

# MEMORANDUM

---

Date: November 3, 2016

To: Town Council of the Town of Burrillville

From: Michael R. McElroy, Esq.

Re: Recommendations to Town Council Regarding  
Proposed Clear River Energy LLC (CRE) Agreements

---

This memo outlines my recommendations to the Town Council for its November 3, 2016 meeting to discuss and vote upon proposed agreements with Clear River Energy LLC (CRE). These agreements are (1) the proposed Tax Agreement, (2) the proposed Decommissioning Agreement, (3) the proposed Property Value Guarantee Agreement (PVGA), (4) the proposed Property Value Guarantee Opt Out Agreement (Opt Out), and (5) a request to the EFSB to make CRE's compliance with the Decommissioning Agreement, the PVGA, and Opt Out an express condition of any permit the EFSB issues.

The Town, its attorneys, its consultants, and representatives from the Town Council have been engaged in negotiating these agreements for over a year.

The proposed agreements were negotiated and are being proposed by CRE for approval as a single unified package. In other words, if the Town should vote to reject or renegotiate the terms of any of the proposed agreements, then all of the proposed agreements would no longer be on the table. Of course, it is always possible that CRE might be willing to negotiate further.

As you know, as Assistant Solicitor for the Town, I have taken the lead in the negotiations. I strongly believe that in order to maximize our chances of killing the proposed plant, our focus must be on putting on the strongest possible case against the plant at the EFSB hearings. My personal recommendations are: (1) the Council should vote to approve the execution of the Tax Agreement and the Decommissioning Agreement, and (2) the Council should vote to approve the Town making a request to the EFSB that compliance with the PVGA, Opt Out, and Decommissioning Agreement should be included as an express condition of any permit granted by the EFSB. My reasoning is as follows:

## **TAX AGREEMENT**

1. **\$2,925,000 Up-Front Fees.** This proposed tax agreement provides for payments to the Town in the form of fees that would be made available to the Town prior to the commercial operation of the facility. The fees total a minimum of \$2,925,000, (of which **\$1,175,000** must be paid by January 10, 2017). These fees are unrestricted and can be used to fund the Town's vigorous and relentless efforts to kill the plant, at the EFSB and in the Supreme Court if necessary.

Invenergy has already identified 19 expert witnesses who will testify at the EFSB. These include 6 engineers, 3 Ph.D.'s, and 10 other professionals in various areas. To kill the plant, we must fight fire with fire. This will require having experts who will work with the Town to strongly oppose the plant. Experts and lawyers are expensive.

2. **\$91,960,767 minimum tax payments - \$182,324,993 maximum.** This is a minimum average of **\$4.6 million** per year over 20 years for just one unit. For two units, the average is **\$5.5 million** per year minimum and **\$9.1 million** per year maximum. By comparison, the proposed Johnston Clean Power plant will pay only \$0.3 million per year; the Tiverton plant pays only \$0.6 million per year; the Johnston plant pays \$3.6 million per year; the original Ocean State Power plant paid \$3.6 million per year; and the current Ocean State Power tax agreement pays \$2.8 million.
3. **Guaranteed Revenue Stream.** Entering into a 20-year long term tax agreement would provide the Town with a substantial revenue stream of stable, predictable payments that will assist the Town in budgeting and planning if the plant is permitted.
4. **Leverage.** In my opinion, the Town loses leverage regarding these agreements for every day the Town delays approval. If Invenergy locks down a water source in the near future, we lose leverage; if Invenergy gets its air or other non-EFSB permits, we lose leverage; and if we wait until the EFSB hearings and Invenergy gets an EFSB permit, we will have almost no leverage at all.
5. **Avoids Costly Litigation.** By entering into this proposed tax agreement, the Town avoids costly and unpredictable tax assessment litigation. The Town would incur significant legal and expert witness fees and the outcome would be uncertain. Based on our experience litigating the Ocean State Power tax assessment appeals, legal and expert fees would be in the hundreds of thousands of dollars. Moreover, to the extent the owner prevails in any such appeal, the Town would need to refund whatever portion of the collected taxes the court determined was in excess of fair market value, plus annual interest at the rate of 12%.
6. **Eliminates Volatility in Future Valuation.** Entering into a tax agreement with fixed tax payments that cannot be changed protects the Town against volatility in the assessed value of the plant.
7. **CRE is committed to this project.** Invenergy received an award in February 2016 from ISO NE in the forward capacity auction. Invenergy has invested millions into permitting for the project. In addition, the ISO FCA award requires Invenergy to make a firm commitment to provide the power and to provide financial assurances that it will do so, whether or not a tax agreement is in place. These assurances required about a \$4 million deposit when the FCA award was made, and will require an additional approximate \$20 million of financial assurances in the next 2 years. Failure to approve a tax agreement will not, in my opinion, stop the project. Therefore, we need to do what we can to protect the Town's best interests in the event the EFSB forces the plant on the Town.

8. **Guarantee of Full Taxability.** A tax agreement assures the Town that the plant will be fully taxable, and it eliminates various legal arguments Invenergy has explicitly threatened to use to attempt to escape or reduce taxation for all or a portion of the plant if a tax agreement is not entered into. Such arguments include the manufacturing exemption, the pollution control exemption, and depreciation of personal property. All of those arguments are eliminated by entering into the proposed tax agreement.
9. **Binding on Possible Future Owners.** The proposed agreement is structured so that it remains fully binding, even if the plant is sold or otherwise transferred to a new owner.
10. **State Aid.** When we could not reach agreement with Ocean State Power on an extension of their tax agreement, we had to place them on the tax roll. This impacted our state aid. If we do not enter into a tax agreement with CRE, we could again potentially suffer a negative impact on our state school aid if we put CRE on the tax roll.
11. **Rhode Island Municipal Tax Law**
  - Taxes are assessed on property; as the owner of the property, CRE is responsible for the taxes.
  - A Town tax lien on property is automatic and superior to all other liens, including mortgages.
  - If CRE becomes insolvent, municipal taxes have priority over all other liens, mortgages, and debts (except taxes or debts to the federal government or the State of Rhode Island).
  - If CRE's taxes are ever unpaid, CRE's lenders should pay them, but if they do not, the tax collector may take the property, and will sell the property for the full amount owed to the Town.

**FORMS FOR PROPERTY VALUE GUARANTEE AGREEMENT (PVGA)**  
**AND OPT OUT AGREEMENT**

1. **Forms Only.** These are only suggested forms. Owners may choose to negotiate on their own with CRE.
2. **Appraisal.** Owners can pick a qualified appraiser of their choice to establish the Base Value of their home. CRE must pay for the appraisal. If owners are dissatisfied with the initial appraisal, they have the right to a second appraisal, at CRE's expense, and the Base Value will be the average of the two appraisals.
3. **Buy Out.** If owners choose to sell their home, and it does not sell within 165 days, CRE must buy the home at the appraised Base Value.
4. **Sale.** If owners are successful in selling their home, but it sells for less than the appraised Base Value, they will be compensated by CRE for the difference.
5. **\$1,500 Payment.** If owners sign the PVGA, they will receive \$1,500 from CRE.
6. **\$5,000 Opt Out.** If owners opt out, they will receive \$5,000 from CRE.

7. **No Obligation.** Owners are under no obligation to enter into either the PVGA or the Opt Out Agreement. They are free to negotiate a different agreement with CRE or to do nothing.
8. **EFSB License.** The PVGA and the Opt Out will be made available for owners to sign if and when the EFSB grants a license to CRE.
9. **Town Not a Party.** The Town is not a party to the PVGA or the Opt Out. Any agreements would be between each home owner and CRE.
10. **License Condition.** The Town and CRE have agreed to ask the EFSB to make compliance by CRE with the PVGA and the Opt Out conditions of any license granted by the EFSB. This means that any breach of the Agreements by CRE could result in large fines and/or suspension or revocation of the CRE project license.
11. **Term.** The PVGA remains in effect for 7 years.

### **DECOMMISSIONING AGREEMENT**

The Decommissioning Agreement provides many protections for the Town. It requires restoration of the site to its original condition unless the Town agrees otherwise; CRE must pay all decommissioning costs; CRE must provide financial assurances of up to 125% of the anticipated decommissioning costs with independent financial institutions; and the decommissioning costs must be regularly reviewed and adjusted. CRE must pay the Town's costs in evaluating each required decommissioning review and update.

### **CONCLUSIONS AND RECOMMENDATIONS**

In my opinion, signing the Tax Agreement and the Decommissioning Agreement will not send the wrong message to other cities and towns. We have taken a very aggressive and very public position against approval of this "polluting monster" at the EFSB, the Public Utilities Commission and in the press. Any approval resolution of the Council should emphasize that the Town remains committed to vigorously opposing the issuance of a permit by the EFSB for the proposed plant. These agreements do not diminish in any way the Town's pledge to fight to kill the plant, and in fact, the agreements increase the Town's ability to properly fund such a fight.

These agreements will give the Town the funds needed to fight long and hard to kill the plant. If the EFSB forces the plant on the Town, these agreements will assure that the Town gets a known and guaranteed stream of substantial revenue that can be budgeted every year; they will avoid expensive tax litigation that could drag on for years; they will provide the necessary funding for decommissioning; and they will provide some measure of protection against diminution in property values. I recommend approval.

cc: Michael C. Wood, Town Manager  
Oleg Nikolyszyn, Esq., Town Solicitor  
Louise Phaneuf, Town Clerk

