STATE OF RHODE ISLAND
PUBLIC UTILITIES COMMISSION

IN RE: Application of
Invenergy Thermal Development LLC for
Proposed Clear River Energy Center

Docket No. 4609

POST-HEARING MEMORANDUM OF LAW OF CONSERVATION LAW FOUNDATION

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Introduction

The Public Utilities Commission (PUC or Commission) should find that the proposed Invenergy plant is not needed. True, the record evidence shows that ratepayer benefits from the plant would be small but meaningful. The PUC's primary charge, however, is to issue an advisory opinion as to whether the plant is needed – indeed, the PUC is required both by statute and by order of the Energy Facility Siting Board (EFSB) to consider need. And the record evidence before the PUC does not show that the plant is needed. This conclusion is true for two reasons. First, there is unrebutted evidence in the record showing affirmatively that the plant is not needed. And second, there is insufficient evidence in the record to demonstrate a need for the plant – in other words, Invenergy has not met its burden to show that the plant is needed.

I. The PUC must determine whether the Invenergy plant is needed.

Before explaining why the record does not support a finding that the proposed Invenergy plant is needed, it is important to note that as a matter of law the PUC must determine whether the plant is needed.

The requirement that the PUC determine the need for a proposed power plant stems from the Rhode Island Energy Facility Siting Act, specifically Rhode Island General Laws § 42-98-9(d). That subsection provides that "[t]he public utilities commission shall conduct an investigation … and render an advisory opinion as to the need for the proposed facility."

The PUC's determination of need is vitally important to the EFSB licensing process. The Act provides at § 42-98-11(b)(1) that the EFSB may not approve a project except upon a finding that the project is needed: "The board shall issue a decision granting a license only upon a finding that the applicant has shown that: (1) 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."

Notwithstanding the statutory requirement that the PUC and, eventually, the EFSB determine whether a plant is needed, in Docket 4609 Invenergy has suggested that the Capacity Supply Obligation (CSO) obtained by one of the two proposed Invenergy turbines – half the proposed plant – obviates the statutory requirement for such a finding. This suggestion is wrong.

The wrong argument that Invenergy's CSO obtained for half its proposed plant obviates the statutory requirement that the PUC determine need derives from a misreading of two decades-old, non-binding decisions of the PUC.

The first such decision is In re: Tiverton Power Associates, Ltd., a 1997 non-binding advisory opinion in which the PUC opined in dictum that the need assessment required by the Energy Facility Siting Act was no longer relevant in the modern de-regulated energy market. The PUC's dictum suggested that, following the enactment of the Utility Restructuring Act, either "the Energy Facility Siting Act should have been amended" or "a court of competent jurisdiction could find that the recently enacted URA [Utility Restructuring Act] effectively repeals by implication the much older 'need'

assessment provisions of the EFSA [Energy Facility Siting Act]." But in Tiverton Power, because neither the General Assembly nor a court of competent jurisdiction had actually altered the Act, the PUC followed the law and "nevertheless ... considered the issue of whether the record supports a conclusion of need for the Project."

The second decision is In re: Need Assessment to Construct a Gas-Fired Power Generating Facility [Hope Energy], a 1998 non-binding advisory opinion in which the PUC again opined in dictum that the need assessment required by the Energy Facility Siting Act was no longer relevant in the modern de-regulated energy market. Again in Hope Energy, because neither the General Assembly nor a court of competent jurisdiction had actually altered the Act, the PUC followed the law and "[n]evertheless ... considered the issue of whether the record supports a conclusion of need for the Project."

In the eighteen years since the PUC issued its advisory opinion in Hope Energy, neither the General Assembly nor a court of competent jurisdiction has altered the Energy Facility Siting Act. The Act controls. The PUC must therefore follow the law and consider whether the record supports a conclusion of need for the Invenergy plant.

II. The record does not support a conclusion that the Invenergy plant is needed.

A. Unrebutted evidence shows that the Invenergy plant is not needed.

Unrebutted testimony of CLF expert witness Robert Fagan demonstrates that the Invenergy plant is not needed. Because this testimony is unrebutted, it is binding on the PUC. Milliken v. Milliken, 390 A.2d 934, 936 (R.I. 1978) ("A trier of fact must accept the uncontradicted and unimpeached positive testimony of a witness as probative of the

fact that it was adduced to prove when it is free from inherent contradiction or improbability.").

Both in his pre-filed testimony and on the stand, Mr. Fagan testified at length and in great detail about why the proposed Invenergy plant is not needed. This testimony need not be rehashed here; a summary of it may be found in Mr. Fagan's pre-filed testimony at page 3, lines 23 through 27.[1]

One point, however, does require discussion here. Mr. Fagan has testified that the ISO's determination of need is reflected in a figure called the Net Installed Capacity Requirement (NICR) and that the most recent Forward Capacity Auction (FCA-10) cleared 1,416 MW of excess capacity over and above the NICR. *See* Pre-Filed Direct Testimony of Robert Fagan, page 4, lines 10 through 14; page 8, footnote 14. This means that the 485 MW of the Invenergy plant that cleared in FCA-10 could be eliminated and there would still be a surplus of capacity for Capacity Commitment Period 10, and that the remainder of the proposed Invenergy plant would be additional surplus above and

[1] See also Pre-Filed Direct Testimony of Robert Fagan, p. 13, line 7 – p. 15, line 12, including Figures 1 and 2; page 17, lines 3-17 (both summer peak load and annual net energy trending downward); id., page 7, line 12 – p. 12, line 7 (Invenergy plant is not needed to meet reliability needs in either Rhode Island or New England); id., page 3, line 28 – p. 5, line 5; p. 12, line 11 – p. 13, line 6; page 16, line 1 – p. 21, line 9, including Figures 3 – 6 and Table 1 (Invenergy plant not needed in the short or medium term); id., page 27, line 19 – page 29, line 15; p. 30, line 14 – p. 32, line 5 (Invenergy not needed in the long term). In addition, the last line of Exhibit B to Mr. Fagan's pre-filed testimony, showing Installed Reserves spiking to an 11-year high of 26% in 2019, demonstrates that there is no short-term need for Invenergy.

beyond the already-cleared surplus. Simply put, Mr. Fagan's testimony means that the plant is not needed for system reliability.

Notably, Invenergy and the Division of Public Utilities and Carriers (the Division) do not actually rebut Mr. Fagan's testimony. As Mr. Fagan points out on page 11, lines 10 through 15 of his Pre-Filed Direct Testimony, what Invenergy (and, later, the Division) actually say is that generators that obtain CSOs – like one of the Invenergy units – are needed not for reliability but rather to "maximize[e] social surplus" (or, again from the Division, to "minimiz[e] total capacity costs").

That is what Invenergy's expert witness Ryan Hardy says:

> The NICR is the minimum amount of capacity needed to meet ISO-NE's reliability target. However, meeting the NICR is only one component of need. ISO-NE's FCM is designed to determine need not just in terms of meeting the absolute minimum amount of capacity needed to maintain reliability, but also to maximize the overall value to the ratepayer. ISO-NE calls this maximization of value, maximizing social surplus.

Pre-Filed Rebuttal Testimony of Ryan Hardy, page 5, lines 20-24.

The Division's expert witness Seth Parker agrees:

> The ICR (or NICR) is no longer a fixed procurement target or a single need determinant; it is the FCA parameter corresponding to the probabilistically-determined capacity required to meet the 1-in-10 LOLE reliability criterion. ... The FCAs are designed to clear the amount of capacity that the ISO-NE system needs to ensure reliability while minimizing total capacity costs to be paid by consumers. As I explained earlier, the sloped demand curve allows ISO-NE to procure capacity in excess of the NICR. Capacity resources that clear are assigned CSOs by ISO-NE and are therefore needed. At the same time, capacity resources offered at prices exceeding the clearing price do not clear, are not assigned CSOs, and are not needed.

Pre-Filed Direct Testimony of Seth Parker, page 47, lines 15 through 20.

True, both Mr. Hardy and Mr. Parker profess to disagree with Mr. Fagan. But, far from actually rebutting Mr. Fagan, Messrs. Hardy and Parker both acknowledge that the NICR is the figure representing need in terms of system reliability, while a CSO is the result of a more complex analysis taking into account other factors (including cost) as well.

"Social surplus" is not the same as the statutory requirement of finding "need."

Because Mr. Hardy and Mr. Parker do not actually rebut Mr. Fagan's testimony that the proposed Invenergy plant is not needed for system reliability – in fact, there is no evidence that contradicts Mr. Fagan's testimony on this point – Mr. Fagan's testimony is binding on the PUC. The PUC must determine that the plant is not needed for system reliability.

B. No evidence supports a conclusion that the Invenergy plant is needed.

Perhaps more importantly, there is no record evidence to support a conclusion that the proposed Invenergy plant is needed.

The PUC may only base its advisory opinion on the evidence before it. As a general matter, the PUC "is charged with the duty of rendering independent decisions" that must be based on "the evidence presented before it by the division and by the parties in interest." R.I. Gen. Laws § 39-1-11. And in rendering an advisory opinion, the PUC should likewise take note that the ultimate burden of proving need for the plant rests with the applicant Invenergy. See R.I. Gen. Laws § 42-98-11(b)(1) (requiring a "finding that

the applicant has shown" need). Because the evidence before the Commission does not show that the proposed Invenergy plant is needed, the Commission cannot issue a finding of need for the plant.

Both Invenergy and the Division argue that ISO-NE's Forward Capacity Market determines need. By Invenergy's and the Division's reasoning, a CSO is equivalent to a showing of need for the generator that obtains the CSO. As is discussed above, this reasoning is incorrect – a CSO is not a showing of need but the result of a complex market mechanism that takes into account other factors such as cost. See Pre-Filed Rebuttal Testimony of Ryan Hardy, page 5, lines 20-24; Pre-Filed Direct Testimony of Seth Parker, page 47, lines 15 through 20. But even if the PUC were to accept the CSO-equals-need argument, neither Invenergy nor the Division has presented evidence to show that the proposed Invenergy plant is needed. This is because Invenergy has proposed a two-turbine, 1,000 MW plant but has not obtained a CSO for a two-turbine, 1,000 MW plant.

Let's consider the matter straightforwardly. Again, Invenergy has proposed a two-turbine, 1,000 MW plant.[2] The EFSB must therefore consider whether to license a two-turbine, 1,000 MW plant. And the PUC must likewise consider the need for a two-

[2] See, e.g., Rhode Island Energy Facility Siting Board Application, Clear River Energy Center (October 28, 2015) § 1.1, pp. 1-2 ("The Facility will be configured as a two-unit one-on-one (1x1), duct fired, combined cycle generation station. … The Facility will have a nominal power output at base load of approximately 850-1,000 megawatts (MW) while firing natural gas (with supplementary HRSG duct firing) and 650-800 MW while firing ULSD.")

turbine, 1,000 MW plant. It is undisputed that Invenergy has not obtained a CSO for a two-turbine, 1,000 MW plant. The upshot is that, even if one were to apply Invenergy and the Division's mistaken test for need, the record contains no evidence to support a finding that a two-turbine, 1,000 MW plant is needed.

But what about the 485 MW CSO Invenergy has obtained? At best that shows a need for a 485 MW project – not the project that Invenergy has proposed, not the project that is before the EFSB, and not the project that is before the PUC. Again, the Energy Facility Siting Act requires the applicant to show that "the proposed facility" is needed. R.I. Gen. Laws §§ 42-98-9(d) and 42-98-11(b)(1). The EFSB has therefore issued an order directing the PUC to consider "the need for the Project." Preliminary Decision and Order of the EFSB, SB-2015-06, p. 9. "The Project" is a two-turbine, 1,000 MW power generating facility. Not once does the EFSB Order describe the proposed Invenergy plant under consideration as a single-turbine, 485 MW generator. Instead, the Order says the proposed plant "will have a nominal power output at base load of approximately 850-1,000 megawatts" (pp. 1 and 2) and that the plant will consist of two units (p. 2). So defined, "the proposed facility" and "the Project" do not have a CSO. Neither Invenergy nor the Division has shown any need for a two-unit, 850-1,000 MW plant.

By the terms of the PUC's statutory mandate to consider the evidence before it and the EFSB's Preliminary Decision and Order, the PUC must conclude that the record does not show a need for the proposed Invenergy plant.

Conclusion

The PUC must consider whether the proposed Invenergy plant is needed. Simply put, the record does not support such a finding. The evidence put forth by CLF shows that the plant is not needed, and there is no evidence in the record to support a finding that the proposed two-turbine, 1,000 MW plant is needed.

WHEREFORE, CLF urges the Commission to issue an advisory opinion concluding that the record before it does not support a finding of need for the proposed Invenergy plant.

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CERTIFICATE OF SERVICE

I hereby certify that an original and nine copies of the within Memorandum were mailed to Lully Massaro, Commission Clerk, Public Utilities Commission, 89 Jefferson Blvd., Warwick, RI 02888. In addition, electronic copies only were transmitted to all of the persons on the PUC's Service List for this Docket. I hereby certify that all of the foregoing was done on the 18th day of August, 2016.