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September 25, 2020

**In the Matter of the Application of PSEG Nuclear, LLC and Exelon
Generation Company, LLC For The Zero Emission
Certificate Program – Salem Unit 1
Docket No. ER20080557**

**In the Matter of the Application of PSEG Nuclear, LLC and Exelon
Generation Company, LLC For The Zero Emission
Certificate Program – Salem Unit 2
Docket No. ER20080558**

**In the Matter of the Application of PSEG Nuclear, LLC For The Zero
Emission Certificate Program – Hope Creek
Docket No. ER20080559**

VIA ELECTRONIC DELIVERY

Aida Camacho-Welch, Secretary
New Jersey Board of Public Utilities
44 South Clinton Avenue, 9th Floor
P.O. Box 350
Trenton, New Jersey 08625-0350

Dear Secretary Camacho-Welch:

Enclosed is PSEG Nuclear, LLC's Brief in Opposition to the Motion to Intervene of New Jersey Large Energy Users Coalition ("NJLEUC") in the above-captioned proceedings. By copy of this letter, copies of the brief are being forwarded on this date via electronic mail to all persons whose names appear on the attached Service List.

Consistent with the Order issued by the Board in connection with In the Matter of the New Jersey Board of Public Utilities' Response to the COVID-19 Pandemic for a Temporary Waiver of Requirements for Certain Non-Essential Obligations, BPU Docket No. EO20030254, Order dated March 19, 2020, this document is being electronically filed. No paper copies will follow.

Thank you for your anticipated courtesies.

Sincerely,

A handwritten signature in black ink that reads "Grace H. Park" followed by a long horizontal flourish.

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**STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES**

In the Matter of the Application of PSEG Nuclear,)
LLC and Exelon Generation Company, LLC)
for the Zero Emission Certificate) Docket No. ER20080557
Program—Salem Unit 1)

In the Matter of the Application of PSEG Nuclear,)
LLC and Exelon Generation Company, LLC)
for the Zero Emission Certificate) Docket No. ER20080558
Program—Salem Unit 2)

In the Matter of the Application of PSEG Nuclear,)
LLC for the Zero Emission Certificate) Docket No. ER20080559
Program—Hope Creek)

**PSEG NUCLEAR, LLC’S AND EXELON
GENERATION COMPANY, LLC’S BRIEF IN
OPPOSITION TO THE MOTION TO INTERVENE OF
NEW JERSEY LARGE ENERGY USERS COALITION**

On September 21, 2020, the New Jersey Large Energy Users Coalition (“NJLEUC”) filed a motion for intervention (“Motion”) in the above-referenced dockets involving the applications of Hope Creek, Salem 1, and Salem 2 for the Zero Emission Certificate (“ZEC”) program. PSEG Nuclear, LLC (“PSEG”) and Exelon Generation Company, LLC (“Exelon Generation”) oppose this intervention for several reasons.¹ First, the Board of Public Utilities’ (“BPU”) November 19, 2018 Order denied NJLEUC’s virtually identical motion in the first ZEC application round seeking intervenor status and access to confidential documents. NJLEUC does not (and cannot) explain why the circumstances this time should yield a different result.

¹ PSEG’s opposition applies to the Hope Creek, Salem 1, and Salem 2 nuclear plants. Exelon Generation’s opposition is limited to the Salem 1 and Salem 2 nuclear plants.

Second, NJLEUC has not demonstrated that it is an “essential” participant entitled to review confidential financial information that will be submitted by applicants to the BPU.

Third, NJLEUC has not satisfied the statutory or regulatory criteria warranting intervention status this time. NJLEUC’s interest is not sufficiently different from that of any party such that it would measurably and constructively contribute to the scope of the proceeding. Its presence can only cause confusion and undue delay.

Notwithstanding the forgoing, should the presiding Commissioner consider allowing NJLEUC to be involved in the case, that involvement should be as a participant rather than as an intervenor.

FACTS

On May 23, 2018, Governor Murphy signed legislation into law that created a “Zero Emission Certificate” or “ZEC” program to provide support payments for at-risk nuclear power plants that serve New Jersey (the “ZEC Act”).² In the ZEC Act, the Legislature found that “[n]uclear power generation is a critical component of the State’s clean energy portfolio” and that “nuclear power is an important component of a diverse energy portfolio.” N.J.S.A. 48:3-87.3(a)(7). The ZEC Act requires applicants to submit an array of sensitive financial information, which the applicant can designate as confidential, to determine if the applicant qualifies for ZECs. *Id.* at 48:3-87.5(a). The above-referenced dockets were established by the BPU for this purpose. On September 21, 2020, NJLEUC filed a motion to intervene seeking (1) intervention status with full rights as a party, and (2) access to all information designated as confidential by applicants for ZECs.

² The ZEC Act was codified at N.J.S.A. 48:3-87.3 *et seq.*

ARGUMENT

A. NJLEUC's Motion To Intervene Should Be Denied For The Same Reasons The BPU Denied NJLEUC's Virtually Identical Motion To Intervene In The First ZEC Application Round

On October 16, 2018, during the first ZEC application round, NJLEUC filed a motion to intervene (“Previous Intervention Motion”). In the Previous Intervention Motion, NJLEUC argued that its “interests are unique from and not adequately represented by any other party” and that “[f]undamental fairness and due process considerations” require it be granted intervenor status with full rights of a party and access to confidential information. NJLEUC Motion to Intervene, BPU Docket No. EO18080899, at 3, 7 (Oct. 16, 2018). On November 19, 2018, the BPU denied NJLEUC’s Previous Intervention Motion. The BPU ruled that NJLEUC had “not made a showing that its interest in this matter warrants granting its motion to intervene, given the statutory scheme with its numerous opportunities for public participation through public comments and public hearings, the explicit provision at N.J.S.A. 48:3-87.5(a) concerning confidential documents, and the need for prompt and expeditious administrative proceedings.” Order on Motions to Intervene or Participate and for Admission Pro Hac Vice, BPU Docket No. EO18080899, at 9 (Nov. 19, 2018). The BPU also ruled that “NJLEUC is not essential to aid the Board” in understanding the issues in the first ZEC application round. *Id.* at 10. As a result, the BPU denied NJLEUC intervenor status and denied NJLEUC access to confidential documents. *Id.*

In the instant Motion, NJLEUC again moves to intervene with full rights of a party and access to confidential documents. In fact, NJLEUC’s Motion is virtually identical to the Previous Intervention Motion. Once again, NJLEUC argues that its “interests are unique from and not adequately represented by any other party” and that “[f]undamental fairness and due process considerations” require it be granted full rights of a party with access to confidential information. Motion at 3, 7. However, NJLEUC neither addresses the BPU’s November 19, 2018 Order

denying its Previous Intervention Motion, nor explains why the applicable legal standards – which remain unchanged – warrant a different outcome this time. The reason for this intentional omission is because the reasoning in the BPU’s November 19, 2018 Order applies with equal force now. This is especially true given that the Motion and the Previous Intervention Motion are virtually identical. The Previous Intervention Motion was legally insufficient, and the instant Motion suffers the same fatal flaw. The rationale underlying the BPU’s November 19, 2018 Order remains controlling and warrants denial of NJLEUC’s Motion.

B. NJLEUC Has Not Demonstrated That Its Participation Is “Essential” To This Proceeding And Therefore Is Not Entitled To Confidential Information

NJLEUC contends that it should be entitled “to obtain access to confidential materials.” Motion at 2. However, under the ZEC Act, confidential information supplied by an applicant for the purpose of demonstrating eligibility is only available to entities that have been “deem[ed] essential [by the Board and the Attorney General] to aid the board in making the determinations required” in this proceeding. N.J.S.A. 48:3-87.5(a). The “essential” requirement exists because the ZEC Act requires applicants to submit an array of sensitive financial information that can be designated as confidential, and only those entities necessary in aiding the BPU’s review of an application should be granted access to this confidential information. *Id.*

Even if NJLEUC were granted status as an intervenor (which, as shown below, it should not be), NJLEUC would still not be “essential” as required by the ZEC Act to be permitted access to confidential submittals. First, NJLEUC never alleges in its Motion that it is “essential to aid the board in making the determinations” required for establishing eligibility under the ZEC Act. N.J.S.A. 48:3-87.5(a). Because NJLEUC fails even to allege – let alone support an allegation – that it is essential to aid the BPU in making the financial determinations required under

the ZEC Act, it cannot be granted access to confidential financial information submitted by ZEC applicants. Not only does NJLEUC fail to allege compliance with the “essential” standard, it denies its existence. Specifically, NJLEUC contends that “[t]he Board has consistently authorized the disclosure of confidential information [subject to execution of a confidentiality agreement], and this matter presents nothing new that would justify a departure from this longstanding and firmly-established practice.” Motion at 7. However, this proceeding does present “something new” that justifies “a departure” from past practices: the requirement under the ZEC Act that the movant demonstrate an “essential” need to assist the BPU.

NJLEUC claims that its participation as an intervenor in the stranded cost proceedings under the Electric Discount and Energy Competition Act in the 1990s, with access to confidential information, supports its argument here that it should be granted access to confidential information. This argument is misplaced because there was no requirement in those cases that intervenors demonstrate that their participation in the BPU’s financial evaluation was “essential” to the BPU’s deliberations.

Second, even if dismissal of NJLEUC’s request for access to confidential financial information under the ZEC Act were not barred by its failure to plead the necessary elements to establish an entitlement, it still would not be eligible. To demonstrate that it is “essential” for the determinations required under the ZEC Act, NJLEUC would need to show that those determinations could not reasonably be made without its involvement because its participation is “basic and necessary” and “of the utmost importance.”³ NJLEUC has not (and cannot) make that

³ See *Air Master & Cooling, Inc. v. Selective Ins. Air Master & Cooling, Inc.*, 452 N.J. Super. 35, 53 (App. Div. 2017) (applying “standard dictionary definitions for ‘essential’” and citing BLACK’S LAW DICTIONARY 663 (10th ed. 2014), defining “essential” as “[o]f utmost importance” or “basic and necessary”); *Raush v. Raush*, 2017 WL 3722545 (App. Div. 2017) (“Essential terms are those that are ‘[o]f the utmost importance’ or are ‘basic and necessary’ to the parties’ agreement”, citing BLACK’S LAW DICTIONARY 663 (10th ed. 2014); cf. *Mars, Inc. v. JCM Am. Corp.*, 2006 WL 3373284 (D.N.J. 2006) (dismissing claims for summary judgement in patent case dependent on whether materials incorporated by reference were “essential” because movant failed to show that “without [the incorporated materials], one skilled in the art is not sufficiently ‘enabled’ to produce the invention”).

showing. The BPU has the inherent capabilities to make the financial determinations required under the ZEC Act with its own personnel. In addition, the BPU is expressly permitted by the ZEC Act to hire any necessary consultants as it did during the first application process and, through a \$250,000 fee for each applicant plant, i.e., \$750,000 in total, will have ample means to do so.

C. NJLEUC Has Not Demonstrated Its Entitlement To Become An Intervenor

N.J.A.C. 1:1-16.1 provides that “[a]ny person or entity not initially a party . . . who will be substantially, specifically and directly affected by the outcome of a contested case, may on motion, seek leave to intervene.” N.J.A.C. 1:1-16.3 provides the following standards to consider in addressing a request for intervention:

- i. the nature and extent of the movant’s interest in the outcome of the case;
- ii. whether or not the movant’s interest is sufficiently different from that of any party so as to add measurably and constructively to the scope of the case;
- iii. the prospect of confusion or undue delay arising from the movant’s inclusion; and
- iv. other appropriate matters.

The relevant statutory factors warrant denial of NJLEUC’s request for intervenor status.

First, NJLEUC’s alleged interest justifying intervention is that its members are some of the largest consumers of power and therefore pay significant ZEC charges, which may impact corporate decision-making. Motion at 2-3. This tangential interest is insufficient to warrant granting NJLEUC the rights of an intervenor in this proceeding governing whether nuclear applicants are entitled to ZECs. NJLEUC’s legally insufficient interest is coupled with the recognition that, as shown above, NJLEUC will not be entitled to review the financial

information under the statutory language limiting access to “essential” parties. Accordingly, NJLEUC will not be able to make any contribution in the review of that information.

In addition, NJLEUC wrongly contends that plants selected to receive ZECs in this proceeding will be entitled to payments for 10 years. Motion at 3. In fact, the proceeding before the BPU only deals with payments for the three-year eligibility; selected plants need to reapply for subsequent periods and therefore payments after this three-year period are not at issue in this proceeding. NJLEUC has exaggerated the impact that this proceeding could have on its membership and has not explained in a meaningful manner how its status as a party would “measurably and constructively” aid in the resolution of any of the issues before the BPU.

Second, NJLEUC’s interests in this proceeding will be adequately represented by the New Jersey Division of Rate Counsel (“Rate Counsel”). Rate Counsel “is the statutory representative of ratepayers” and operates “as a representative of the public.” Division of Rate Counsel Motion for Access to Confidential Information, BPU Docket No. E018080899 at 3, 4 (Sept. 21, 2018). Under the BPU’s September 15, 2020 Order, Rate Counsel will be given access to confidential information in this ZEC application round because Rate Counsel was previously granted such access in the first ZEC application round. Order – Motions to Intervene and Participate and Access to Confidential Information, BPU Docket No. ER20080559, at 3 (Sept. 15, 2020). NJLEUC questions Rate Counsel’s ability to represent its members, contending that “residential customers . . . are the primary focus of Rate Counsel.” Motion at 3. However, there is nothing in Rate Counsel’s statutory authority that limits Rate Counsel’s role as an advocate for the public interest. In fact, as stated on Rate Counsel’s website, it represents the interests of all consumers, including commercial and industrial. State of New Jersey Division of the Rate Counsel, “Learn About the Division,” (<https://www.nj.gov/rpa/about>). Further, in this case, given that the ZEC

charge applies to all distribution customers across-the-board without regard to rate class designations, the interests of residential, commercial, and industrial customers are fully aligned.

Third, NJLEUC's intervention in this proceeding would cause undue delay. The ZEC Act sets forth mandatory deadlines for completion of the BPU's deliberations. Applications will need to be filed by October 1, 2020, and the BPU will be required to make a decision regarding whether and to whom to award ZECs by April 30, 2021. The procedural schedule has numerous deadlines to be completed in a short timeframe, including: two weeks to respond to two separate rounds of discovery requests in October and November 2020, seven days to respond to final discovery requests in January 2021, and evidentiary hearings and briefing occurring in February and March 2021. This means that the BPU will have a great deal to accomplish within a compressed time frame – including a period that encompasses the holiday season – to hire consultants, review and analyze application submittals, obtain additional information as needed, review and analyze additional information submittals, issue preliminary findings, hold public and evidentiary hearings, identify plants that meet the eligibility requirements, determine ranking criteria, rank eligible plants and prepare its order explaining its decision. Allowing NJLEUC to intervene will inevitably slow down this process and could impose extraordinary burdens on the BPU in order to meet its statutory obligations in a timely manner. To the extent NJLEUC wants to participate in the process, the procedure set out by the statute and the BPU affords NJLEUC ample opportunities to participate without being an intervenor, including public hearings and comments.

CONCLUSION

NJLEUC has failed to justify its entitlement to confidential financial information as an “essential” party needed to assist the BPU, and also has failed to meet the basic standards

for intervention in this proceeding. Its participation as an intervenor would simply create undue delay and interfere with the ability of the BPU to meet a strict statutory timeline without adding constructively to the resolution of the issues that need to be addressed. For the reasons the BPU articulated in denying NJLEUC's motion to intervene in the first ZEC application round, the instant Motion should be denied. In the alternative, should the presiding Commissioner decide to authorize NJLEUC's involvement in this case at all, such involvement should be limited to participant status.

Respectfully submitted,



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