

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

Comments of the PJM Power Providers Group

to the Notice of Request for Written Comments

Application for Zero Emission Certificate Program Docket No. EO18080899

The PJM Power Providers (“P3”)¹ appreciates the opportunity to again comment in this docket.² As P3 previously noted, the Board of Public Utilities (“BPU” or the “Board”) was given a tall task by the General Assembly when it passed P. L. 2018, c. 16³ (“Act”) on April 12, 2018 and the legislation was signed into law by the Governor on May 23, 2018. The Act required the Board to invent a process to approve an unprecedented charge on New Jersey’s electricity consumers without having the typical regulatory tools available to render a just and reasonable decision. P3 understands that the BPU was put in a very tough spot. Despite the fact that multiple experts, including Board Staff, agreed that the nuclear plants in New Jersey were profitable and did not require a subsidy, the operators of the plants, PSEG and Exelon, threatened to close them. This threat in essence forced the Board to “play chicken” with the plant operators to determine if

¹ P3 is a non-profit organization dedicated to advancing federal, state and regional policies that promote properly designed and well-functioning electricity markets in the PJM Interconnection, L.L.C. (“PJM”) region. Combined, P3 members own approximately 65,000 MWs of generation assets and produce enough power to supply over 50 million homes. The comments contained in this filing represent the position of P3 as an organization, but not necessarily the views of any particular member with respect to any issue.

² Request for Written Comments, Applications for Zero Emission Certificate Program, NJ BPU Docket No. EO18080899, July 1, 2020,

[https://www.nj.gov/bpu/pdf/publicnotice/ZEC%20Application%20Request%20for%20Comment%20-%20Notice%20\(003\).pdf](https://www.nj.gov/bpu/pdf/publicnotice/ZEC%20Application%20Request%20for%20Comment%20-%20Notice%20(003).pdf) (“July 1, 2020 NJ BPU Request for Written Comments.”)

³P. L. 2018, c. 16, (N.J.S.A. 48:3-87.3, et seq.)

their threats were real or hollow. The Board should strive to not put itself in that same position ever again.

The Board is now requesting comments on the draft application that the Board will use to determine which, if any, nuclear power plants will be eligible to receive Zero Emission Certificates (“ZECs”) during the next three-year eligibility period. In order to improve the process going forward, P3 suggests that the Board focus on three areas: transparency, operational and market risk, and the need for more in-depth financial information.⁴

1. Transparency

As is well documented in this docket, P3 was extremely frustrated by the lack of transparency associated with the entire process leading up to the April 18, 2019 Board order that awarded ZEC payments to profitable nuclear facilities. P3 was denied intervenor status, and P3 noted the inability to respond to information deemed confidential that went to the question of whether the nuclear power units were truly in the financial distress they purported to be in. As a result, the ability of parties, like P3, whose members own generation and therefore understand the workings of power plant finances, was limited in its ability to help develop a record. The Board unnecessarily limited the participation of several parties that were in a position to offer valuable commentary and insights to the Board.⁵ The Board missed a valuable opportunity to benefit from the perspectives of multiple other parties which, in the end, created a less robust record upon which to base a decision. The Board must not make the same mistake again. Moving forward, and now with this new draft application, the Board should

⁴ The PJM Power Providers (“P3”) is currently a party to the Appeal of the April 18, 2019 BPU decision, and nothing contained herein, shall constitute a waiver of any issue regarding the P3 Appeal of the underlying April 18, 2019 decision.

⁵ Note that under section 3(a) of the ZEC act, the Board has the authority to designate certain parties as “...essential to aid the board in making the determinations” and can allow parties to review confidential information subject to appropriate confidentiality protections. Section 3(a) of P. L. 2018, c. 16, (N.J.S.A. 48:3-87.3, et seq.),

institute a more transparent process that New Jersey ratepayers and interested parties deserve. It is in the Board and New Jersey ratepayers' interests to have a full and transparent process.

Specifically, P3 believes that the review process should be longer and more transparent. As P3 noted in its November 13, 2018 letter to the Board in this matter, the Board, in order to protect truly confidential information, has the ability to require the execution of non-disclosure agreements which can be appropriately tailored to deal with the specific parameters of this matter. Further, there are also other ways in which the Board could deal with potential access to confidential information, for instance, by limiting access to certain persons, or by closely scrutinizing and then narrowing the applicant's assertions as to what constitutes confidential information. Outside consultants can also be utilized to review information. The Board does not need to unnecessarily limit its ability to receive input from all stakeholders in order to fully inform its decisions. The Board can and should address this issue as early in the process as possible to give parties clarity as to their role.

P3 understands that the ZEC approval is not a traditional rate case, but many of the questions posed to the Board bear a remarkable similarity to traditional rate case questions. The legislation essentially asks the Board to pass judgment on whether deregulated generation facilities are profitable – or whether their costs plus risks exceed their revenues. Importantly, in the upcoming review, the Board will have the ability to adjust the level of subsidy to a number below the \$300 million a year cap which will require the Board to more thoroughly review and analyze the numbers in a manner that resembles a rate case. In a rate case, parties can challenge every cost input on a granular basis in an open forum. No such forum existed in the initial proceeding and the public was basically shielded from this analysis while the applicants were in the convenient

position of being able to tell the Board their costs and the Board was hamstrung in its review because it did not have the benefit of opposing views.

2. Operational and Market Risks

The Board's decision to approve the initial ZEC subsidy rested almost entirely on the notion that the plant owners somehow needed to be compensated for their "market" and "operational" risks. The facts in the docket were clear and the Board Staff found that the plants were "viable under current market conditions" and did not require additional financial support to cover their operating expenses.⁶ In other words, the plants' revenues exceeded their costs and therefore did not require a subsidy in order to make a profit for their owners.⁷ However, the subsidy was eventually awarded based on a very ill-defined and unsupported notion that \$300 million a year was required to compensate the plant owners for their market and operational risks otherwise the plant owners would close the facilities. Again, New Jersey deserve a better process than this.

P3 believes that the Board should define and clarify who bears the burden of operational and market risks and what risks are appropriately borne by the company and what, if any, should be borne by consumers. As the Board noted, "It is clearly within the Board's authority to determine the weight that should be given to these factors."⁸ As President Fiordaliso commented at the April 18, 2019 meeting, "the eligibility team concluded that none of these three units met

⁶April 18, 2019 State of New Jersey Board of Public Utilities Order Determining the Eligibility of Hope Creek, Salem 1, and Salem 2 Nuclear Generators to Receive ZECs ("Order") at p. 10.

⁷ Transcript, In The Matter of BPU Board Agenda Item 9A, April 18, 2019 ("Transcript"), "the eligibility team, quite frankly, determined that the units are financially viable as they stand now in the current market conditions and that they were not in need of this subsidy." Transcript at p. 12. Staff further noted "Financial risk of plants shutting down without material changes, we determined that they did not qualify for that requirement of the Act." Transcript at p. 13. Although Board Staff, Levitan Associates, Rate Counsel, the PJM IMM and P3 did not believe that the plants met the financial requirements, the Board included the operational and market risks and therefore approved the ZECs based on this item. See Transcript at p. 16-19.

⁸ Order at p. 14.

the financial threshold necessary to be awarded ZECs.”⁹ The eligibility team found that market and operational risks included by PSEG in the applications should be excluded from the financial viability of the nuclear units.¹⁰ As the April 18, 2019 Order stated, Board Staff and Levitan & Associates, Inc. adopted the Board’s more traditional view that certain items raised by the applicants – specifically, inclusion of operational risks and market risks *should not be considered* in the analysis of the need for ZECs. Staff relied on its own review, comments of Rate Counsel, the PJM Independent Market Monitor and other participants rejecting risk calculations.¹¹

However, President Fiordaliso noted that he believed that “operational risks and market risks” should be evaluated in the applications, and that these risks are defined as “operational costs or operating costs higher than anticipated and market risks, i.e., market energy and capacity price volatility.”¹² Further, in the Order the Board cited that the Act defines “operational risks” to include, but not limited to, the risk that operating costs will be higher than anticipated because of new regulatory mandates or equipment failures and the risk that per megawatt-hour costs will be higher than anticipated because of lower than expected capacity factors, and that the Act defines “market risks” as including but not limited to, the risk of a forced outage and the associated costs arising from contractual obligations, and the risk that output from the nuclear power plant may not be sold at projected levels.¹³

Given that operational and market risk, not the financial position of the nuclear plants, was a determinative factor upon which the Board awarded the ZECs, it is important for the Board to *analyze, define and quantify these risks, and specifically assess who bears the burden*

⁹ Transcript at p. 16.

¹⁰ Order at p. 10.

¹¹ Order at p. 13.

¹² Transcript at p. 17.

¹³ Order at p. 14.

of the risks. For example, if gas prices go up or down or a plant temporarily shuts down due to an act of God – do ratepayers or the nuclear plant owners bear the risk? Similarly, if the operations at the plant cease due to improper operations or maintenance, should consumers bear the risk? Under current Board policy, they appear to. There are many risks and factors to consider and determinations on who bears each risk. Due to the importance and expansiveness of this issue, perhaps the Board should commence a separate inquiry that comprehensively evaluates such risks and who bears the burden of each risk. The record related to risk in the awarding of the first three years of ZEC payments is extremely thin. The Board should strive to not base a potentially \$300 million decision on such a thin record.

Although the enabling legislation discusses market and operational risk, the Board has the discretion to determine the appropriate quantification of those risks.¹⁴ P3 reiterates the comments made by Paul Sotkiewicz, Ph.D., on behalf of P3 and in response to Board Staff regarding accounting for risk in PJM’s markets and how generators bidding into the PJM Energy and Capacity Markets typically cover their operational and market risks, and whether these risks are built into pricing bids or assumed by the bidder. As Dr. Sotkiewicz stated, “In competitive electricity markets it is the responsibility of the generation owner to find the means to mitigate operational and market risks, and to enjoy the payoffs from successfully managing this risk as well as any potential downside of not managing such risks.”¹⁵ As Dr. Sotkiewicz concluded, “Generation resources have many opportunities to manage their market and operational risk both outside of PJM’s markets and within the framework of PJM’s markets.

¹⁴ Section 3(a) and 3 (j) of P. L. 2018, c. 16, (N.J.S.A. 48:3-87.3, *et seq*)

¹⁵ In the Matter of the Implementation of L. 2018 c.16 Regarding The Establishment of a Zero Emission Certificate Program for Eligible Nuclear Power Plants, BPU Docket No. EO18080899, *Response of Paul M. Sotkiewicz, Ph.D., on Behalf of the PJM Power Providers Group In Regard to Staff Questions On Accounting For Risk*, March 8, 2019, (“Dr. Sotkiewicz, Testimony on Accounting for Risk”) at P 8.

Given this ability to manage risk, it would not be appropriate to allow PSEG nuclear resources to include in any ZEC payments risks for which they already have the ability to manage and for which they are best positioned to managed.”¹⁶ It is important to note that P3 members, who combined own over 65,000 MW of power, bear and manage these risks without the ability to shift that risk to captive ratepayers, and P3 whole-heartedly shares the view of Board staff that generators should have the obligation to manage these risks lest ratepayers be left with a losing scenario.

P3 continues to believe that operational and market risks should be borne by plant operators and that it is not the responsibility of New Jersey ratepayers to assume the burdens associated with those risks. If, however, the Board still makes the ill-advised decision to include operational and market risks, which was opposed by Board Staff and the consultants, the risks must be specifically quantified so that the Board can determine the appropriate level, if any, of the subsidy.

3. More In-Depth Financial Information is Required from the Applicant

Based on flexibility to award ZEC payments of less than \$300 million a year, the Board, as part of this second review, has an obligation to know *even more* in-depth financial information. Importantly, the Act, P. L. 2018, c. 16, (N.J.S.A. 48:3-87.3, et seq.), vests the Board with discretion to determine whether a nuclear facility has satisfied the objectives of the Act, and if it does not, the Board is under no obligation to certify such nuclear plant as eligible. Additionally, this time around the Board is required to obtain and know even more detailed information as it may reduce the per kilowatt-hour charge. Specifically, the Act states:

Notwithstanding the provisions of paragraph (1) of this subsection, and to ensure that the ZEC program remains affordable to New Jersey retail distribution customers, the board may, **in its discretion, reduce the per kilowatt-hour charge** imposed by paragraph (1) of this subsection starting in the second three year eligibility period and for each subsequent three year eligibility period thereafter, provided that the board

¹⁶ Dr Sotkiewicz, Testimony on Accounting for Risk, at PP 25 and 26.

determines that a reduced charge will nonetheless be sufficient to achieve the State's air quality and other environmental objectives **by preventing the retirement of the nuclear power plants** that meet the eligibility criteria established pursuant to subsections d. and e. of this section.¹⁷

The Board is under an obligation to reduce the kilowatt-hour charge, and to determine an actual charge.

Again, P3 stresses that the Board has the responsibility to ensure that the intent of the statute is met: that no financial award will be made where it was not supported by the substantial and credible evidence in the record. The BPU must carefully scrutinize and determine the costs of the ZEC awarded nuclear power plants. As Commissioner Solomon stated at the April 18, 2019 BPU Board meeting, "The Legislature and Governor provided very specific criteria for determining whether a nuclear generator is entitled to ZECs. Specifically, it requires that PS show that their costs and risks exceed their revenues or that PS could not cover adjusted cost of capital and would cease operation within three years without material financial change. In the event that revenues are greater than PS's cost and risk, we do not have the authority under the legislation tool for ZECs."¹⁸ The Board must ensure that costs of subsidized nuclear power plants are prudently incurred. The Board can and should establish a process, similar to a traditional rate case, for evaluating these costs. Moreover, information regarding the return on investment that ZEC plants receive should also be disclosed and subject to challenge— as would be the case in any rate case before the Commission. P3 appreciates that the nuclear facilities are not regulated assets in the traditional sense, but the Board's evaluation must consider how much profit is appropriate as it considers the appropriate level of subsidy.

¹⁷ Section 3 (j) (3) (a) of P. L. 2018, c. 16, (N.J.S.A. 48:3-87.3, et seq.), emphasis added.

¹⁸ Transcript at p. 20.

As part of that review, the Board must obtain specific bid information related to the nuclear plants in New Jersey from the applicant or PJM. The Board needs to understand and consider how these subsidy-seeking plants are participating in the capacity auctions and ensure that the plant owners are appropriately bidding their units into the auction. Similarly, if the owners of Hope Creek and Salem are seeking a unit specific cost review prior to a PJM capacity auction, the Board should have complete access to all information submitted to PJM and the PJM Independent Market Monitor. Consistent with the above comments regarding transparency, parties should have the ability to review and challenge these submissions subject to appropriate confidentiality protections. Specifically, question 8 in the Financial section on page 5 of the draft application asks the applicant to “Provide for the annual average Unit bid price in the annual Base Residual Auction (“BRA”) over the past five (5) years (\$/MW).”¹⁹ This question should be expanded to make it clear that the ZEC applicant needs to include in its application all capacity auction bids, by year, as well as any cost data that is submitted to PJM and the PJM Independent Market Monitor as part of a unit specific review process.

4. Conclusion

As a matter of public policy, ZECs are a political solution to poorly defined problems that create long term challenges for any regulatory policy. P3 and many other parties attempted without success to persuade the General Assembly not to put the Board in the position it has been put in. P3 wishes that the BPU was not given the unenviable task of dealing with the “messy details” that have proven to be very messy indeed.

In order to make the best of a bad situation, the Board must commit itself to a better process moving forward so as to not put itself in a position of being “directed to pay ransom.”²⁰ While

¹⁹ July 1, NJ BPU Request for Written Comments, at p. 5 of the draft Application.

²⁰ Commissioner Gordon, Transcript at p. 26.

the applicants will protest and raise smokescreens of confidentiality, the Board must find a way to appropriately provide more transparency consistent with the ideas presented above. Also, the Board must either not include operational and market risks in the financial determination of whether ZECs are awarded or specifically identify and quantify any risks that are worthy of consideration. Further, the Board must also ask the applicants more detailed in-depth financial information as this higher burden is required by the statute this time around. The Board has a constitutional obligation to ensure just and reasonable rates and must demand more financial information.

P3 respectfully requests that the Board and Board Staff consider its comments herein and institute a more open and transparent process with the goal of making sure that the applicants have properly and satisfactorily demonstrated to the Board and ratepayers that their requests for more subsidies are just, reasonable, and required under the law.

Respectfully submitted,

On behalf of the PJM Power Providers Group

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