Duff, at *26

Fagan's testimony is not relevant to the task at hand, because he did not employ a long-term need analysis as defined by the EFSA. Rather, Fagan created his own definitions of short, medium, and long-term timeframes and gave no consideration to the express requirements of the EFSA. Thus, Fagan failed to undertake an analysis of need based upon a 20-year horizon as required by the EFSA and, as a result, Fagan did not set forth facts legally sufficient to form a basis for his opinion. By analogy, consider the Rhode Island Supreme Court's decision in *Pankiw v. Polish National Catholic Church of our Savior,* 493 A.2d 819 (R.I. 1985). There, the Rhode Island Supreme Court was faced with reviewing a negligence action brought by a plaintiff against her church after slipping and falling on the church staircase. The staircase in the church had been constructed in 1965. The trial court, as upheld by the Rhode Island Supreme Court,

excluded evidence offered by plaintiff's expert concerning whether the staircase was in compliance with applicable building codes. The trial court's basis for excluding the testimony was the fact that the expert admitted that he was not familiar with the building code as it existed in 1965. Thus, the expert's analysis was not based upon the applicable standards established by the 1965 building code.

Here, as shown below, Fagan's engagement was purposely structured to be limited to a 10-year horizon, without reference to the requirements of the EFSA. Thus, Fagan failed to undertake the necessary analysis of need, much in the same way the expert in *Pankiw*, could not testify as to the applicable building code standard. Rather, it appears that Fagan was engaged to analyze a standard that is applicable under Connecticut law based on his work for opponents in the recent Connecticut energy facility siting case involving the proposed Killingly project.

III. ARGUMENT

A. The EFSA Requires a Need Analysis Based Upon a 20-Year Horizon

As set forth above in the introduction, it is beyond dispute that the mandate established by the General Assembly requires a long-term assessment of need. Moreover, it is equally beyond dispute that in Rhode Island, a long-term assessment of need is based upon a 20-year horizon. *To wit*, the General Assembly in setting forth the legislative policy underlying the EFSA, mandated that:

> An energy facility planning process shall be created through which the statewide planning program, in conjunction with the division of public utilities and carriers, will be empowered to undertake evaluations and projections of long and short term energy needs, and any other matters that are necessary to establish the state energy plans, goals, and policies. The state planning council shall be authorized and empowered to adopt a long term plan assessing the state's future energy needs and the best strategy for meeting them….

R.I. Gen. Laws §42-98-2(5)

In the State Guide Plan Element: Energy 2035, dated October 18, 2015 ("Energy 2035"), the long-term planning exercise undertaken by the State of Rhode Island with regard to energy is based on a 20-year horizon. *See* Docket SB-2015-06, CLF Final Hearing Exhibit 17. Moreover, each and every implementation section within Energy 2035, defines "long-term" as 20 years. *See, e.g.*, Energy 2035, p. 59 ("The Energy 2035 policies and strategies are intended to provide policy makers with a high-level implementation plan for achieving the long-term goals and performance measure targets set in the Plan….The Plan proposes policies and strategies with a planning horizon of 20 years.") It is likewise beyond dispute that within that long-range planning effort embodied within Energy 2035, the goal is to establish diversity in the State's energy portfolio, not to eliminate facilities utilizing fossil fuel. This is supported by the advisory opinion submitted by the Rhode Island Statewide Planning Program, finding that Invenergy's application is consistent with Energy 2035. *See* Rhode Island Statewide Planning's Advisory Opinion dated August 3, 2016 at 27; Rhode Island Statewide Planning's Second Supplemental Advisory Opinion dated February 12, 2018 at 9.

When asked about the definition of "long-term" that he employed, Fagan readily admitted that State long-term planning is a resource adequacy planning exercise that looks out 20 to 25 years.

> Q. The construct that you just described, is it your opinion or your belief that that's how need is required to be assessed under the Energy Facility Siting Act?
>
> A. I can't really interpret the Siting Act. That's out of my expertise. **But my expert interpretation of a phrase that says look at the state and regional – long term state and regional energy needs, I would turn to a resource adequacy framework for guidance.** [Emphasis added]

See Tr. dated January 17, 2019 at 70:17-71:2

Q. And you're defining long term as ten years or more?

A. Roughly. Out to the end of the forecast period that ISO provides data for.

Q. Which I think we saw a little bit earlier this morning is out to roughly ten years.

A. That's correct.

Q. All right. And what's your basis for using that time period – those time periods? Where do they come from, or is that something that you've just come up with on your own?

A. Sure. That's something that I've come up with on my own.

Q. So that's not something that ISO has defined, ISO New England has defined, right?

A. I don't think so. In the industry there's all sorts of different periods that people plan for. Ten-year period is a fairly standard lookout period for transmission planning that RTOs do. Resource adequacy planning tends to look out longer than that, 20 to 25 years or even more than 25-year horizons. **ISO [Invenergy -- sic] is not doing resource planning. They're doing transmission planning when they look out ten years. It's more in the state policy arena when resource planning look[s] out 20 or 25 years.** [Emphasis added]

See Tr. dated January 17, 2019 at 60:3-24 – 61:1-7

During further cross-examination, Fagan was asked if he based his long-term analysis solely on the Independent System Operator-New England ("ISO-NE") Capacity, Energy, Loads and Transmission, or the "CELT", Report Outlook, which is a 10 year outlook. Then, after being asked that question, Fagan was specifically referred to Section 2(2) of the EFSA, which sets forth the General Assembly's statements governing the EFSA definition of need. When asked to compare his definition of "long-term" with R.I. Gen. Laws §42-98-2(2), Fagan agreed that the

policy established by the General Assembly in Section 2(2) of the EFSA, would require a much longer horizon than the 10-year period to which Fagan's engagement was specifically limited:

> Q. It's a little bit difficult to see, but I'll read it for you. This is, for the record, Section 42-98-2, Rhode Island General Laws, and Subsection 2 says, "Construction, operation and/or alteration of major energy facilities shall only be undertaken when those actions are justified by long-term state and/or regional energy need forecasts." Do you see where I'm referring to?
>
> A. Yes.
>
> Q. Is this, by any chance, one of the provisions that you've read previously?
>
> A. As indicated, I have read this. I haven't looked at this in a number of years, but I read the whole thing.
>
> Q. Do you refer to this provision in any of the five submittals that you've made?
>
> A. I think I certainly refer to No. 2, perhaps not directly, but the essence of what I'm saying is referring to whether or not this plant is needed as justified by long-term state and/or regional energy need forecasts. A significant focus of this involves looking at the long-term state and regional energy need forecasts as part of my analysis.
>
> Q. I believe you testified a little while ago when I asked you where you came up with short, medium and long term, you essentially said you created those and you tied long term essentially to the CELT report outlook, correct?
>
> A. That's correct.
>
> Q. **And is it your understanding that that is the long term that's referred to in 42-98-2, subparagraph 2?**
>
> **A. No. I would think that 2 goes beyond ten years. So this [R.I. Gen. Laws §42-98-2(2)] clearly says we should be looking beyond just a ten-year period. But my charge was to look at the need in the context of the numbers that ISO New England puts out.** [Emphasis added]

See Tr. dated January 17, 2019 at 65:7 – 67:1

Thus, Fagan admitted that the appropriate standard under R.I. Gen. Laws §42-98-11(b)(1), incorporating the legislative policy embodied within R.I. Gen. Laws §42-98-2(2), requires a long-term resource adequacy analysis based upon a 20-year horizon. In turn, Fagan also clearly admitted that his analysis is not in line with the applicable standard under Rhode Island law, because the scope of his engagement was specifically limited. Just like the expert in *Pankiw*, whose expert opinion was stricken because he did not look at the relevant 1965 building code – Fagan admittedly did not undertake the applicable resource adequacy analysis.

B. <u>The Scope of Fagan's Engagement Was Structured Such that It Was Limited to a 10-Year Analysis</u>

Fagan was cross-examined as to the specific scope of his engagement, which he admitted was limited to analyzing what he defined as "reliability need":

> Q. The sense I got from your testimony and from looking at the latest version of the CV that we have here is that you have always testified in opposition to fossil fuel facilities, is that correct?
>
> A. I think so, subject to checking my resume.
>
> Q. And in fact, that is what Mr. Elmer retained you through Synapse here for, to testify in opposition of this facility.
>
> A. Essentially, but the retention was to do a technical analysis of whether or not there was reliability need for the plant.
>
> * *
>
> Q. Understood.
>
> A. And if I determined otherwise, I don't' know what Mr. Elmer would have done, but it wasn't I'm hiring you to testify to oppose the plan. It's I'm hiring you to testify to the Plant. It's I'm hiring you to do the analysis of this plant. I expect that you're probably going to find that it is not in the interest of Rhode Island to build it.
>
> Q. That's what he said to you?

A. No. I'm thinking out loud. Essentially he hired us to look at the reliability perspective. He had other experts looking at other dimensions to this case.

Q. So if you had come up with an opposite conclusion, it would have been the first time in your career that you might have testified in favor of a fossil foul plant, is that correct?

A. As I said, subject to checking my resume, yes, that probably would have been correct.

See Transcript dated January 16, 2019 ("Tr. dated January 16, 2019") at 186:12-24; 187:1-20

For the definition of "reliability need", Fagan testified that he relied exclusively on the ISO-NE projections which are limited to a 10-year horizon:

Q. What do you mean by reliability?

A. Reliability standards generally talk about a potential for the loss of load associated with not having enough resources available in the region, not having enough capacity resources available in the region to meet the demand at any given time. And there's usually a threshold associated with that. The threshold is referred to as a one day in ten years or one event every ten years where there is a loss of load that did not choose to be interrupted as a result of not having enough resources available on the system.

See Tr. dated January 17, 2019 at 58:9-22

In order to undertake the specific scope of his engagement, Fagan created and used his own definitions of "short-term", "medium-term" and "long-term". In fact, a key to this Motion is Fagan's own definition of "long-term":

Q. How long is short term?

A. Next few years, sort of out to the commencement of the capacity commitment period associated with the next FCA. It's not a hard line. It's a few years. Medium is three to five or six years, and long would probably go out to the end of the – whatever the current ISO New England CELT

period looks like. Again, no hard lines. I may have specifically characterized that in years at some place in one of the volumes of my testimony.

Q. I didn't find it, candidly, so just – I want to make sure I understand what you just said. You're defining short term as I think one to three years. Is that what you're saying?

A. I am. I think realistically what it really means is in the case of this plant, obviously, this plant is not online this year or next year, probably not online in 2021 if it was approved to be built. So we're probably looking at the first year in which the capacity supply obligation might be obtained as the short term.

Q. And then you're defining medium term as three-to-five years, it that correct?

A. That sounds about right.

Q. And you're defining long term as ten years or more?

A. Roughly. Out to the end of the forecast period that ISO provides data for.

See Tr. dated January 17, 2019 at 58:23 – 60:6

However, even though Fagan relied solely on ISO-NE projections, Fagan had to concede that his own definitions of short, medium and long-term have not been adopted by ISO-NE, and are inconsistent with the requirement of the EFSA:

Q. So that's not something that ISO has defined, ISO New England has defined, right?

A. I don't think so. In the industry there's all sorts of different periods that people plan for. Ten-year period is a fairly standard lookout period for transmission planning that RTOs do. Resource adequacy planning tends to look out longer than that, 20 to 25 years or even more than 25-year horizons. ISO [Invenergy - sic] is not doing resource planning. They're doing transmission planning when they look out ten years. **It's more in the state policy arena when resource planning look[s] out 20-25 years.** [Emphasis added]

See Tr. Transcript dated January 17, 2019 at 60:17 – 61:7

It is clear that the scope of Fagan's engagement was specifically structured to be limited to a 10-year horizon. The issue before this Board, however, is defined by the General Assembly's mandate that need be determined in the context of resource adequacy planning that looks out 20 years. In turn, Fagan admitted that such an artificial, temporal limitation on the scope of his engagement is not consistent with the EFSA:

> Q. And it is your understanding that that is the long term that's referred to in 42-98-2, subparagraph 2?
>
> A. **No. I would think that [R.I. Gen. Laws §42-98-2(2)] goes beyond ten years. So this clearly says we should be looking beyond just a ten-year period. But my charge was to look at the need in the context of the numbers that ISO New England puts out.** [Emphasis added]

See Tr. dated January 17, 2019 at 66:17 – 67:1

Accordingly, the facts upon which Fagan bases his opinion are not relevant to the "task at hand" as defined by the EFSA. As the Rhode Island Supreme Court held in *Franco v. Latina*, 916 A.2d 1261, 1251 (R.I. 2007), when an expert acknowledges the appropriate standard and then opines in a manner which deviates from that standard, that opinion is not relevant.

C. Fagan Acknowledges Long-Term Need, But Advocates that Such Need Should be Fulfilled Exclusively by Renewable Energy Facilities

Even though Fagan admittedly did not undertake the long-term analysis required by the EFSA, he acknowledged a long-term need even under his own definition. However, Fagan chose to advocate that such a "long-term" need should be fulfilled exclusively by renewable energy facilities rather than the project at issue.

Fagan customized his "own" definitions of short, medium and long-term need. *See* Tr. January 17, 2019 at 60-61. Then, as set forth above, Fagan acknowledged that the EFSA requires

a long-term analysis with at least a 20-year horizon – an analysis that is beyond the scope of his retention. *Id.* at 66-67. Given that startling admission, Fagan was asked why he discussed short and medium term "reliability need". Fagan's answer was enlightening. *See* Tr. January 17, 2019 at 67-68. First, Fagan testified that, during what he defines as the "short term", energy efficiency programs would satisfy any need. *Id.* Then, during what Fagan defined as the "medium term", installations of "solar PV" will satisfy the need. *Id.* However, when it came to his explanation of what would satisfy long-term need under his customized definition of "long-term", Fagan's answer reveals the real "scope" of his engagement:

> A. Over long-term timeframes things that are not yet installed, for example, the offshore wind resources or the stuff coming down from Canada or the storage resources, those will by providing energy services. That's essentially what I'm talking about. **There's different times over the course of the next ten years that different groups of alternative resources either show up or demonstrate their contribution to the energy needs.** [Emphasis added]

See Tr. January 17, 2019 at 68:2-13

Absent the necessary analysis over the required 20-year horizon, Fagan's opinion is exposed as mere advocacy – the kind of all-encompassing opposition to thermal energy projects that has punctuated his testimony in multiple proceedings. *See* Tr. dated January 16, 2019 at p. 186 (L12-L24); p. 187 (L1-L20). Yet, the Board must pause and consider that even under Fagan's manufactured, 10-year definition of "long-term", he acknowledged need and then, "opined" that such need will be fulfilled solely by the renewable sector. Not only is this opinion completely unsupported by legally sufficient facts in the record, it is at complete variance with the planning undertaken by the State of Rhode Island which looks to bring facilities utilizing renewable fuels into the marketplace for diversity – not to displace another fuel type.

In short, Fagan's advocacy must be contrasted with the Statewide Planning Program's Advisory Opinion which specifically advises that Energy 2035 does not prohibit fossil fuel facilities. *See* Rhode Island Statewide Planning Advisory Opinion dated August 3, 2016.[1]

In fact, Fagan himself acknowledged this under cross-examination:

> A. I don't have anything in particular against thermal plants. You know, they serve their purpose. You know, I clearly state in my testimony, for example, the importance of the set of existing, more efficient, newer combined cycle plants in New England to provide the flexibility that the system requires.

See Tr. January 17, 2019 at 8:9-16

Furthermore, Fagan's statement must be viewed in light of his admission that retirements of older, less-efficient fossil fuel facilities must be factored into a required long-term analysis:

> Q. I'm actually focusing on the last couple of sentences. The first one, "The ISO has experienced substantial retirements in recent years and expects that trend to continue." Do you agree with that?
>
> A. Yes.

See Tr. January 17, 2019 at 169:2-7

Invenergy agrees with Fagan's statement that more efficient, newer combined cycle plants are necessary to provide the flexibility that the system requires as consistent with the long-range resource planning done by the State of Rhode Island. However, Invenergy submits to the Board that these statements highlight the "sheer advocacy" of Fagan's opinion. More importantly, that opinion is not based on legally sufficient facts, because Fagan was engaged in a structured and artificially limited manner, so that he did not and could not undertake the

[1] Under Rule 1.12(D)(2), this Board may exclude Fagan's advocacy from being presented during the final hearings as it was clearly rejected in an advisory opinion by a designated agency.

necessary long-term need analysis required by the EFSA. As a result, Fagan's testimony must be stricken.

D. Fagan Was Engaged to Employ Definitions and Standards Established under Connecticut Law

If the Board will recall, Fagan was very careful to testify on numerous occasions that he was opining as to the concept of "reliability need". In fact, Fagan was careful to testify that his engagement was specifically structured around the concept: *see, e.g.*:

> Q. And in fact, that is what Mr. Elmer retained you through Synapse here for, to testify in opposition of this facility.
>
> A. Essentially, but the retention was to do a technical analysis of whether or not there was reliability need for the plant.

See Tr. January 16, 2019 at 186:19-24

When asked how that concept is consistent with the EFSA, Fagan gave the following answer:

> Q. Mr. Fagan, do you understand that this Board is charged with determining whether or not this facility is necessary under the auspices of the Rhode Island Energy Facility Siting Act?
>
> A. I do understand that in general, yes.
>
> Q. What do you mean in general?
>
> A. It's the Energy Facility Siting Board. Part of their charge is to see whether or not the plant is needed for reliability purposes. For reliability purposes my primary interpretation of that is resource adequacy which is a New England construct.
>
> Q. Okay. So it's your understanding that under the Energy Facility Siting Act this Board is to determine whether or not this facility is needed for reliability purposes. Is that what you're saying?
>
> A. Yes.

See Tr. January 16, 2019 at 181:1 – 182:13

Perhaps the best illustration of Fagan's engagement to undertake a "reliability need" analysis is set forth as follows:

> Q. Could you point me to any place in any of those five sets of submittals where you refer to and address the concept of need as it is defined under the Rhode Island Energy Facility Siting Act?
>
> MR ELMER: Objection: We have not presented Mr. Fagan as a lawyer or a commentator on the Energy Facility Siting Act. He's told the Board what his charge was, what he was hired to do. His testimony addresses the issues that he was hire to address.
>
> THE CHAIRPERSON: Overruled.
>
> A. **I don't know that I cited that anywhere in testimony. My basic understanding is that there's three areas. One has to do with whether or not there's reliability need for the proposed plant.** One has to do with whether or not it brings value to ratepayers in Rhode Island. And the third being whether or not there are environmental effects associated with it. So that's sort of my generic understanding of what it is. And then in addition to that, I also understand that it specifically is not supposed to be a type of determination that rests on the overall economics associated with the plant. **It's not – this is not an integrated resource planning proceeding that might weigh the long-term economic implications.** [Emphasis added]

See Tr. January 17, 2019 at 62:11 – 63:17)

Fagan is wrong. The General Assembly specifically requires an integrated resource planning exercise that must weigh the long-term implications of Invenergy's application.[2] This

[2] As an aside, this is also the relevance of paragraph 46 of the Federal Energy Regulatory Commission's ("FERC") decision dated November 19, 2018, that Fagan focused on in his supplemental testimony before this Board. FERC made it clear at paragraph 46 of its decision that CREC's disqualification with regard to its prior, forward capacity award cannot factor into a resource adequacy planning exercise.

error serves as a critical basis for the instant Motion. Fagan limited his analysis to one of "reliability need", when that term is not even mentioned in the EFSA. Invenergy submits that Fagan's limited analysis was based on the definition of "need" in the Connecticut Public Utility Environmental Standards Act. Fagan apparently did so as a result of his engagement by opponents to the Killingly, Connecticut project.

Connecticut General Statutes, Title 16, chapter 277a, section 16-50p, was amended in 1998, after the Connecticut legislature "deregulated" the electric generating industry, as Rhode Island did in 1996. In amending Section 16-50p, the Connecticut legislature defined "need" as governed by the reliability studies and projections being undertaken by ISO-NE. To wit, the Connecticut legislature included the following phrase to define need in that statute: **"[f]or purposes of subparagraph (a) of this subdivision, a public benefit exists if such a facility is necessary for the reliability of the electric power supply of the state and for a competitive market for electricity.** [Emphasis added]" *See* Conn. Public Act No. 98-28, Conn. Gen. Stat. Title 16, chapter 277a, section 16-50p(c)(3) (Approved April 29, 1998) In additional amendments in 2011 and 2012, the Connecticut Legislature further focused on "reliability need" as the above-cited section now provides "[a] public benefit exists when a facility is necessary for the reliability of the electric power supply of the state or for the development of a competitive market for electricity and **a public need exists when a facility is necessary for the reliability of the electric power supply of the State**. [Emphasis added]" *See* Conn. Public Act Nos. 11-80 (Approved July 1, 2011) and 12-165 (Approved June 15, 2012), Conn. Gen. Stat. Title 16, chapter 277a, section 16-50p(c)(3)

Therefore, Fagan's analysis is not relevant to the "task at hand", because Fagan used a definition of need under the Connecticut Public Utility Environmental Standards Act and did not

adhere to the standards and definitions required by the EFSA. As Fagan admitted, this was part of his structured and artificially limited engagement to testify before this Board. Again, just like the expert in *Pankiw*, who did not base his opinion on the 1965 building code, Fagan did not base his opinion on the applicable definition of need, because that was not what he was retained to do.

This structured engagement may be contrasted with the scope of Glenn Walker's engagement:

> Q. Because I want to read this just to make sure we're on the same page on what you're testifying about and what you were retained to do.
>
> A. Yes.
>
> Q. "In each instance since Invenergy's initial filing, my testimony has continuously demonstrated that the proposed CREC is not necessary to meet the needs of Rhode Island and/or the New England region for energy of the type that would be provided by the proposed CREC and is not needed or justified by long-term Rhode Island and/or New England energy need forecasts such as the independent need forecasts developed by the ISO." Did I read that correctly?
>
> A. You did.
>
> Q. And that is the scope of your engagement?
>
> A. That is the essence of what we're here to testify about. We may say it slightly differently in each of the testimonies, but that's a reasonable representation.

See Transcript dated January 23, 2019 at 96:1-22[3]

E. <u>The Scope of Fagan's Engagement Was Narrowly Limited, Such That He Could Not Consider Issues of Priority Effecting Need as Defined by the EFSA</u>

[3] Walker was the Town of Burrillville's retained witness with respect to need. Mr. Walker's testimony will be fully addressed in Invenergy's post-hearing submittal – including the fact that, contrary to the scope of his engagement to oppose the subject project, he in fact confirmed the long term need for the Clear River facility. Unlike Fagan, however, Walker at least partially acknowledged the proper standard to determine need.

Fagan was clear that his analysis was limited to a 10-year horizon despite the definition of "long-term" under the EFSA. In turn, Fagan determined that within his 10-year definition of long-term, there was need. However, Fagan advocated that such need would be fulfilled exclusively by renewable energy facilities. Fagan was unable to articulate how this advocacy squares with the priorities established by the General Assembly.

The General Assembly in enacting the EFSA set forth certain priorities that this Board must take into account in the context of energy generation projects, including whether there is a need for the energy of the type to be produced by the proposed facility. *See* R.I. Gen. Laws §42-98-2(8).

The priority criteria are as follows:

> (8) The energy facilities siting board shall give priority to energy generation projects based on the degree to which such projects meet, criteria including, but not limited to:
>
> > (i) Using renewable fuels, natural gas, or coal processed by "clean coal technology" as their primary fuel;
> > (ii) Maximizing efficiency;
> > (iii) Using low levels of high quality water;
> > (iv) Using existing energy-generation facilities and sites;
> > (v) Producing low levels of potentially harmful air emissions;
> > (vi) Producing low levels of wastewater discharge;
> > (vii) Producing low levels of waste into the solid waste stream; and
> > (viii) Having dual fuel capacity.

See R.I. Gen. Laws §42-98-2(8)

During cross-examination, Fagan acknowledged reviewing Section 2(8) of the EFSA and its relation to the overall criteria in which he was engaged to testify. However, when asked how that criteria factored into his analysis, the question was met with the following objection:

> MR. ELMER: I will object to the question insofar as these criteria were beyond the charge that CLF hired this witness for, but he can answer the pending question.

See Tr. January 17, 2019 at 87:16-20

Mr. Elmer's objection, in itself, is telling. The objection was not that such priority criteria are not relevant or that they are outside Fagan's field of expertise. Rather, the objection is that Fagan was not "hired" to review the priority criteria and integrate them into his own definition of long-term need or his advocacy that long-term need should be fulfilled only by renewable energy facilities. That same "beyond the scope" objection was repeated multiple times, confirming that the scope of Fagan's engagement did not include the priority criteria that are to be considered by this Board. *See* Tr. January 17, 2019 at 72:22) – 73:6; 98:12-22; 99:13-19; 99:22 – 100:11

In short, Fagan was engaged to undertake an analysis using a concept of his own design, based loosely on the definition of need in the Connecticut Public Utility Environmental Standards Act and not Rhode Island's EFSA. Fagan's charge was to limit his long-term analysis to a horizon not exceeding 10 years. Even though he acknowledged a long-term need for fossil fuel facilities which support flexibility and diversity in the system, his engagement was limited to advocating that any such need should be fulfilled exclusively by renewable energy facilities. Finally, when it came to analyzing priority criteria which impact need as established by the General Assembly, his engagement was limited such that he was not allowed to consider those priorities.

IV. CONCLUSION

For all of the reasons set forth herein, Fagan's testimony should be stricken and excluded from this proceeding pursuant to Rule 1.29(A) and Rhode Island law regarding situations in which an expert admits to the relevant standard yet fails to opine based upon that standard.

Moreover, those sections of Fagan's testimony that advocate fulfilling need exclusively with renewable facilities should be stricken from the final hearing record pursuant to Rule 1.12(D)(2).

Respectfully submitted,
INVENERGY THERMAL DEVELOPMENT, LLC

/s/ Alan M. Shoer

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Dated: February 6, 2019

Certificate of Service

I hereby certify that on the 6th day of February, 2019, I delivered a true copy of the foregoing Motion via electronic mail to the parties on the attached service list.

/s/ Alan M. Shoer