Schacht & McElroy

Michael R. McElroy
Leah J. Donaldson

Members of the Rhode Island and Massachusetts Bars

Attorneys at Law

21 Dryden Lane
Post Office Box 6721
Providence, RI 02940-6721

Michael@McElroyLawOffice.com
Leah@McElroyLawOffice.com

(401) 351-4100
fax (401) 421-5696

July 5, 2016

Luly Massaro
Clerk
Public Utilities Commission
89 Jefferson Boulevard
Warwick, RI 02888

Re: Invenergy Thermal Development LLC – Clear River Energy Center – PUC Docket No. 4609

Dear Luly:

Enclosed for filing in this matter are an original and nine copies of an Objection being filed by the Town of Burrillville in this docket. Copies have been served on the service list.

If you need any further information, please do not hesitate to contact me.

Very truly yours,

Michael R. McElroy

MRMc:tmg

Burrillville Invenergy 4609 Objection

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

IN RE: INVENERGY THERMAL DEVELOPMENT LLC'S :
PROPOSAL FOR CLEAR RIVER ENERGY CENTER : DOCKET NO. 4609

OBJECTION TO A SINGLE COMMISSIONER ADVISORY

The Town of Burrillville ("the Town"), by and through its undersigned counsel, hereby respectfully objects to a single commissioner conducting an investigation and rendering an advisory opinion to the Rhode Island Energy Facility Siting Board ("EFSB") in this docket.

I. BACKGROUND

This docket relates to a matter pending before the EFSB, in which Invenergy is proposing to build a new energy facility to be located in the Town. The purpose of this docket is for the PUC to "conduct an investigation [...] and render an advisory opinion as to the need for the proposed facility." R.I.G.L. § 42-98-9. Moreover, the EFSB Preliminary Decision and Order designates the PUC to "render an advisory opinion as to (i) the need for the proposed Facility; (ii) whether it is cost-justified to the consumer consistent with the object of ensuring that the construction and operation of the Facility will be accomplished in compliance with all of the requirements of the laws, rules, and regulations; and (iii) whether cost effective efficiency and conservation opportunities provide an appropriate alternative to the proposed Facility."

As the PUC is aware, the EFSB consists of three members, including "the chairperson of the public utilities commission, who shall serve as chairperson of the siting board..." R.I.G.L. § 42-98-5. As a result, Chairperson Curran recused herself from the PUC proceeding, because she is serving as chairperson of the EFSB.

In addition, Commissioner Gold – newly appointed to the PUC – has recused herself due to her previous role as the Commissioner of the Office of Energy Resources ("OER"). OER is a

party to the proceedings before the EFSB, and has been directed by the EFSB to participate in the related PUC proceedings pursuant to R.I.G.L. § 42-98-9(d). *See* EFSB Preliminary Decision and Order. Commissioner Gold's recent appointment to the PUC moved her from the role of a party to the role of adjudicator on the same matter. The Town respects Commissioner Gold's decision to recuse and understands her underlying reasoning.

The recusal of two of the three PUC commissioners seemingly leaves Commissioner DeSimone as the sole commissioner remaining to preside over this docket. However, with all due respect, the Town objects to a single commissioner advisory for the reasons set forth below.

The Town wishes to emphasize that its objection to a single commissioner acting on this docket is in no way directed toward Commissioner DeSimone. To the contrary, the Town holds Commissioner DeSimone in the highest regard. He is an experienced commissioner and attorney, and serves the ratepayers of Rhode Island with diligence and great care.

However, the Town maintains that – as a purely legal matter – a single commissioner acting in this docket would be insufficient under the governing statute and rules. Further, should the EFSB rely on an advisory opinion from a single commissioner of the PUC, the EFSB's decision could be challenged as that decision may rest on an error of law.

II. ARGUMENT

A. Two commissioners are required to transact business.

R.I.G.L. § 39-1-8 sets forth, in part, that "[t]wo (2) commissioners shall constitute a quorum **for the transaction of business**, except as provided in § 39-1-11." (Emphasis added.)[1] R.I.G.L. § 39-1-11 creates an exception allowing one commissioner to "constitute a quorum at

[1] In addition, Rule 1.2(d) states that "Except as otherwise permitted by law, two (2) Commissioners shall constitute a quorum for the transaction of any business." *See Great American Nursing Centers, Inc. v. Norberg*, 567 A.2d 354, 357 (R.I. 1989) (holding that legislative rules have the force and effect of law and such rules are entitled to a presumption of validity).

all hearings provided that the concurrence of a majority of the commission shall be required for the rendering of a decision."

The statutes above set forth three categories of actions to be taken by the PUC – transacting business, conducting hearings and rendering decisions. Clearly, only one commissioner is necessary to conduct a hearing. However, two commissioners are required to "transact business," as well as to "render a decision."

In this docket, the PUC is directed to "conduct an investigation" and "render an advisory opinion." *See* R.I.G.L. § 42-98-9. Neither of these tasks fall into the specific categories of "conducting a hearing" or "rendering a decision." Therefore, by process of elimination, these tasks fall into the broader category of "transacting business." Under R.I.G.L. § 39-1-8, two commissioners are required to transact business. Therefore, by statute, a minimum of two commissioners are required to proceed in this docket.

B. Chairperson Curran could recuse herself from the EFSB proceeding instead.

The Commission has alternatives available in this situation. One option is that Chairperson Curran could recuse herself from the EFSB proceeding, and participate in this PUC docket instead.

R.I.G.L. § 42-98-5(a) provides, in part, that "any member of the [EFSB] who recuses him or herself shall designate his or her own successor from his or her respective agency." Therefore, if Chairperson Curran recuses herself from the EFSB, she could designate her own replacement to the EFSB from the PUC. Note that her successor need not be a commissioner.

Doing so would allow Chairperson Curran to resume her seat on the PUC, and increase the PUC to the two commissioners needed to transact business.

C. The PUC could forego its right to issue an advisory opinion to the EFSB.

A second option available in this situation is the PUC could forgo its right to issue an advisory opinion as to the need, costs and alternatives for the proposed facility. In lieu of a PUC investigation and advisory opinion on these issues, a full investigation and determination as to the need, costs and alternatives for the facility would be conducted by the EFSB itself. See R.I.G.L. § 42-98-10.

Under R.I.G.L. § 42-98-11(a), parties generally may not present evidence at the EFSB hearing if that evidence was previously introduced at a hearing before any advising agency, including the PUC. Therefore, if the PUC proceeds to an evidentiary hearing with a single commissioner, the parties will rarely, if ever, be permitted to present evidence to the EFSB on those issues to avoid repetition and cumulative evidence. The EFSB would rely on the PUC's investigation, including its review of all presented evidence at the hearing.

However, if the PUC refrains from conducting a hearing and investigation and issuing an advisory opinion, there would be no constraint on the parties presenting evidence on those issues directly to the EFSB. The EFSB would be free to directly hear and evaluate all evidence on the issues of need, costs and alternatives.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, the Town respectfully objects to a single commissioner conducting an investigation and rendering an advisory opinion to the EFSB in this docket.

TOWN OF BURRILLVILLE
By its attorneys,

Dated: 7/5/16

Michael R. McElroy, Esq. #2627
Leah J. Donaldson, Esq. #7711
Schacht & McElroy
21 Dryden Lane
P.O. Box 6721
Providence, RI 02940-6721
Tel: (401) 351-4100
Fax: (401) 421-5696
Michael@McElroyLawOffice.com
Leah@McElroyLawOffice.com

Dated: 7/5/16

Oleg Nikolyszyn, Esq. #2414
155 South Main Street
Suite 303
Providence, RI 02903
Tel: (401) 474-4370
Fax: (401) 273-5290
Oleg@NikolyszynLaw.com

by MRM

CERTIFICATE OF SERVICE

I certify that the original and four photocopies of this Motion were filed by U.S. Mail, postage prepared, with the Clerk of the Public Utilities Commission, 89 Jefferson Boulevard, Warwick, RI 02888. In addition, electronic copies of this Motion were served via email on the service list for this Docket. I certify that all of the foregoing was done on July 5, 2016.

Theresa Gallo

Docket No. 4609 – PUC Advisory Opinion Regarding Need to Construct the Clear River Energy Facility
Service List as of 6/24/16

Name/Address	E-mail	Phone
Invenergy Thermal Development LLC **(Clear River Energy Facility)** Alan Shoer, Esq. Richard Beretta, Esq. Elizabeth Noonan, Esq. Nicole Verdi, Esq. Adler, Pollock & Sheehan One Citizens Plaza, 8th Floor Providence, RI 02903 John Niland, Dir. Of Business Development Tyrone Thomas, Esq., Asst. General Counsel Invenergy Thermal Development LLC One South Wacker Drive, Suite 1900 Chicago, IL 60600	ashoer@apslaw.com; rberetta@apslaw.com; enoonan@apslaw.com; nverdi@apslaw.com; jniland@invenergyllc.com; Tthomas@invenergyllc.com;	401-274-7200 312-224-1400
Division of Public Utilities and Carriers Leo Wold, Esq. Department of Attorney General 150 South Main Street Providence, RI 02903	LWold@riag.ri.gov; Jmunoz@riag.ri.gov; Dmacrae@riag.ri.gov;	401-274-4400
John J. Spirito, Esq., Chief of Legal Steve Scialabba, Chief Accountant	john.spirito@dpuc.ri.gov; steve.scialabba@dpuc.ri.gov; Don.ledversis@dpuc.ri.gov;	401-941-1400
Seth Parker Boris Shapiro Levitan & Associates, Inc. 100 Summer Street Suite 3200 Boston, MA 02110	sgp@levitan.com; bls@levitan.com;	617-531-2818
Office of Energy Resources Andrew Marcaccio, Esq. Nick Ucci, Chief of Staff Chris Kearns, Chief Program Development One Capitol Hill Providence, RI 02908 Ellen Cool Levitan & Associates	Andrew.Marcaccio@doa.ri.gov; Nicholas.Ucci@energy.ri.gov; Christopher.Kearns@energy.ri.gov; Danny.musher@energy.ri.gov; egc@levitan.com;	401-222-3417 401-574-9100
Statewide Planning Program Jared Rhodes, Chief Statewide Planning Program Jennifer Sternick, Esq. Chief of Legal Services, DOA	Jared.rhodes@doa.ri.gov; Jennifer.sternick@doa.ri.gov;	401-222-5731 401-222-8339
Conservation Law Foundation (CLF) Jerry Elmer, Esq.	jelmer@clf.org;	401-351-1102 Ext. 2012

Conservation Law Foundation 55 Dorrance Street Providence, RI 02903	mgreene@clf.org;	
RI Building and Construction Trades Council Gregory A. Mancini, Esq. Sinapi Law Associates, Ltd. 2374 Post Road, Suite 201 Warwick, RI 02886	gmancinilaw@gmail.com;	**401-739-9690**
Paul and Mary Bolduc Joseph A. Keough, Jr., Esq. Keough & Sweeney 41 Mendon Ave. Pawtucket, RI 02861	jkeoughjr@keoughsweeney.com;	401-724-3600
Dennis and Kathryn Sherman Christian F. Capizzo, Esq. Shechtman Halperin Savage, LLP 1080 Main St. Pawtucket, RI 02860	ccapizzo@shslawfirm.com;	401-272-1400
Town of Burrillville Michael McElroy, Esq. Schacht & McElroy PO Box 6721 Providence RI 02940-6721	Michael@McElroyLawOffice.com; Leah@McElroyLawOffice.com;	401-351-4100
Oleg Nikolyszyn, Esq. Town Solicitor 155 South Main St., Suite 303 Providence, RI 02903	Oleg@NikolyszynLaw.com;	401-474-4370
National Grid Bess Gorman, Esq. National Grid USA Service Co. d/b/a National Grid 40 Sylvan Rd. Waltham, MA 02451	Bess.Gorman@nationalgrid.com;	781-907-1834
Public Utilities Commission (PUC) Luly E. Massaro, Commission Clerk 89 Jefferson Blvd. Warwick, RI 02888	Luly.massaro@puc.ri.gov; Cynthia.wilsonfrias@puc.ri.gov; Alan.nault@puc.ri.gov;	401-780-2107
Ambar Espinoza, RI Public Radio: RI's NPR	aespinoza@ripr.org;	401 519-0233