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August 21, 2017

Todd A. Bianco
Coordinator
Rhode Island Energy Facility Siting Board
89 Jefferson Boulevard
Warwick, RI 02888

Re: Invenegy Thermal Development LLC – Clear River Energy Center
Docket No. SB-2015-06

Dear Dr. Bianco:

As you know, this office represents the Town of Burrillville in this docket. Enclosed for filing please find an original and three (3) copies of a Motion of the Town of Burrillville (1) to Strike Invenegy Thermal Development LLC's Objection to the Town of Burrillville's Data Request No. 33-1, (2) to Compel a Complete Data Response to the Town of Burrillville's Data Request No. 33-1, and (3) to Stay the Hearings Until All Water Issues are Resolved. Electronic copies have been sent to the service list.

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

Very truly yours,



Michael R. McElroy

cc: Service List

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
ENERGY FACILITY SITING BOARD**

In Re: Invenergy Thermal Development LLC's :
Application to Construct the Clear River Energy : Docket No. SB-2015-06
Center in Burrillville, Rhode Island :

**MOTION OF THE TOWN OF BURRILLVILLE (1) TO STRIKE INVENERGY
THERMAL DEVELOPMENT LLC'S OBJECTION TO THE TOWN OF
BURRILLVILLE'S DATA REQUEST NO. 33-1, (2) TO COMPEL A COMPLETE DATA
RESPONSE TO THE TOWN OF BURRILLVILLE'S DATA REQUEST NO. 33-1, AND
(3) TO STAY THE HEARINGS UNTIL ALL WATER ISSUES ARE RESOLVED**

Now comes the Town of Burrillville ("Town") and hereby files this Motion (1) to Strike Invenergy Thermal Development LLC's ("Invenergy") Objection to the Town's Data Response No. 33-1 ("DR 33-1"), (2) to Compel a Complete Data Response to the Town's DR 33-1, and (3) to Stay the Hearings Until All Water Issues are Resolved. In support thereof, the Town states that Invenergy's objection to DR 33-1 was both procedurally incorrect and lacks substantive merit. The objection is simply a continuation of Invenergy's ongoing pattern of delay and obfuscation in this docket, intended to prevent a public, transparent, and open application process before the Energy Facility Siting Board ("EFSB"). The Town requests that the EFSB strike Invenergy's improper objection in its entirety and compel Invenergy to immediately provide a complete response to DR 33-1. The Town also requests that the hearings scheduled to begin in October be stayed until a water plan is finalized that is not subject to the risks and uncertainties of ongoing litigation.

I. INTRODUCTION

Water is essential to the operation of Invenergy's proposed facility. In order for the Town, the EFSB and the advisory agencies to meaningfully evaluate the impact of the project on the environment, and the health, safety and welfare of the residents of the Town and the state, we

must have complete, detailed information about Invenergy's water supply plans for the Invenergy project. *See* R.I.G.L. § 42-98-9(2); EFSB Rule 1.6(b)(4) and (11). Invenergy bears the burden of proof. Failure of Invenergy to submit information related to reliable and unchallenged water supply options renders Invenergy's application incomplete.

As the EFSB is aware, securing a water supply has been troublesome for Invenergy. In October 2016, the EFSB held that "lack of information regarding Invenergy's water source rendered its application incomplete and therefore not in compliance with Rule 1.6(b)(4) of the Rules of Practice and Procedure." EFSB Order 103 at 1. As a result, the EFSB suspended application proceedings in this docket to allow time for Invenergy to remedy its incomplete application.

At this time, the legality of Invenergy's proposed Johnston water supply contract is being vigorously litigated in Rhode Island Superior Court, and Invenergy once again is without a guaranteed water supply for the proposed facility.¹ The Town has asked for information about Invenergy's alternative water sources on several occasions, and, consistent with its pattern of behavior in this docket, Invenergy has refused to provide the information necessary to permit a meaningful evaluation of the water supply options and their related impacts.

In rebuffing the Town's July attempt to gather information about Invenergy's alternative water sources, Invenergy carefully crafted a response that improperly limited its answer by stating that it had not attempted to secure additional water sources "as a result of the [Johnston] litigation." However, the Town's request was not limited in this way.

¹ The EFSB has, at its request, been receiving regular updates on the status of the litigation challenging the validity of the Johnston water contract in Superior Court. There is a hearing this week on the Town and CLF's motion to preclude discovery in Superior Court. The motion is opposed by Invenergy because Invenergy wishes to take discovery in the Johnston litigation. If the motion is denied, a discovery schedule will be created which will further delay the case. Also, by court order, at least 20 parties have recently been joined in the case making it much more complex. As of the date of this filing, none of the new parties have been served.

For this reason, on August 9, 2017, the Town served DR 33-1 specifically seeking an identification of any and all water sources being considered or explored for the proposed plant.

Specifically, DR 33-1 stated:

In response to the Town's data request 32-9, Invenergy stated "Invenergy has not made any attempts to secure alternative water sources **as a result of the litigation.**" (Emphasis added.) Invenergy went on to state that it is continuing "the exploration of additional contingent water sources to supplement the contingency contained in our previously filed water supply plan."

Regardless of whether Invenergy's attempts have been made to secure additional contingent water sources "as a result of the litigation" or not, please set forth in detail all of Invenergy's efforts to explore additional contingent water sources to supplement the contingency contained in your previously filed water supply plan. Please identify any and all additional possible sources of water that have been considered or explored including, but not limited to, the location of the water supply.

Instead of submitting a complete response to the Town's request, Invenergy chose to maintain its pattern of delay and obfuscation, and again refused to provide the necessary information to the Town, the EFSB, the advisory agencies, and the public.²

The information sought by the Town is necessary to ensure that there will be a meaningful evaluation of the impact of Invenergy's proposed facility and its water supply options, especially if the Johnston litigation voids the water contract. The Town therefore respectfully requests (1) that Invenergy's objection be stricken, (2) that the EFSB compel Invenergy to immediately publicly produce a complete response to the Town's water request, and (3) that the EFSB stay the hearings until all water issues are resolved and a reliable, unchallenged water supply source has been identified and fully vetted.

² In its objection, Invenergy claimed the requested information is confidential, and claimed that the Town intends to act illegally. We submit that the requested information should be publicly disclosed and vetted. However, Invenergy has already produced significant confidential information in this docket to the Town (and other parties) under existing confidentiality agreements. The Town has treated all confidential information (as designated by the confidentiality agreement) with great care. Invenergy's statements regarding the Town's alleged illegal intent are improper and unfounded.

II. FACTS

On July 25, 2017, the Town submitted a simple data request to Invenergy (DR 32-9) asking Invenergy to identify other possible water sources that Invenergy might use for its proposed facility. See Exhibit A. Clearly, this is important information: this project needs a water supply.

On August 9, 2017, Invenergy responded evasively – essentially refusing to answer the Town’s request. See Exhibit B.

In response, on August 9, 2017, the Town sent a new data request to Invenergy (DR 33-1), asking Invenergy to answer the question properly. See Exhibit C. The information requested by the Town is critically important and relevant to this docket in order to fully evaluate the effect Invenergy’s water supply options will have on the environment, and the health, safety and welfare of the residents of the Town and the state.

On August 15, 2017, Invenergy filed an improper “Objection” to the Town’s data request. See Exhibit D.

III. ARGUMENT

A. Invenergy’s objection was procedurally deficient and therefore should be stricken.

Invenergy’s objection to the Town’s DR 33-1 should be stricken because it was not properly raised. EFSB Rule 1.27(b)(3) states, in part:

Objection to a data request in whole or in part on the ground that the request is unreasonable and/or the material is not relevant or not permitted or required by law shall be made **by motion** filed as soon as practicable and in no event later than five (5) days after service of the request. (Emphasis added.)

Invenergy did not file a motion as required. Instead, Invenergy filed an objection. Rule 1.27(b)(3) expressly requires the filing of a motion and the period for filing such a motion has now expired. For this reason, the EFSB should strike Invenergy's defective objection.

B. Information related to water sources is plainly relevant (in fact central) to this proceeding and Invenergy should be compelled to immediately provide the requested information.

Even if the EFSB does not strike Invenergy's objection because it was procedurally defective, the EFSB should nevertheless require Invenergy to immediately provide the information sought by the Town because it is plainly relevant and central to this proceeding. The information requested in DR 33-1 is necessary to ensure that the Town, the EFSB, the advisory agencies, and the public all have a meaningful opportunity to fully evaluate the effect Invenergy's water supply options will have on the environment, and the health, safety and welfare of the residents of the Town and the state.

Under EFSB Rule 1.27(b)(3), when a party properly files a motion objecting to a data request, the EFSB "shall thereupon determine by order the validity of the request" and establish a date for compliance. EFSB Rule 1.27(b)(3) further states: "The relevancy of such a request shall be determined under the standards established for such determinations under Rule 26 of the Superior Court Rules of Civil Procedure."

Rule 26 states that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Rule 26(b)(1) requires only that the materials sought be "reasonably calculated to lead to the discovery of admissible evidence." *DeCurtis v. Visconti, Boren & Campbell, Ltd.*, 152 A.3d 413, 420 (R.I. 2017). The Rhode Island Supreme Court has consistently held that "our discovery rules are liberal and have been construed to 'promote broad discovery.'" *Id.* at 421 (citing *Henderson v. Newport County*

Regional Young Men's Christian Ass'n, 966 A.2d 1242 (R.I. 2009)). “The philosophy underlying modern discovery is that prior to trial, all data relevant to the pending controversy should be disclosed unless the data is privileged.” *Id.*

It is undisputed that water is essential to the operation of the proposed Clear River Energy Center (“CREC”). As the EFSB is aware, Invenergy has experienced significant difficulty in securing a reliable water supply plan for the proposed project. Without a reliable source of water, the proposed facility cannot function. Further, without details related to the proposed water source options, it is impossible for the EFSB, its advisory agencies, the parties, and the public to meaningfully evaluate how each option would impact the environment, as well as public health, safety and welfare.

Invenergy claims in its objection that this information is not relevant. See Invenergy’s Objection to the Town’s DR 33-1 at 2. However, Invenergy has already acknowledged that identifying additional water supply options for the proposed project is very relevant to this proceeding. John Niland, Director of Business Development for Invenergy, testified that “Invenergy has identified redundant and contingent water supply from Benn Water & Heavy Transport Corp., and is **still considering additional/contingent/redundant sources to supply water to the Facility.**” Pre-Filed Direct Testimony of John Niland, at 7 (emphasis added). The Town merely asks Invenergy to identify more fully a matter that has been discussed in direct testimony by Invenergy. Invenergy opened the door regarding this relevant information, and the Town is entitled to take discovery related to Invenergy’s testimony.

The EFSB should therefore compel Invenergy to immediately provide the information sought in DR 33-1 because it is plainly relevant (indeed central) to this proceeding.

C. *Producing information related to water sources is not unduly burdensome and Invenergy should be compelled to immediately provide the requested information.*

In its improperly filed Objection to DR 33-1, Invenergy alleges that DR 33-1 is “unduly burdensome” and therefore should be exempt from disclosure in this proceeding. Invenergy confuses the legal standard for “undue burden” with protecting confidential information.³ See Invenergy’s Objection at 3.

The Advisory Committee’s Note to Federal Rule 26(b)(2)(B) identifies seven factors to consider when determining whether the discovery of information would cause undue burden or cost. See *Cassie M. v. Chaffee*, C.A. 07-241ML (D.R.I. 2013).

(1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties’ resources.
Id.

The Town’s request is narrowly tailored and seeks limited specific information. The Town has no other means to acquire the information sought. The information sought is necessary to assess the impact of each water supply option and the overall effects of the proposed project on the environment, and the health, safety and welfare of residents of the Town and the state. Invenergy has ample legal and monetary resources available to respond to DR 33-1.

³ For example, Invenergy argues that the EFSB should enter a protective order under R.I. Superior Rule of Civil Procedure 26(c)(7). But in doing so, Invenergy includes only the section of that subpart which suits their argument: “that a trade secret or other confidential research, development, or commercial information not be revealed.”

This is yet another example of Invenergy attempting to “hide the ball” from the EFSB and interested parties. The Rule cited by Invenergy states: “(7) that a trade secret or other confidential research, development, or commercial information not be revealed **or be revealed only in a designated way...**” (Emphasis added.)

Rule 26(c) goes on to state: “In ruling on a motion for protective order the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery.”

The Town's request can likely be answered in a single paragraph. This does not place an undue burden on Invenergy. Responding to the Town's request is part of the application process.

The EFSB should therefore compel Invenergy to immediately provide the information sought in DR 33-1 because it is relevant to this proceeding and producing it is not unduly burdensome.⁴

D. Invenergy continues to withhold relevant and necessary information to prevent a public, transparent and open process before the EFSB.

Invenergy's refusal to provide a response to DR 33-1 is consistent with its evasive manner throughout this proceeding. Invenergy's pattern of delay and obfuscation in this docket has consistently prevented the Town, its entities and other advisory agencies from meaningfully reviewing the proposed project, which in turn robs the EFSB of the benefit of the expertise of those entities. Invenergy should not be permitted to continue this pattern of behavior, especially on an issue as central as water supply.

As the EFSB is aware, a number of Town entities were designated by the EFSB to provide advisory opinions in this docket. The Town's entities attempted to provide guidance to the EFSB in accordance with the Preliminary Order and the Energy Facility Siting Act. However, Invenergy was consistently unwilling to provide necessary information during the advisory opinion processes. This in turn prevented the Town's entities from fully evaluating the impact of the proposed facility on the environment, the Town and the state. In addition, three of the state entities designated as advisory agencies by the EFSB were unable to provide an Advisory Opinion due to Invenergy's failure to provide adequate information in a timely manner.

⁴ The Town believes that, in order for the public to be able to "trust the process," as Governor Raimondo has urged, all information related to water supply options must be examined in an open and transparent manner by the EFSB, the Town, the advisory agencies, and the public. For this reason, the Town urges the EFSB to require Invenergy to publicly produce all information regarding its water supply options. However, if the EFSB determines that the information being sought is proprietary, it can be released subject to the existing confidentiality agreements.

Below are a few excerpts from the initial Advisory Opinions filed by local and state agencies, which demonstrate the way Invenergy has attempted to ‘hide the ball’ throughout this process.

- ***Town Planning Board Advisory Opinion:***

- “We must unfortunately provide this Advisory Opinion without having seen either the complete engineering design for the CREC or permits from other state agencies.” Burrillville Planning Board Advisory Opinion at 8.
- “It is also our opinion that many of the data responses we received from Invenergy were incomplete and at times evasive.” *Id.* at 9.

- ***Town Zoning Board Advisory Opinion:***

- “... the lack of information provided to us by Invenergy, as well as the unknown crucial factor of the use and discharge of water, is of such importance, that we cannot adequately evaluate this project and provide the EFSB with reasoned judgment as to the effect of this Facility upon our community.” Advisory Opinion to the EFSB from the Burrillville Zoning Board at 1.
- “Because of the lack of such crucial information, this Town is not given a reasonable opportunity to opine upon this application. This Board is of the opinion that the Town’s rights under the constitution and laws of the State of Rhode Island are being infringed upon because it is not given a meaningful opportunity to evaluate this application and to provide a reasoned opinion upon its advantages or disadvantages and the possible harm to its residents and the environment.” *Id.* at 2.

- “The Board voted unanimously that under the circumstances presented, and without the benefit of reviewing ACTUAL plans and the proposed utilization of water or its discharge, this Zoning Board cannot evaluate this application.” *Id.* at 11.
- ***Town Building Inspector Initial Advisory Opinion:***
 - “I first met with representatives of Invenergy at a meeting in the Burrillville Town Hall on March 24, 2016, to discuss, among other things, what I would require from the applicants to render an advisory opinion. At that time, I was told that the plan was being worked on. I have had numerous occasions to remind the applicants this spring and summer as I have attended a number of hearings and meetings in Town. I last spoke with a representative of Invenergy at a Planning Board meeting on August 15, 2016. I was told that I should have something soon.” Burrillville Building Inspector Advisory Opinion at 3.
 - “To date, I have not received anything from Invenergy in the form of plans, narratives or construction drawings to meet any of the requirements of the Town of Burrillville’s Soil Erosion and Sediment Control Ordinance.” *Id.*
 - “Based on the lack of information, under the Town’s Erosion and Sediment Control Ordinance, I would have to judge the application as incomplete and consider the delay, or withholding, grounds for disapproval (12-64(b)(3)).”⁵ *Id.* at 4.
 - “While reviewing the CREC proposal, notwithstanding what was submitted by Invenergy and what was presented in testimony at the Zoning Board hearing by

⁵ Soil erosion and sediment control plans were recently filed.

the applicant's expert witness, I have determined that some of the information was incorrect and, more importantly, more relief should have been requested by the Applicant." *Id.* at 6.

- "It could be that every building and structure build as part of the CREC is a principal structure, or it may not be the case. I do not have the information necessary to make that determination."⁶ *Id.*
- "From the beginning, I have been unable to get pertinent information needed to make the advisory opinion you have requested." *Id.* at 14.

- ***Rhode Island Department of Transportation Advisory Opinion:***

- "To date, Invenergy has not filed any applications for permits with RIDOT..." RI DOT Advisory Opinion at 1.
- "Until applications with the detailed design plans and required documentation are submitted by Invenergy, there will be no formal review done by RIDOT."⁷ *Id.* at 2.

- ***Rhode Island Department of Health Advisory Opinion:***

- "Since no process water source is currently under public consideration, RIDOH asks to assess the impact of any future water source proposal on drinking water quality." RI DOH Advisory Opinion at 34.
- "The application did not include sufficient information for evaluation of impacts of potential nighttime lighting of the facility."⁸ *Id.* at 35.

⁶ The Town has a Motion to Dismiss pending in this docket based on Invenergy's failure to file complete plans for all structures as expressly required by the Energy Facility Siting Act and the EFSB Rules. The Town continues to vigorously press its Motion to Dismiss which has not yet been set for hearing.

⁷ A DOT application has been recently filed.

⁸ Additional lighting information has been recently filed.

- ***Rhode Island Department of Environmental Management Advisory Opinion:***

- “[A]t the time of this Advisory Opinion the Applicant had not completed the design of the fuel oil piping, pumping and storage tank systems [...] As a result, further evaluation of the fuel oil [aboveground storage tanks] and appurtenances cannot be completed.” RI Department of Environmental Management Advisory Opinion at 6.
- “As of the date of this opinion, Invenergy has not supplemented its application with information regarding the source of its water supply. [...] If and when Invenergy supplements its application with a proposed water supply source, DEM can evaluate the impacts of that water supply.” *Id.* at 8.
- “DEM cannot, with such little site-specific information, make conjectures on the full suite of species that would be impacted by the project and the exact nature and extent of those impacts.” *Id.* at 23.
- “The source of cooling water for the Facility is currently unknown. Based on these current conditions, DEM cannot yet render an opinion as to whether the Facility presents an unacceptable harm to the environment.”⁹ *Id.* at 30.

The Town asks that the EFSB put a stop to Invenergy’s pattern of evasive behavior. In order for residents of the Town and the state to be able to “trust the process,” as the Governor has urged, Invenergy’s application must be fully evaluated in an open and transparent process.

⁹ The revised Johnston water plan has been filed, but is under legal challenge.

E. The evidentiary hearings should be stayed until all water issues are resolved and a reliable, unchallenged water supply source has been identified and vetted.

The Town respectfully requests that the evidentiary hearings (currently scheduled to begin in October 2017) be stayed until Invenergy finalizes and presents a water plan that is not subject to the risks of litigation and that plan has been vetted. The information sought by the Town is necessary under the Energy Facility Siting Act, and must be produced to create a complete application. Without all details of Invenergy's water supply plan, the EFSB, its advisory agencies, the parties and the public cannot meaningfully evaluate Invenergy's application for the proposed facility. To begin the evidentiary hearings without this vital information would prevent the public from "trusting the process" before the EFSB.

Additionally, without a confirmed, final and unchallenged water supply plan, the proposed facility cannot function. If Invenergy is unable to solidify a water supply plan for the proposed project, Invenergy's application must be denied by the EFSB. To begin evidentiary hearings prior to confirmation of such a final water plan would result in a waste of time and resources for the EFSB, the Town, other parties and the public. For these reasons, the Town respectfully requests that the EFSB hearings scheduled to begin in October be stayed until a water plan is finalized that is not subject to the risks of litigation and is properly vetted.

IV. CONCLUSION

WHEREFORE, the Town respectfully requests that the EFSB enter an Order (1) striking Invenergy's objection to DR 33-1, (2) compelling Invenergy to immediately submit a complete (and public) data response to DR 33-1, and (3) staying the evidentiary hearings until all water issues discussed above are resolved.

The Town requests oral argument on this Motion.

Respectfully submitted,
Town of Burrillville
By its attorneys



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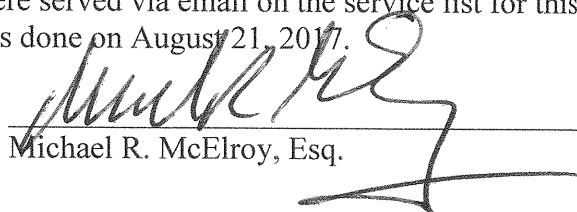


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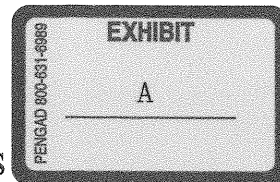
Date: August 21, 2017

CERTIFICATE OF SERVICE

I certify that the original and ten photocopies of this Motion were filed by U.S. Mail, postage prepared, with the Coordinator of the EFSB, 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 August 21, 2017.



Michael R. McElroy, Esq.



STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
ENERGY FACILITY SITING BOARD

IN RE: INVENERGY THERMAL DEVELOPMENT LLC's :
APPLICATION TO CONSTRUCT THE CLEAR RIVER : DOCKET No. SB-2015-06
ENERGY CENTER IN BURRILLVILLE, RHODE ISLAND :

**THE TOWN OF BURRILLVILLE'S 32nd SET OF DATA REQUESTS TO
INVENERGY THERMAL DEVELOPMENT LLC**

- 32-1 In the Clear River Economic Impacts: Overall Assumptions, please provide the following:
- a. Basis for the property tax or other land taxes and the calculations used to arrive at the property tax assumption.
 - b. Calculations and basis for the capacity factor assumption.
- 32-2 In regard to the Supply/Demand assumptions worksheet, please provide the following:
- a. Basis for the BTMPV amounts used in calculating Peak Demand – BTMPV:
 - b. Assumptions and/or calculations for change in Supply from 2017 through 2025.
 - c. If not identified above, provide the assumptions and calculations for the reduction in Demand Side Resources.
- 32-3 Are the assumptions for BTMPV consistent with the 2017 report? Please explain.
- 32-4 In developing its total energy and capacity market savings to Rhode Island ratepayers, please provide the following:
- a. Assumptions for the new transmission lines being built from Canada to satisfy ISO-NE load.
 - b. Assumptions for the new offshore wind projects being built to satisfy ISO-NE load.
 - c. Cost of energy assumed from the new transmission lines for each year of the economic analysis.
 - d. Cost of energy from offshore wind in each year of the economic analysis.
- 32-5 What is the legal name of the entity that was qualified by ISO-NE to participate in ISO's Forward Capacity Auction 10, and which obtained a Capacity Supply Obligation in FCA-10?
- 32-6 With regard to the entity referred to in 32-5, please state the form of entity (e.g., corporation, LLC, LLP, or other) and name the state in which the entity is chartered.

- 32-7 With regard to the entity referred to in 32-5, did the same legal entity participate in FCA-11?
- 32-8 If the answer to 32-7 is "no," please name any entity affiliated with the entity named in 32-5 that participated in FCA-11, and state the form of that entity.
- 32-9 In light of the litigation concerning the proposed Johnston water supply arrangement, have any attempts been made to secure an alternate water supply? If so, please provide details.

Respectfully submitted,
Town of Burrillville
By its attorneys



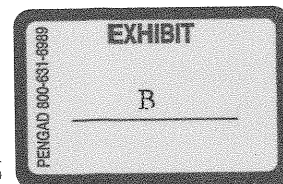
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Date: July 25, 2017

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
ENERGY FACILITY SITING BOARD



IN RE: Application of Invenergy Thermal
Development LLC's Proposal for
Clear River Energy Center

Docket No. SB-2015-06

**INVENERGY THERMAL DEVELOPMENT LLC'S RESPONSES TO
THE TOWN OF BURRILLVILLE'S 32nd SET OF DATA REQUESTS**

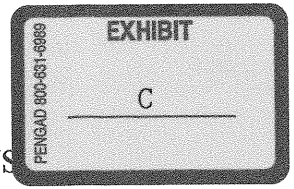
Request 32-9 In light of the litigation concerning the proposed Johnston water supply arrangement, have any attempts been made to secure an alternate water supply? If so, please provide details.

Response 32-9 Invenergy has not made any attempts to secure alternative water sources as a result of the litigation. As indicated in our response to the Town's Data Request No. 22-57, Invenergy continues to engage in sound, responsible business practices through the exploration of additional contingent water sources to supplement the contingency contained in our previously filed water supply plan.¹

RESPONDENT: John Niland, Invenergy Thermal Development LLC

DATE: August 9, 2017

¹ The Town's Data Request, No. 22-57, states: "Is Johnston your one exclusive primary water source or are you still considering any other water sources?" In response to the Town's Data Request, No. 22-57, Invenergy stated: "Johnston is Invenergy's primary supplier. Invenergy has identified a contingent/redundant source, Benn Water & Heavy Transport Corp. Invenergy is still considering additional contingent/redundant sources."



STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
ENERGY FACILITY SITING BOARD

IN RE: INVENERGY THERMAL DEVELOPMENT LLC's :
APPLICATION TO CONSTRUCT THE CLEAR RIVER : DOCKET No. SB-2015-06
ENERGY CENTER IN BURRILLVILLE, RHODE ISLAND :

THE TOWN OF BURRILLVILLE'S 33rd SET OF DATA REQUESTS TO
INVENERGY THERMAL DEVELOPMENT LLC

33-1 In Response to the Town's data request 32-9, Invenergy stated "Invenergy has not made any attempts to secure alternative water sources **as a result of the litigation.**" (Emphasis added.) Invenergy went on to state that it is continuing "the exploration of additional contingent water sources to supplement the contingency contained in our previously filed water supply plan."

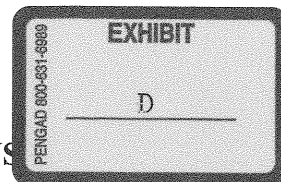
Regardless of whether Invenergy's attempts have been made to secure additional contingent water sources "as a result of the litigation" or not, please set forth in detail all of Invenergy's efforts to explore additional contingent water sources to supplement the contingency contained in your previously filed water supply plan. Please identify any and all additional possible sources of water that have been considered or explored including, but not limited to, the location of the water supply.

Respectfully submitted,
Town of Burrillville
By its attorneys

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Date: August 9, 2017



STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
ENERGY FACILITY SITING BOARD

In Re: INVENERGY THERMAL)
DEVELOPMENT LLC’S APPLICATION)
TO CONSTRUCT THE CLEAR RIVER) Docket No. SB-2015-06
ENERGY CENTER IN BURRILLVILLE,)
RHODE ISLAND)

**OBJECTION OF INVENERGY THERMAL DEVELOPMENT LLC TO
THE TOWN OF BURRILLVILLE’S DATA REQUEST, NO. 33-1**

Invenergy Thermal Development LLC (“Invenergy”) respectfully objects to the Town of Burrillville’s (“Town’s”) Data Request, No. 33-1 on the ground that it seeks confidential, proprietary, and irrelevant information that is plainly outside the scope of discovery and likely is sought for an improper purpose. The Town’s Data Request, No. 33-1 requests the following:

In Response to the Town’s data request 32-9, Invenergy stated “Invenergy has not made any attempts to secure alternative water sources **as a result of the litigation.**” (Emphasis added.) Invenergy went on to state that it is continuing “the exploration of additional contingent water sources to supplement the contingency contained in our previously filed water supply plan.”

Regardless of whether Invenergy’s attempts have been made to secure additional contingent water sources “as a result of the litigation” or not, please set forth in detail all of Invenergy’s efforts to explore additional contingent water sources to supplement the contingency contained in your previously filed water supply plan. Please identify any and all additional possible sources of water that have been considered or explored including, but not limited to, the location of the water supply.

Invenergy objects to Data Request, No. 33-1 on the following grounds: (i) The Request seeks information related to potential negotiations or potential other contingent/redundant sources that have not resulted in any formal agreement, which is wholly irrelevant to the issues before the Rhode Island Energy Facility Siting Board (“EFSB” or “Board”) and is unlikely to lead to the

discovery of admissible evidence; (ii) The Request appears to seek information for the improper purpose of attempting to interfere with Invenergy's attempt to negotiate with and/or contract with an alternative contingent/redundant water supplier and preventing Invenergy from conducting business in Rhode Island; (iii) The Request seeks confidential and proprietary business information related to Invenergy's business strategy and negotiations; and (iv) The Request is unduly burdensome, in that if Invenergy is forced to provide the information requested, that production will adversely impact Invenergy's ability to fairly negotiate and secure other contingent water supply arrangements. The grounds for Invenergy's objections are articulated more fully below.

The information sought in Data Request, No. 33-1 is plainly irrelevant and beyond the scope of discovery permitted under the EFSB Rules of Practice and Procedure ("EFSB Rules"). EFSB Rule 1.27(b) only permits parties to request information that is "reasonable" and "relevant to the proceeding." EFSB Rule 1.6(b)(11) requires an Applicant to provide information on its support facilities, including water, and an analysis of their availability. Invenergy provided that information to the Board in its January 11, 2017 revised Water Supply Plan. If Invenergy actually enters into an agreement with an additional contingent/redundant supplier, it will supplement its Water Supply Plan and its response to the Town's Data Request, No. 32-9 to disclose the existence of that agreement and supplier.¹

Neither EFSB Rule 1.6(b)(11) nor any other EFSB Rule, however, requires an Applicant to provide information on its attempts to secure a contingent/redundant water source and/or the identities of possible prospective suppliers that the Applicant is talking to, "considering," or

¹ Invenergy previously identified a contingent/redundant source, Benn Water & Heavy Transport Corp. See Invenergy's revised Water Supply Plan, filed with the Board on January 11, 2017; Invenergy's Response to the Town's Data Request, Nos. 22-57 & 32-9 n.1.

“exploring.” Indeed, such information has no bearing on Invenergy’s Water Supply Plan because Invenergy has not yet entered into an agreement, and it is purely speculative as to whether Invenergy will reach another agreement. *See, e.g., Micro Motion, Inc. v. Kane Steel Co., Inc.*, 894 F.2d 1318, 1328 (Fed. Cir. 1990) (“A litigant may not engage in merely speculative inquiries in the guise of relevant discovery.”). Thus, the information sought in Data Request, No. 33-1 is beyond the scope of discovery permitted by the EFSB Rules and is flatly irrelevant.

In addition, Data Request, No. 33-1 is not only irrelevant, but also is unduly burdensome and improper in that it seeks sensitive and confidential business information and strategy on what Invenergy might be “considering” or “exploring.” A party cannot obtain another party’s proprietary and confidential business information (including information regarding negotiations), unless the information is relevant and not unduly burdensome and adequate protections are in place. *See, e.g.,* EFSB R. 1.27(b)(3) (stating that the relevancy of data requests is determined under the standards established by Rule 26 of the Rhode Island Superior Court Rules of Civil Procedure); R.I. Super. R. Civ. P. 26(b)(1) (noting that the court “shall” limit unduly burdensome discovery, even if it is relevant); R.I. Super. R. Civ. P. 26(c)(7) (noting that the court can enter into a protective order to protect a party from undue burden, including an order “that a trade secret or other confidential research, development, or commercial information not be revealed.”); *Providence Journal Co. v. Convention Ctr. Auth.*, 774 A.2d 40, 47 (R.I. 2001) (determining that documents regarding negotiations that led to the booking of events “fall squarely within the [Access to Public Records Act (“APRA”)] exemption for confidential commercial or financial information”); *see also Barnes v. District of Columbia*, 289 F.R.D. 1, 10 (D.D.C. 2012) (“The Court understands that the parties may try to gain a competitive advantage through gaming the

discovery process.”); *McCook Metals L.L.C. v. Alcoa Inc.*, No. 00 C 6782, 2001 WL 293626, at *2 (N.D. Ill. Mar. 13, 2001) (expressing concern that “this plaintiff could delve into the status of the ongoing negotiations between Boeing and other subcontractors We fear that the pretrial discovery in this suit could permit the plaintiff to gain unfair competitive advantages with respect to the pending contract negotiations and with respect to the legitimately confidential plans of its competitors.”); *JILCO, Inc. v. MRG of S. Fla., Inc.*, 162 So. 3d 108, 110 (Fla. Dist. Ct. App. 2014) (“The disclosure of a party’s financial or confidential business information may cause irreparable harm where the information is irrelevant to any pending matter.”).

Here, there is no question that the information sought is highly confidential and irrelevant. Moreover, even if the requested information was marginally relevant—which it is not—that marginal relevance would not override the clear burden to Invenergy in ordering it to produce information regarding its thought process and potential suppliers. Indeed, it appears likely that the Town seeks the identities of the potential water suppliers whom Invenergy has contacted or is considering contacting, so that the Town can approach these prospective water suppliers and attempt to convince them not to contract with Invenergy. This is not only an improper purpose of discovery, but also may constitute a violation of Rhode Island law. *See L.A. Ray Realty v. Town Council of Cumberland*, 698 A.2d 202, 207 (R.I. 1997) (finding a defendant liable for tortious interference with prospective contractual relations). Moreover, if the Board forces Invenergy to release this highly sensitive commercial information, that release will adversely impact Invenergy’s bargaining position and its ability to negotiate and secure additional contingent/redundant water supply arrangements.

In sum, if the Town is provided with the irrelevant information sought in Data Request, No. 33-1, the Town will have the ability to interfere with and potentially impact Invenergy’s

negotiations via direct contact with a potential contingent/redundant supplier of water. The Town should not be allowed to abuse the discovery rules and obtain proprietary business strategy information that is irrelevant to this EFSB proceeding. If Invenergy reaches an agreement with an additional contingent/redundant supplier, Invenergy will provide that information to the Board (and the Town). Accordingly, Invenergy objects to the Town's Data Request, No. 33-1.

Respectfully submitted,

INVENERGY THERMAL DEVELOPMENT LLC

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Dated: August 15, 2017

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2017, I delivered a true copy of the foregoing document to the Energy Facilities Siting Board via electronic mail to the parties on the attached service list.

/s/ Alan M. Shoer

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