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September 21, 2018

Via Hand Delivery

Honorable Gurbir S. Grewal
Office of the Attorney General
Richard J. Hughes Justice Complex
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Trenton, NJ 08625-0080

Ms. Aida Camacho-Welch, Secretary
Board of Public Utilities
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3rd Floor, Suite 314
P.O. Box 350
Trenton, New Jersey 0862500350

Re: I/M/O the Implementation of L. 2018, C. 16 Regarding the Establishment of a Zero Emission Certificate Program for Eligible Nuclear Power Plant BPU Dkt. No. EO18080899

Dear Attorney General Grewal and Secretary Camacho-Welch:

Please accept this letter in lieu of more formal submission on behalf of the New Jersey Division of Rate Counsel (“Rate Counsel”) in support of its motion seeking access to confidential information in BPU Docket No. EO18080899 and any and all proceedings before the Board of Public Utilities (“Board” or “BPU”) arising out of that matter and L. 2018, ch. 16. (S2313/A3724 Establishes zero emission certificate (“ZEC”) program for nuclear power plants) (hereinafter “ZEC proceedings”). Rate Counsel is, of course, willing to accept this information subject to the standard Non-disclosure Agreement (NDA) developed by the Attorney General and routinely used in matters before the Board.

Rate Counsel is seeking approval to access confidential information now in order not to delay any proceedings that are subject to a statutory deadline. Once the Board establishes its

rules, which are subject to a 180 day deadline, the applicants will be submitting their information within 30 days thereafter. The Board then only has 90 days to establish whether any applicants are eligible for ZECs. In the event any applicant contests Rate Counsel's ability to get the confidential information or in the event any party seeks a review of the Board's decision regarding who gets access to confidential information, there will be little time to litigate these issues once the applications are submitted. Accordingly, Rate Counsel seeks a determination now that it is entitled, on behalf of ratepayers and subject to an NDA, to receive all of the information submitted.

There can be no doubt that Rate Counsel is entitled to be a party to these proceedings. As you are aware, N.J.S.A. 52:27EE-48 provides that Rate Counsel may represent and protect the public interest:

in proceedings before and appeals from any State department, commission, authority, council, agency or board charged with the regulations or control of any business, industry, or utility regarding a requirement that the business, industry or utility provide a service or regarding the fixing of a rate, toll, fare, or charge for a product or service.

The ZEC proceedings clearly fall within the proceedings covered under Rate Counsel's enabling statute as they involve the fixing of a rate to be charged to the public by a business that is providing a service. See, Public Service Electric & Gas Co. v. Rodriguez, 195 N.J. Super. 252, 257 (App.Div. 1984)(rejecting PSE&G's argument that Rate Counsel lacked authority to intervene in a federal matter involving nuclear power due to "the very apparent public interest in nuclear energy matters which deserves representation."). Accordingly, by operation of the statute Rate Counsel is a party to these proceedings.

However, L. 2018, ch. 16 provides that in order for a party to be permitted to review information marked "confidential" by an applicant for ("ZECs");

The board and the Attorney General shall jointly approve the disclosure of such confidential information to a party that they deem essential to aid the board in making the determinations required under this subsection, provided the party is not in a position such that disclosure could harm competition and the party agrees in writing to maintain the confidentiality of the confidential information.

L. 2018, ch. 16, Section 3(a).

As noted, Rate Counsel would certainly take the information deemed confidential pursuant to the NDA that has been developed by the Attorney General. There has never been an assertion that Rate Counsel has failed to maintain confidentiality in any of the thousands of cases in which it has participated pursuant to the NDA. Nor can there be any claim that Rate Counsel's review of the information could harm competition, as Rate Counsel is not a competitor of the nuclear plants and would be bound not to disclose the information to the nuclear plant's competitors. Thus, those factors do not come into play in the consideration of Rate Counsel's review of confidential information.

The only question would be whether Rate Counsel's participation in these proceedings may be deemed "essential." While the standards for this criterion are not set forth in the statute, and presumably will be fleshed out during the Board's initial proceeding, there can be no doubt that the legislatively-designated representative of New Jersey's ratepayers must be included in the review of the applications in order for the requirements of due process to be upheld. In their applications, the nuclear plants will be seeking to demonstrate that they should be awarded hundreds of millions of dollars to be collected from ratepayers to subsidize their operations. If the statutory representative of ratepayers is not permitted to review all of the documents and data submitted to support the applications, ratepayers will not be adequately represented in the process. The opportunity to comment alone, without access to key documents deemed confidential is not enough to meet due process requirements.

The interest of ratepayers is not otherwise represented. While the BPU certainly takes the public interest into account in rendering its decisions, it does so as a regulator, not as a representative of the public. Similarly, while the Attorney General's Office will certainly participate in the proceedings, it does so as the representative of BPU Staff, not as the representative of ratepayers. Thus, if Rate Counsel is not permitted to participate in these proceedings in a meaningful way, ratepayers' interests will not be represented in the proceedings.

Access to all information submitted by the applicants is necessary for ratepayers to have a meaningful opportunity to participate in these proceedings. As the Supreme Court stated in the seminal case of Mathews v. Eldridge, 424 U.S. 319, 333 (1976) "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). Here, applicants will have the ability to designate, subject to the Board's confidentiality rules, N.J.A.C. 14:1-12.1 et seq., what information in their applications they believe is confidential. Much of that information is likely to go to the heart of the application, including the applicant's revenues, costs and risks. If the ratepayers who will be asked to compensate the applicants for their risks are not permitted to see what those risks are, then ratepayers' participation will not be meaningful or consistent with due process.

The New Jersey Legislature has consistently made clear that interested persons, such as the ratepayers here, must have a meaningful opportunity to review and participate in administrative proceedings where their interests will be adjudicated. This principle appears not only in Rate Counsel's enabling statute quoted above, in which our office has been given broad jurisdiction to represent the public interest, but also in the Administrative Procedures Act, which

requires that an administrative agency deciding whether to issue a permit or approval, should allow "all interested persons" a "reasonable opportunity to submit data, views or arguments, orally or in writing," and that "persons who have particularized property interests or who are directly affected by a permitting decision have constitutional and statutory rights and remedies." N.J.S.A. 52:14B-3.1. See also, N.J.S.A. 52:14B-4 (Requiring in rulemaking proceedings that interested persons be afforded the opportunity to submit data, views, comments, or arguments, orally or in writing). While the statute here includes language to protect applicants' proprietary information from their competitors, that language does not cite Rate Counsel's participation and it would not be reasonable to interpret that language to override all of the language in these other enactments or fundamental principles of due process. This is particularly true where there is a simple and reasonable mechanism, the NDA, which would protect the applicants' rights without trampling on ratepayers'.

As the Court stated in Mathews, supra,

The essence of due process is the requirement that "a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." Joint Anti-Fascist Comm. v. McGrath, 341 U.S., at 171-172 (Frankfurter, J., concurring). All that is necessary is that the procedures be tailored, in light of the decision to be made, to "the capacities and circumstances of those who are to be heard," Goldberg v. Kelly, 397 U.S., at 268-269 (footnote omitted), to insure that they are given a meaningful opportunity to present their case.

424 U.S. at 348-349.

Here, Rate Counsel, the statutory representative of the ratepayers who would be required to fund any zero emission credits awarded by the Board, should be permitted to fully participate in these proceedings and gain access to confidential information subject to an NDA. If such access is not permitted, then an essential party will be deprived of meaningful due process and

any administrative action that results will be *ultra vires*. Thus, Rate Counsel's ability to fully participate and review documents designated as confidential is essential to allow the Board to make a valid and constitutional determination.

Accordingly, Rate Counsel respectfully requests that its motion for access to confidential information in this proceeding and all proceedings arising out of L. 2018, Ch. 16 be granted. Rate Counsel requests further that, to avoid any delay of these proceedings, this issue be addressed at the Board's October 29 Agenda Meeting or as soon thereafter as possible. Thank you for your consideration in this matter.

Respectfully submitted,



Stefanie A. Brand

Director, Division of Rate Counsel

SAB/lg

c: Caroline Vachier, Deputy Attorney General
Service List

I/M/O THE IMPLEMENTATION OF L. 2018, C. 16
REGARDING THE ESTABLISHMENT OF A ZERO
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NUCLEAR POWER PLANTS ORDER INITIATING THE
ZERO EMISSION CERTIFICATE PROGRAM,
DESIGNATING COMMISSIONER, SETTING MANNER
OF SERVICE
BPU Dkt. No.: EO18080899

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