**SUPERIOR COURT OF NEW JERSEY**
**APPELLATE DIVISION**
Docket No. A-002518-20

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| In the Matter of the Application of PSEG Nuclear, LLC and Exelon Generation Company, LLC for the Zero Emission Certificate Program – Salem Unit 1 | ) | APPELLATE DIVISION **Docket No. A-002518-20** |
| In the Matter of the Application of PSEG Nuclear, LLC and Exelon Generation Company, LLC for the Zero Emission Certificate Program – Salem Unit 2 | ) | Civil Action On Appeal from Orders of the New Jersey Board of Public Utilities in: Docket Nos. ER20080557, ER20080558, ER20080559 |
| In the Matter of the Application of PSEG Nuclear, LLC for the Zero Emission Certificate Program – Hope Creek | ) | |

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# BRIEF OF APPELLANT NEW JERSEY DIVISION OF RATE COUNSEL

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**PUBLIC VERSION**

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## PRELIMINARY STATEMENT

This appeal challenges the April 27, 2021 decisions of the New Jersey Board of Public Utilities to award approximately $800 million in ratepayer-funded subsidies in the form of "zero emissions certificates" or "ZECs" to the owners of three nuclear power plants for a second, three-year eligibility period. In this case, unlike the prior proceedings in which the ZECs were granted for the first eligibility period, the Board possessed explicit statutory authority to award less than the statutory maximum subsidy of $10 per megawatt-hour. In fact, the Board was required in this round of reviews to consider affordability and the impact on ratepayers in determining whether and how much of a subsidy to award. Yet the Board granted the full subsidy in each of the three Orders below.

In these proceedings, the Board recognized that there was substantial evidence challenging the Applicants' claimed financial need for subsidies, including reports from the Board's own consultant concluding that lower subsidies would have sufficed. The Board, however, failed to engage in any meaningful analysis of that evidence. Rather than address the many factual issues in dispute, the Board simply stated that financial need had been "demonstrate[ed] to the satisfaction of the [B]oard" and that the Board was "not persuaded that a reduced ZEC charge

will be 'sufficient' to prevent the retirement of the nuclear plants." (Aa443, Aa510, Aa576)

The discussion at the open public meeting where these matters were considered makes it clear that the Board awarded the full $10 per megawatt-hour subsidy – not based on an analysis of the record – but because the Board believed the owners would follow through on their threats to close the plants unless they received the maximum amount of subsidies. As Commissioner Robert Gordon stated, "Apparently, the legislature's call for data[-]base[d] decision-making, months of analysis by various consultants, and the preparation of voluminous reports by various parties were a meaningless exercise. In the end it was $10 per megawatt hour [or] nothing." (Aa389)

The Board's written Orders relied heavily on this Court's affirmance of the Board's prior decision to award ZECs for the first ZEC eligibility period. Such reliance was clear error because this proceeding involved a new evidentiary record with factual issues different from those resolved in the first ZEC proceedings. Further, unlike the first ZEC proceeding, where this Court ruled that the Board was not obligated to determine the reasonableness of the ZEC charge, this case was subject to the Legislature's explicit direction to consider the affordability of the ZEC charge. Despite this, the Board

erroneously relied on this Court's prior decision as justification for refusing to even consider whether the ZEC subsidies it ordered would be a reasonable burden on ratepayers.

New Jersey's electric ratepayers have been called upon to subsidize the Applicants three nuclear plants for many years, despite these privately owned units have been unregulated for two decades. The three Orders below will require ratepayers to continue to fund a virtual guarantee against downside risks, with no right to share in any higher-than-anticipated profits, and no guarantee the plants will continue to operate. Instead of thoroughly evaluating whether this one-sided allocation of costs and risks was necessary to keep the nuclear plants open, the Board simply waved away the evidence to the contrary.

This is not how agency decisionmaking is supposed to work. Fundamental principles of administrative law and due process require the Board to base its decisions on the evidence in the record. The three Orders below did not meet this standard, and accordingly should not be allowed to stand.

## STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

### Introduction[2]

This is the second proceeding in which three nuclear generating units located in Salem County, New Jersey have been awarded subsidies in the form of "zero emissions certificates" or "ZECs" under P.L. 2018, c. 16, N.J.S.A. 48:3-87.3 et seq.

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[1] The Procedural History and Facts of this matter are intertwined and therefore are set forth in a combined statement.

[2] The parties and other entities will be referred to in this brief as follows:

"BPU" or the "Board" refers to the New Jersey Board of Public Utilities.

"BPU Staff" or "Staff" refers to the Staff of the Board of Public Utilities.

"Exelon" refers to Exelon Generation Company, LLC.

"Levitan" refers to Levitan and Associates.

"NJDEP" refers to the New Jersey Department of Environmental Protection.

"P3" refers to the PJM Power Producers Group.

"IMM" refers to the Independent Market Monitor for PJM.

"NJLEUC" refers to the New Jersey Large Energy Users Coalition.

"PJM" refers to PJM Interconnection, Inc.

"PSEG" refers to the Public Service Enterprise Group.

"PSEG Power" refers to PSEG Power, LLC.

"PSEG Nuclear" refers to PSEG Nuclear, LLC.

"PSE&G" refers to Public Service Electric and Gas Company.

"Rate Counsel" refers to the New Jersey Division of Rate Counsel

(the "ZEC Act"). All three of the nuclear generating units that were awarded ZECs are operated by PSEG Nuclear, a subsidiary of PSEG. (Aa269)[3] PSEG is a New Jersey corporation reporting over $49 billion in assets as of September 31, 2020. (Aa68.) PSEG Nuclear is wholly owned by PSEG Power, a Delaware Limited Liability Company that is, in turn, wholly owned by PSEG. (Aa67, 69, Aa238) PSEG Nuclear is the sole owner of the Hope Creek unit. (Aa238) Salem I and Salem II are jointly owned by PSEG Nuclear and Exelon. (Aa238, Aa269) PSEG Nuclear has the exclusive authority to make decisions regarding the retirement of all three units. (Aa238, Aa269).

Rate Counsel, appellant in this appeal, is the statutory representative of the State's utility ratepayers. N.J.S.A. 52:27EE-48. Rate Counsel was an intervenor as of right in the proceedings below. Id.

As defined by the ZEC Statute, a ZEC is a certificate issued by the Board or its designee that represents the "fuel diversity, air quality, and other environmental attributes" of a megawatt-hour of nuclear power. N.J.S.A. 48:3-87.4. Under the Board Orders issued below, each unit will receive one ZEC for

[3] References to the non-confidential volumes of Appellant's Appendix will be cited herein as "Aa___." References to the confidential volumes of Appellant's Appendix will be cited as "Aca___." The transcript of the public portion of the evidentiary hearings before the Board on March 8, 2021 will be cited as "T_-_".

each megawatt-hour of electricity that it generates over a three-year period commencing on June 1, 2022 and, potentially, for an indefinite number of additional three-year periods thereafter. N.J.S.A. 48:3-87.5(h)(1) & (2). The three units will be paid for the ZECs they receive from the proceeds of a "non-by-passable, irrevocable" surcharge of up to $0.004 (four-tenths of one cent) on every kilowatt-hour of electricity that is distributed to retail customers of New Jersey's electric public utilities. N.J.S.A. 48:3-87.5(j)(1) & (3) According to PSEG Nuclear's estimates, the maximum surcharge of $0.004 per kilowatt-hour granted by the Board is expected to result in collections of approximately $809 million over that three-year period. (Aa283, Aa362)

**Electric Restructuring and Stranded Costs**

The ZEC Act, and the first and second ZEC proceedings before the Board, arose against the historical backdrop of the restructuring of New Jersey's electric public utilities following passage of the Electric Discount and Energy Competition Act in 1999. N.J.S.A. 48:3-49 et seq. ("EDECA"). Until the enactment of EDECA, the State's electric utilities were vertically integrated entities that owned both the electric power plants and the wires, poles, substations, and related facilities and equipment used to distribute electricity to their customers. See, N.J.S.A. 48:3-50. With the enactment of EDECA,

the BPU was directed to separate the electric public utilities' generation functions from their transmission and distribution functions. The electric utilities retained their regulated monopoly over electricity transmission and distribution, while most of their generation assets were spun off to unregulated entities, and non-utility electric power suppliers were allowed to compete to provide generation. N.J.S.A. 48:3-52, N.J.S.A. 48:3-53, N.J.S.A. 48:3-59. The goal of EDECA was to place more reliance on the competitive market for generation with a goal of lowering electricity prices for consumers. N.J.S.A. 48:3-50.

Pursuant to EDECA, the State's electric utilities divested most of their generation facilities, while continuing to deliver electricity to their customers. While other utilities sold their electric generation facilities to unaffiliated entities following arms-length negotiations, PSEG's electric and gas utility subsidiary, PSE&G, transferred its electric generation assets, including its interests in the Salem 1 and 2 and Hope Creek nuclear units, to an affiliate, PSEG Power. In re Public Service Elec. and Gas Company's Rate Unbundling, Stranded Costs and Restructuring Filings, 330 N.J. Super. 65, 112-13 (App. Div. 2000), aff'd 167 N.J. 377, cert. denied 534 U.S. 813 (2001). Because PSE&G's generation plants were not sold in the open market, the plants' valuation was administratively determined by the Board. In re Public Serv. Elec. & Gas Company's Rate

Unbundling, 167 N.J. 377, 390-91, cert. denied 534 U.S. 813 (2001). EDECA also permitted the recovery from ratepayers of stranded costs, i.e., the difference between the book value of the utilities' generation assets for ratemaking purposes and the market value of those assets. N.J.S.A. 48:3-51; N.J.S.A. 48:3-61(a)(1). PSE&G was ultimately permitted by the Board to recover approximately $2.94 billion in stranded costs, most of which was attributable to the company's interests in the Salem 1, Salem 2, and Hope Creek nuclear units. In re Public Service Electric and Gas Company's Rate Unbundling, Stranded Costs and Restructuring Filings, 1999 N.J. PUC Lexis 11 at *24-25, *252 (1999), aff'd 330 N.J. Super. 65 (App. Div. 2000), aff'd 167 N.J. 377, (2001)("PSE&G Unbundling Order").

The terms and conditions of the divestiture were based on a non-unanimous Stipulation that was approved by the Board, with certain modifications and clarifications, over the objections of Rate Counsel and other parties. PSE&G Unbundling Order, supra, 1999 N.J. PUC Lexis 11 at *220-23. The Board used the non-unanimous Stipulation as a framework for resolution in part because it included benefits for the utility's captive ratepayers including the transfer of "any risks or liabilities associated with the electric generation business" from the regulated utility to the unregulated affiliate. PSE&G

Unbundling Order, supra, 1999 N.J. PUC Lexis 11 at *307-08, par. 27.

By 2005, it became clear that the transferred nuclear units had been grossly undervalued. For many years, the plants made substantial profits and, since the stranded cost payments were "securitized" PSE&G continued to collect the payments despite the plants' profitability, until the payments finally ended in 2016. PSE&G Unbundling Order, supra, 1999 N.J. PUC Lexis 11 at *262-63 (Aa288-89).

**The ZEC Act**

The ZEC Act, signed into law on May 23, 2018, directed the Board to create a mechanism for the issuance of ZECs, which represent "the fuel diversity, air quality and other environmental attributes" of one megawatt-hour of nuclear generation. N.J.S.A. 48:3-87.4, N.J.S.A. 48:3-87.5(b). Owners of nuclear power plants were required to apply to the Board no later than December 19, 2018 to be selected to receive ZECs. N.J.S.A. 48:3-87.5(c). In order to receive ZECs, applicants were required to meet specific criteria, which are discussed in more detail below. N.J.S.A. 48:3-87.5(e).

The selected units became eligible to receive ZECs for an initial eligibility period that ran through the end of the energy year when the unit was selected, and three additional energy years thereafter. N.J.S.A. 48:3-87.5(h)(1). The selected

units may then be re-certified for additional eligibility periods of three energy years. N.J.S.A. 48:3-87.5(h)(2).

Beginning with the initial qualification period, the selected units receive ZECs based on the actual amount of megawatt-hours of electricity they generate. N.J.S.A. 48:3-87.5(g)(2). The unit owners are compensated for their ZECs with the proceeds of a non-bypassable ZEC paid by the customers of the State's electric utilities. The ZEC statute established a rate of 0.4 cents per-kilowatt hour, or $4.00 per megawatt-hour. N.J.S.A. 48:3-87.5(j)(1). Since the subsidies are limited to generation providing 40% of the State's retail sales, this equates to a subsidy of $10 per megawatt-hour generated by the units receiving ZECs. N.J.S.A. 48:3-87.5(g)(1).

For the first eligibility period, the ZEC Act made no explicit provision for the Board to set the ZEC charge at an amount lower than 0.4 cents per kilowatt-hour. For the subsequent eligibility periods, however the ZEC Act provides that, in order "to ensure that the ZEC program remains affordable to New Jersey retail distribution customers" the Board may modify the charge if the Board finds that a lower charge will be sufficient to prevent the retirement of the selected units. N.J.S.A. 48:3-87.5(j)(3)(a). Such determinations must be made by the Board no later than 13 months prior to the applicable eligibility period. Id.

If a selected unit receives direct or indirect payments as a result of state or federal action for its "fuel diversity, resilience, air quality or other environmental attributes" the amount of such payments is deducted from the amount that would otherwise be paid for that unit's ZECs. N.J.S.A. 48:3-87.5(i)(3). Selected units are required to certify annually they will operate at full capacity except for maintenance and refueling outages, for the duration of the then current eligibility period. N.J.S.A. 48:3-87.5(h)(3). However, the ZEC statute includes provisions excusing a unit from performance for reasons that include "significant" new taxes or assessments, any state or federal law that materially reduces the value of ZECs, the Board's exercise of its discretion to reduce the per-kilowatt-hour charge provided in the ZEC statute, or required capital expenditures exceeding $40 million. N.J.S.A. 48:3-87.5(k)(1).

**The First ZEC Proceeding.**

The PSEG and Exelon initiated the first ZEC proceeding on December 19, 2018 when they filed applications to receive ZECs on behalf of the Salem I, Salem II, and Hope Creek nuclear generation units for the first eligibility period. No evidentiary hearings were held in the first ZEC proceedings. Instead, the materials submitted by the applicants, along with comments and supporting certifications filed by intervenors Rate

Counsel and the IMM, and participants P3 and NJLEUC, were reviewed by an "Eligibility Team" that included representatives of Staff, the New Jersey Department of Environmental Protection ("DEP"), and the Board's consultant, Levitan & Associates ("Levitan"). In re Implementation of L. 2018, c. 16 Regarding the Establishment of a Zero Emission Certificate Program for Eligible Nuclear Power Plants, BPU Docket Nos. E018080899 et al., Order Determining Eligibility of Hope Creek, Salem 1 and Salem 2 Nuclear Generators to Receive ZECs at 3, 7 (Apr. 18, 2020) (referred to hereinafter as the ZEC I Eligibility Order"), available at: https://www.nj.gov/bpu/pdf/boardorders/2019/20190418/4-18-19-9A.pdf.

On April 18, 2019, the Board issued an Order granting ZECs to all three units for the initial eligibility period, despite the conclusions of the intervenors, participants, and the Board's own Eligibility Team, that subsidies were not needed. ZEC I Eligibility Order at 4-7, 9-10, 13-16. The Board Order allows the three nuclear units to receive ZECs through May 21, 2022.

On March 19, 2021 the New Jersey Superior Court, Appellate Division issued a decision affirming the Board's Order. In re Implementation of L. 2018, C. 16 Regarding the Establishment of a Zero Emission Certificate Program for Eligible Nuclear Power

Plants, 467 N.J. Super. 154 (App. Div.) certif. denied,2021 N.J LEXIS 700 (2021) (referred to hereinafter as the "ZEC I Affirmance"). Rate Counsel's petition for certification to the New Jersey Supreme Court was denied in an Order dated July 6, 2021. Id.

**The Proceedings Below**

On September 10, 2020, PSE&G and Exelon filed applications for the issuance of ZECs for Salem I, Salem II and Hope Creek units for the second eligibility period. The Applicants submitted financial statements purporting to show shortfalls substantially in excess of the maximum $10 per megawatt-hour subsidies that the Board could award. (Aa282-84, Aa359, Aca196-98) Nevertheless, PSEG stated publicly that "we would accept $10 now because that's all the state can do." (Aa361, Aa368-69)

Rate Counsel, Appellant in this appeal, the statutory representative of New Jersey's public utility ratepayers was an intervenor as of right in the proceedings before the Board. N.J.S.A. 52: 27EE-48 Petitions to intervene or participate were filed by the following entities:

1. The PJM Independent Market Monitor (the "IMM"), which monitors the competitiveness of the wholesale electric markets operated by PJM, a regional transmission organization that coordinates the movement of

electricity in thirteen states including New Jersey, moved to intervene. (Aa26, Aa42, Aa58)

2. The New Jersey Large Energy Users Coalition ("NJLEUC"), an association whose members include large volume electric customers served by New Jersey's electric distribution utilities, moved to intervene (Aa22, Aa38, Aa54)

3. The PJM Power Providers Group ("P3"), a nonprofit organization made up of power providers that participate in the PJM markets, moved to intervene. (Aa26, Aa42, Aa58)

4. PSEG Nuclear's public utility affiliate, PSE&G. (Aa25, Aa41, Aa57-58)

In addition to Rate Counsel, the Board granted intervenor status to the IMM, NJLEUC and P3. PSE&G was granted participant status. (Aa31, Aa47, Aa63)

Under the ZEC Act, access to information deemed confidential by the applicants is limited to entities that are jointly determined by the Board and the New Jersey Attorney General to be "essential" to aid the Board in making the statutorily required determinations. N.J.S.A. 48:3-87.5(a).

Only Rate Counsel and the IMM were granted access to confidential information. (Aa31, Aa47, Aa63)

On January 19, 2021, following a period of discovery, the Board released public and confidential versions of preliminary reports that had been prepared for the Board by its consultant Levitan concerning the eligibility of each of the three units for ZECs. (Aa84-86, Aa116-18, Aa148-50) The three reports concluded that, while the plants were not profitable, they did not need the full $10 per megawatt hour subsidy. (Aca26-27, Aca55-56, Aca85)

On January 29, 2021 PSEG Nuclear submitted prefiled testimony in support of the applications, and Rate Counsel and the IMM submitted in opposition. (Aa418, Aa485, Aa552) The witnesses presented by Rate Counsel and the IMM both concluded that Applicants had not demonstrated they needed subsidies for the nuclear plants. (Aa275-76, Aa190, Aca98)

On February 1, 2021 the Board held two virtual public hearings with Board President Joseph A. Fiordaliso presiding. Various organizations including Rate Counsel spoke in opposition to applications, and others spoke in favor. In addition, written comments were received following the public hearings. (Aa419-21, Aa486-88, Aa553-55)

Following an evidentiary hearing and briefing, the Board considered the applications at its April 27, 2021 agenda

meeting. In discussing the matter, each of the Commissioners explained that they were voting to award ZECs because of the need to keep the plants in operation. (Aa387-90, Aa392-96, Aa398-400, Aa401-04, Aa405-08) The amount of the subsidy was addressed by three commissioners. Commissioner Chivukula stated that "one thing that stood out in my mind was the statement by PSEG Nuclear, President Daniel [Cregg], who said under oath that if we do not get the full subsidy as defined by the ZEC Act, they will be shutting down the nuclear plants." (Aa399) Commissioner Gordon stated that, while he had hoped that the parties could have agreed on a lower subsidy based on the financial data, this did not happen, and "Public Service and Exelon have told us that it is all or nothing." (Aa388-89) Commissioner Solomon criticized the "all-or-nothing approach taken by this applicant to influence regulators." (Aa403)

The Board's decision was memorialized in three Orders, one for each of the nuclear units. With regard to the financial criteria for awarding ZECs, in each of the three Orders the Board first discussed the types of costs that are enumerated in the ZEC Act, noting that the statute required it to consider "operation and maintenance expenses, fuel expenses, including spent fuel expenses, non-fuel capital expenses, fully allocated overhead costs, the costs of operational risks and market risks that would be avoided by ceasing operations." (Aa442, Aa508,

Aa575) Then, addressing the evidence in the record, the Board acknowledged that, in addition to disputes about the types of costs to be considered, there was evidence disputing the "amount of costs, including the costs of risks, that the applicants will receive in the future." (Aa443, Aa509-10, Aa576)(emphasis supplied). That evidence was rejected by the Board with the following sentence:

> Our review of the "financial and other confidential information" submitted throughout this proceeding "demonstrates to the satisfaction of the board . . . that the nuclear power plant's fuel diversity, air quality, and other environmental attributes are at risk of loss because the nuclear power plant is projected to not fully cover its costs and risks." See N.J.S.A. 48:3-87.5(e)(3).
>
> (Aa443, Aa510, Aa576)

Turning to the amount of the subsidy to be awarded, the Board acknowledged that "the financial analysis prepared by some parties, Levitan, and our Staff might indicate that a lesser ZEC charge may provide enough of a market signal to keep the plants in operation," but stated "that is not our inquiry." (Aa443, Aa510, Aa576) The Board stated that its "inquiry [was] whether a reduced ZEC charge is 'sufficient to achieve the State's air quality and other environmental objectives by preventing the retirement of the nuclear power plants . . .'" (Aa443, Aa510, Aa576) (quoting N.J.S.A. 48:3-87.5(j)(3)(a)). The Board then explained its decision to award the full ZEC subsidy as follows:

> Preservation of the fuel diversity, air quality, and environmental attributes of the nuclear power plants is the aim of the ZEC Act, and we are not persuaded that a reduced ZEC charge will be "sufficient" to prevent the retirement of the nuclear plants. Accordingly, we decline to reduce the ZEC charge pursuant to N.J.S.A. 48:3-87.5(j)(3)(a).
>
> (Aa443, Aa510, Aa576).

The Orders did not explain further why a subsidy adequate to provide an economic signal to continue operation would not be "sufficient" to avoid a closure. The Orders also do not include any quantification of the minimum sufficient subsidy.

Each of the three Orders attached a redacted copy Levitan's Final Report concerning the relevant unit. The redactions included all of Levitan's quantifications of its proposed adjustments to the Applicant's financial analyses. (e.g., Aa476-77, Aa543-44, Aa610-11). While the unredacted Final Reports were subsequently provided to the parties authorized to receive information designated as confidential, the Board did not issue Orders incorporating the unredacted Final Reports. (See, Aa615-16, 618, 619-20) The Final Reports included some modifications to the amount of Levitan's recommended adjustments to the Applicants' financial analyses, but continued to show that the units did not need the full $10 per megawatt-hour subsidy. (Aca301-02, Aca337-38, Aca373-74)

## ARGUMENT

### Standard of Review

While decisions of the New Jersey Board of Public Utilities are entitled to a measure of deference, they are not immune from judicial review. In re Petition of New Jersey American Water Company, 169 N.J. 181, 188 (2001). The courts are authorized to "review any order of the board and to set aside such order in whole or in part when it clearly appears that there was no evidence before the board to support the same reasonably or that the same was without jurisdiction of the board." Id. (quoting N.J.S.A. 48:2-46). Like all administrative decisions, BPU Orders must be based on credible evidence in the record, may not be arbitrary and capricious, and must be in accordance with applicable law. In re Musick, 143 N.J. 206, 216 (1996). There must be "substantial evidence in the record to support the findings upon which the agency based its application of legislative policies." Public Service Electric and Gas Company v. New Jersey Dept. of Envtl. Protection, 101 N.J. 95, 103 (1985) (citations omitted).

Further, the record evidence in support of an agency's finding must be explained in the agency's decision:

> The application of this standard requires far more than a perfunctory review; it calls for careful and principled consideration of the agency record and findings. The administrative agency must set forth basic findings of fact supported by the evidence and

> supporting the ultimate conclusions and final determination so that the parties and any reviewing tribunal will know the basis on which the final decision was reached.
>
> Riverside Gen. Hosp. v. New Jersey Hosp. Rate Setting Comm'n, 98 N.J. 458, 468 (1985)(citations omitted).

Detailed summaries of the record are not sufficient. A "mere cataloging of evidence followed by an ultimate conclusion of liability, without a reasoned explanation based on specific findings of basic facts, does not satisfy the requirements of the adjudicatory process because it does not enable [the court] to properly perform [its] review function ...." Blackwell v. Dept. of Corrections, 348 N.J. Super. 117, 122-23 (App. Div. 2002). When facts are disputed, the agency must explain "how it weighed the proofs" before it. St. Vincent's Hospital v. Finley, 154 N.J.Super. 24, 31 (App. Div. 1977). See also Smith v. E.T.L. Enterprises, 155 N.J. Super. 343, 348 (App. Div. 1978)(quoting Benjamin Moore & Co v. Newark, 113 N.J. Super. 427, 428 (App. Div. 1975)) (agency must both find facts and "set forth 'an analytical expression of the basis which, applied to the found facts, led to the holdings below'"). Here, the Board did not do this.

Judicial deference to administrative agencies stems from the agency's technical expertise. See, In re Adoption of Amendments to Northeast, Upper Raritan, Sussex County, 435 N.J. Super 571, 583(App. Div.), certif. denied 219 N.J. 627

(2014)("[w]here an agency's expertise is a factor, a court defers to that expertise ...."). However, our Supreme Court has stressed that "judicial allegiance to the actions of administrative agencies is neither unlimited nor blind," and that "it is only 'in situations where agency expertise is essential towards understanding the proper context of a dispute [that] a deferential standard of review is appropriate.'" In re Alleged Improper Practice Under Section XI, Paragraph A(d) of the Port Authority Labor Relations Instruction, 194 N.J. 314, 332, cert. denied 555 U.S. 1069 (2008)(quoting In re Hunterdon County Bd. of Chosen Freeholders, 116 N.J. 322, 328 (1989)). Where expertise is not a "pertinent factor" in how the agency reached its decision, "no special deference need be afforded on that basis." 613 Corp. v. State, Div. of State Lottery, 210 N.J. Super 485, 496 (App. Div. 1986).

Thus, this Court's review should examine:

> (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
>
> In re Alleged Improper Practice, supra 194 N.J. at 331-332 (quoting In re Herrmann, 192 N.J. 19, 27, (2007)).

Where the agency's decision is "willful and unreasoning action, without consideration and in disregard of circumstances," it is arbitrary and capricious and should be overturned. In re Proposed Xanadu Redevelopment Project, 402 N.J. Super. 607, 642 (App. Div.), certif. denied 197 N.J. 260 (2008)(quoting Bayshore Sewer Co. v. Dept. of Envtl. Prot., 122 N.J. Super. 184, 199 (Ch. Div. 1973), aff'd 131 N.J. Super. 37 (App. Div.1974)).

## POINT I

### THE BOARD'S DECISIONS TO AWARD ZECS SHOULD BE REVERSED AS ARBITRARY AND CAPRICIOUS BECAUSE THEY WERE NOT BASED ON THE EVIDENCE IN THE RECORD. (Aa439-44, Aa505-10, Aa572-77)

In order to qualify for an award of ZECs, a nuclear plant is required to meet five separate requirements:

1. The plant must be licensed to operate by the United States Nuclear Regulatory Commission through at least 2030;

2. The applicant must demonstrate that the plant "makes a significant and material contribution to the air quality in the State by minimizing emissions that result from electricity consumed in New Jersey" and that retirement of the plant would "significantly and negatively affect New Jersey's ability to comply with State air emission reduction requirements;"

3. The applicant must demonstrate that the plant's "fuel diversity, air quality and other environmental attributes" are at risk of loss because, based on projected financial results, the plant "will cease operations within three years unless the nuclear plant experiences a material financial change;"

4. The applicant must certify that the plant does not receive other direct or indirect payments that eliminate the need for a subsidy; and

> 5. The applicant must pay an application fee set by the Board but not to exceed $250,000.
>
> N.J.S.A. 48:3-87.5(e).

The statutory language governing the third criterion, which is the one at issue in this appeal is as follows:

> To be certified by the board as an eligible nuclear power plant, a nuclear power plant shall:
> * * *
> (3) demonstrate to the satisfaction of the board ... that the nuclear power plant's fuel diversity, air quality, and other environmental attributes are at risk of loss because the nuclear power plant is projected to not fully cover its costs and risks, or alternatively is projected to not cover its costs including its risk-adjusted cost of capital, and that the nuclear power plant will cease operations within three years unless the nuclear power plant experiences a material financial change;
>
> N.J.S.A. 48:3-87.5(e)(3).

This provision allows the applicant to present its financial information in either of two ways, based on "costs and risks" or based on "costs including its risk-adjusted cost of capital." The applicants here chose the former approach, including "operational risks" and "market risks" as part of each unit's "costs." (Aa244)

The applications submitted by the nuclear plant's owners claimed shortfalls that substantially exceeded the maximum subsidy of $10 per megawatt-hour that could be awarded by the Board. Their financial projections claimed shortfalls equating to an average required subsidy of approximately **[BEGIN PSEG**

**CONFIDENTIAL]** [redacted] **[END PSEG CONFIDENTIAL]** per megawatt-hour, later updated to **[BEGIN PSEG CONFIDENTIAL]** [redacted] **[END PSEG CONFIDENTIAL]** per megawatt-hour for the three plants. (Aca147-48, Aca275, Aca311, Aca347) There was, however, substantial evidence in the record disputing the accuracy of the Applicants' quantification of their projected costs and revenues.

With regard to costs, both Rate Counsel and the IMM presented testimony that the Applicants' quantifications of the costs of risk were overstated because they considered only "downside" risks, and did not consider the possibility that revenues could be higher or costs could be lower. (Aa202-09, Aa284-89, Aca110-117, Aca198-203). Rate Counsel and the IMM also presented testimony specifically challenging the Applicants' quantification of the risk that the nuclear units would not clear the PJM capacity auction. (Aa334-37, Aca248-51).[4] Rate Counsel and the IMM presented testimony that the Applicants' costs included a charge for spent nuclear fuel disposal that is

[4] The nuclear units receive roughly **[BEGIN PSEG CONFIDENTIAL]** [redacted] **[END PSEG CONFIDENTIAL]** percent of their revenues from sales of capacity, which represents a commitment of resources to be delivered on demand when needed during an emergency, or pay a significant penalty for non-performance. The nuclear units sell capacity through the PJM Capacity Market, which is a three-year forward looking market in which a generator agrees to provide a specific number of megawatts at a specified price set by an auction process known as the Base Residual Auction ("BRA"). (Aca181, Aca233, Aca242, Aca245-46), See, PJM "Capacity Markets" Fact Sheet, available at: https://learn.pjm.com/three-priorities/buying-and-selling-energy/capacity-markets.

not currently being collected, and may never be collected from the Applicants. (Aa211-12, Aa294-95, Aca119-20) Rate Counsel's witness Ms. Crane also testified that the Applicants had included capital expenditures on a "cash flow" basis contrary to accepted accounting principles, and had overstated costs for support services and overhead. (Aa290-94, Aa295-98, Aca204-08, Aca209-12).

The IMM noted that the Applicants' asserted costs were different from those submitted by Applicant PSEG Nuclear to the Electric Utility Cost Group ("EUCG") Nuclear Committee. As explained by the IMM, the EUCG Nuclear Committee is an organization of nuclear plant representatives that was formed with the objective of optimizing costs and reliability performance of the participating plants. (Aa209) The Nuclear Committee maintains a database of nuclear plant cost and performance data which the Committee claims to be "the best source of best, most comprehensive source of nuclear plant data." (Aa209). The costs provided by Applicant PSEG Nuclear from 2014 through 2018 for the Salem I, Salem II and Hope Creek units were an average of **[BEGIN PSEG CONFIDENTIAL]** [redacted] **[END PSEG CONFIDENTIAL]** than the projected costs as submitted in the applications to the Board. (Aca118-19)

With regard to revenues the nuclear units receive approximately **[BEGIN PSEG CONFIDENTIAL]** [redacted] **[END PSEG**

**CONFIDENTIAL]** percent of their compensation from the energy markets, which address the real-time electricity needs of the system. (Aca181, Aca233, Aca242, Aca245-46) Generators such as the nuclear units can sell energy through bilateral contracts, or through the energy spot markets operated by PJM. See, PJM "Energy Markets" Fact Sheet, available at https://learn.pjm.com/three-priorities/buying-and-selling-energy/energy-markets. Rate Counsel expert Mr. Maximillian Chang and the IMM noted that the in projecting their revenues from energy sales the Applicants had "cherry picked" a date when energy price forwards were low.

Approximately **[BEGIN PSEG CONFIDENTIAL]** ■ **[END PSEG CONFIDENTIAL]** percent of the units' revenues are from sales of capacity, which represents a commitment of resources to be delivered on demand when needed. (Aca181, Aca233, Aca242, Aca245-46) See PJM "Capacity Markets" Fact sheet, available at: https://learn.pjm.com/three-priorities/buying-and-selling-energy/capacity-markets. Mr. Chang noted that the Applicants' assumed unreasonably low capacity prices of **[BEGIN PSEG CONFIDENTIAL]** ■■■■■■■■■■ **[END PSEG CONFIDENTIAL]**, and that this price was lower than the proxy capacity prices adopted by the Board for the electric utilities' Basic Generation Service

auction for the 2020-21 energy year. (Aa243)[5] In addition Rate Counsel noted in its Initial Brief to the Board that PSEG had recommended that the Board assume higher capacity prices of $166/MW-day in another proceeding before the Board. (Aa624-27, Aca378-81)[6] The IMM concurred that the Applicants' assumed capacity prices were too low. (Aa199-201, Aca107-09) In addition, Ms. Crane testified that the Applicants had failed to include hedging revenues and tax benefits. (Aa298-302, Aca212-16).

Both Rate Counsel and the IMM concluded that no subsidy was needed. As Rate Counsel witness Andrea Crane explained in her testimony, the claimed **[BEGIN PSEG CONFIDENTIAL]** [redacted] **[END**

[5] Basic Generation Service or "BGS" is the service provided to electric utility customers that do not purchase their energy from competitive suppliers. Each year the State's four electric utilities conduct an auction under the Board's supervision to procure the energy supplies needed to serve their BGS customers. See, BPU BGS Auction Fact Sheet, available at https://www.state.nj.us/bpu/about/divisions/energy/bgs.html.

[6] On March 27, 2020, the Board instructed Staff to initiate an investigation into "Resource Adequacy Procurement Alternatives." In re BPU Investigation of Resource Adequacy Alternatives, BPU Docket No. EO20030203 (Mar. 27, 2020) (available at https://www.bpu.state.nj.us/bpu/pdf/boardorders/2020/20200325/3-27-20-2H.pdf). In that proceeding, PSEG and Exelon Generation Company, LLC jointly submitted comments asserting that the Board should assume a capacity price of $166/MW-day. See (Aa624-27, Aca378-81) (citing Joint Reply Comments of PSEG and Exelon Generation Company LLC at Page 11, Table 1 (June 24, 2020)(available at https://www.nj.gov/bpu/pdf/ofrp/Supplemental%20Comments/Public%20Service%20Electric%20and%20Gas%20Company-Exelon%20Generation%20%5B6-24-2020%5D.pdf)).

**PSEG CONFIDENTIAL]** million shortfall for the three units included **[BEGIN PSEG CONFIDENTIAL]** [redacted] **[END PSEG CONFIDENTIAL]** million of costs that were speculative or not reasonable to recover from ratepayers, and these figures were without consideration of the Applicants' understatements of revenues. (Aca218-19).

The IMM analyzed this issue from the perspective of an expert in the operation of the PJM markets, focusing on whether the units were "receiving a retirement signal from the market." (Aa186) As explained in the IMM's report, a unit receives a market signal to retire if it "is not covering and is not expected to cover its avoidable costs on an annual basis." (Aa186) Based on the IMM's analysis of costs and revenues, including an evaluation of risks, the IMM concluded the Hope Creek and Salem II units were expected to more than cover their avoidable costs over the next three years, and the Salem I unit was expected to experience only a de mimimis shortfall. (Aa190, Aca98)

In addition, there was evidence suggesting that the Applicants' methodologies might be fundamentally flawed. The Applicants' explicitly stated a willingness to accept subsidy substantially lower than the amount of their claimed shortfall. This implies that their analyses were an inaccurate measure of the Applicants' actual need for subsidies—if the Applicants'

analyses had been accurate, that should have meant that the plants would shut down with or without subsidies. In addition, the IMM presented evidence that a review of the Applicants' financial results during the first full year of ZEC payments, indicated that the Applicants had recovered **[BEGIN PSEG CONFIDENTIAL]** [redacted] **[END PSEG CONFIDENTIAL]** million more than they needed to cover their avoidable costs, despite the fact that energy market prices were at an all-time low as a result of the COVID-19 pandemic. (Aca96). This evidence that the plants were profitable despite historically low prices is an indication that the Applicants' financial presentations in the first ZEC proceeding substantially overstated their need for subsidies, and casts doubt on the reliability or their financial models in this case.

It is clear from the ZEC Act that the Board was required to undertake a de novo review of the evidence presented in this proceeding. The ZEC Act made specific provision for a new review of the need for subsidies every three years. N.J.S.A. 48:3-87.5(h). The Legislature recognized that periodic reviews were needed because circumstances change. In order to meet this statutory obligation, the Board was required to consider the need for subsidies based on the evidence presented in this proceeding. The Board asserted that it had undertaken a "careful and thorough review of the administrative record," and

had found that the financial criteria were satisfied. (Aa441, Aa508, Aa574). However the Board's discussion of this issue was dominated not by an analysis of disputed issues of fact, but by a lengthy legal analysis in which the Board repeatedly cited this Court's affirmance of its decision in the first ZEC proceedings. (Aa441-43, Aa508-09, Aa575-76)

The Board's analysis began with the observation that Levitan, the IMM and Rate Counsel had questioned the Applicant's claimed costs of operational and market risk, and for spent nuclear fuel disposal. (Aa441, Aa508, Aa575). The Board then turned to a legal analysis of what types of costs it was required to consider under the ZEC Act. After observing that the language of the ZEC Act required consideration of costs including "operation and maintenance expenses, fuel expenses, non-fuel capital expenses, fully allocated overhead costs, the costs of operational and market risks that would be avoided by ceasing operations;" the Board then embarked on a discussion specifically addressing operational and market risk. Based on the language of the ZEC Act and the ZEC I Affirmance, the Board concluded that the Board was required to consider operational and market risks. (Aa442-43, Aa508-09, Aa575-76) Finally, the Board stated that it believed that the Legislature intended for the Board to consider, in addition to risks, other factors including "fuel diversity, resiliency, and the impact of nuclear

plant retirement on RGGI [the Regional Greenhouse Gas Initiative], New Jersey's Economy, and the Global Warming Response Act." (Aa443, Aa509, Aa576)

It was only after this extended discussion of legal issues that the Board turned to the consideration of the disputed factual issues, with its acknowledgement that, in addition to disputing the "type of cost and risk that this Board may consider" the parties had also disputed Applicant's estimates of the "amount of costs, including the cost of risk, and revenues that the that the applicants will receive in the future." (Aa443, Aa509-10, Aa576) (emphasis supplied). Thus, the Board acknowledged that that the disputed issues below included factual issues concerning the Applicants' quantification of their projected costs and revenues, in addition to the legal issues of what types of costs needed to be considered. Despite this acknowledgement, the Board's analysis of the disputed issues of fact was deficient.

Instead of providing an explanation of the Board's determinations on key issues of fact, it addressed them all with the single conclusory statement that its "review of the 'financial and other confidential information' submitted throughout this proceeding 'demonstrates to the satisfaction of the board . . . that the nuclear power plant's fuel diversity, air quality, and other environmental attributes are at risk of

loss because the nuclear power plant is projected to not fully cover its costs and risks.'" (Aa443, Aa510, Aa576) This is not the "reasoned explanation based on specific findings of basic facts" that is required to support agency decisionmaking. Blackwell, supra., 348 N.J. Super. at 122-23. It is also not the de novo review based on a new record that is contemplated in the ZEC Act.

In considering the adequacy of the Board's analysis it is important to distinguish the issues that are and are not controlled by this Court's ZEC I Affirmance. The ZEC I Affirmance held that the ZEC Act requires the Board to consider specific types of costs including "operation and maintenance expenses fuel expenses, including spent fuel expenses, non-fuel capital expenses, fully allocated overhead costs [and] the costs operational and market risks that would be avoided by ceasing operation." ZEC I Affirmance, 467 N.J. Super. at 180-81. However, neither the ZEC Act nor the ZEC I Affirmance foreclosed the Board from undertaking a searching review of the Applicants' quantifications of their projected costs and revenues for each of the three nuclear plants based on the different record in this statutorily required new proceeding.

While the ZEC I Affirmance upheld the Board's determinations based in the evidence in the first ZEC proceeding 467 N.J. Super. at 181-82, that ruling does not control nor

could ever address the result of the second ZEC proceeding. The proceedings below resulted in a new evidentiary record with new factual disputes that warranted a complete review by the Board on its own merits. While there were some similarities in the issues considered in the first and second ZEC proceedings, the records and disputed facts were not identical. The ZEC I Affirmance could not address the new issues and factual disputes raised in this matter, and the Board's reliance upon that decision in this legally and factually different matter was misplaced.

The record below included substantial evidence that the Applicants' projections of costs and revenues were not an accurate measure of the need for subsidies that was not in the record before the Board in the first ZEC proceeding. The Board was obligated to give due consideration to the evidence in this proceeding, an obligation that is not satisfied by a lengthy analysis of the law, followed by a one-sentence rejection of the evidence that disputed the factual accuracy of the Applicant's financial presentation. The Board's analysis was not the "reasoned explanation based on specific findings of basic facts," Blackwell, supra, 348 N.J. Super. at 122-23, that is required by basic principles of administrative law.

The Board's casual dismissal of substantial factual disputes is also contrary to the intent of the ZEC Act's

specific provision for a new review of the need for subsidies every three years. N.J.S.A. 48:3-87.5(h)(2). If subsequent reviews were intended to be a mere "rubber stamp" of the first review, there would have been no need for the Legislature to require a new review every three years. Clearly, the Legislature contemplated more than a single sentence of "analysis" of the many factual issues bearing on the Applicant's quantifications of their claimed need for subsidies.

Under fundamental principles of administrative law and due process, and under explicit provisions in the ZEC Act, the Board had an obligation to support its decision based on an analysis of the evidentiary record in this proceeding. Because the Board failed to meet this obligation, its decisions to award ZECs should be reversed.

## POINT II

**THE BOARD'S DECISION TO AWARD THE STATUTORY MAXIMUM SUBSIDY SHOULD BE REVERSED BECAUSE THE BOARD FAILED TO BALANCE THE AFFORDABILITY OF THE ZEC CHARGE AGAINST THE NEED FOR SUBSIDIES AS REQUIRED BY THE ZEC ACT. (Aa439-44, Aa505-10, Aa572-77)**

In the proceedings below, unlike the first ZEC proceeding, the Board had explicit legislative authority to award a subsidy lower than the statutory maximum and a mandate to determine the awarded subsidy's affordability under the following provision in the ZEC Act:

> 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 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.
>
> N.J.S.A. 48:3-87.5(j)(3)(a).

Thus, beginning with the second ZEC qualification period, the Board was required to balance affordability against the claimed need for a subsidy. The record below contained ample evidence that the full ZEC subsidy was both unreasonable and unnecessary.

With regard to the Applicants' claimed need for the maximum ZEC subsidy, there was substantial evidence in the record that

was given only cursory recognition by the Board. At the outset, it is important to note that the Applicants did not present any analysis in support of their claim that only the statutory maximum $10 per megawatt-hour would suffice. They sought a subsidy of $10 per megawatt-hour "because that's all the state can do." (Aa361, Aa368-69) As Rate Counsel witness Ms. Crane explained at the evidentiary hearing, the Applicants presented no other evidence regarding why $10 was the "magic number." (T107-2 to T107-16).

The evidence presented by Rate Counsel and the IMM that no subsidy was needed is summarized above. Even if the Board was inclined to reject these parties' conclusion that no subsidy was necessary, their testimony provided support for several adjustments to the Applicants' financial projection that could have justified a lower subsidy. In addition, the Board's own consultant, Levitan, recommended consideration of adjustments to the Applicant's costs and revenues that would have resulted in subsidies considerably lower than $10 per megawatt-hour. (Aca301-02, Aca337-38, Aca373-74)

In each of the three Orders it issued, the Board acknowledged that "the financial analysis prepared by some parties, Levitan, and our Staff might indicate that a lesser ZEC charge may provide enough of a market signal to keep the plants in operation ...." (Aa443, Aa510, Aa576) However, ignoring the

need to look at affordability, the Board declined to even consider that evidence, stating "that is not our inquiry." (Aa443, Aa510, Aa576). Instead, the Board characterized the issue before it as whether a reduced charge would be "sufficient" to prevent the nuclear units from retiring, and stated that it was "not persuaded" that this would be the case. (Aa443, Aa510, Aa576)

This is an evasion of the Board's duty to consider the record. The Board seemingly determined that evidence showing that a lower subsidy would provide an economically sufficient incentive to continue operations was irrelevant to "our inquiry." If economic evidence is deemed irrelevant, the conclusion is inescapable that the Board based its finding on the factor that "stood out" for Commissioner Chivukula in his consideration of the Applications—PSEG's threat to close the plant unless the full ZEC subsidy was awarded. (Aa399)

This is not proper administrative decisionmaking, and it is not what was contemplated by the Legislature when it enacted the ZEC Act. The plain language of the legislation clearly calls for an analysis of a lower rate and consideration of affordability starting in the second ZEC eligibility period. The legislative history of the ZEC Act confirms that the Board was to make its own determination of the need for subsidies based on an objective review of the evidence in the record. For example,

at one hearing the legislation's primary Sponsor and Senate President Stephen Sweeney stated: "This creates one thing—a process of review where PSEG will show their books to the BPU and BPU has the authority and ability to make a determination at that point. There is no guarantee here."[7] A decision made in response to a threat, rather than a careful analysis of the financial information in the record, is contrary to the ZEC Act's clear direction to the Board to determine what level of subsidy is needed based on the evidence in the record, and not merely defer to the Applicants' determination of how much to demand.

The Board also erred by failing to address the fairness of the subsidy it awarded, despite the Legislature's explicit direction to consider affordability. The three Orders below make it clear that the Board made a deliberate decision not to consider the fairness of awarding the full ZEC subsidy. The Board's "Discussion and Findings" began with nearly a full page of single-spaced text, including repeated citations to the ZEC I Affirmance, explaining why the Board did not consider itself obligated to consider the justness and reasonableness of the ZEC charge. (Aa439-40, Aa506, Aa572-73) The Board's reliance on

[7] N.J. Senate Environment and Energy Committee Hearing, audio at 16:46 (Jan. 25, 2018), available at: https://www.njleg.state.nj.us/media/mp.asp?M=A/2018/SEN/0125-1000AM-M0-1.M4A&S=2018.

the ZEC I Affirmance is misplaced. The ZEC I Affirmance was decided in the context of the first ZEC proceeding, where the Court found the Board had no authority to alter the $0.004 per kilowatt hour ZEC charge during the first ZEC eligibility period. ZEC I Affirmance, 467 N.J. Super at 184-88. In the proceedings below, unlike the first ZEC proceedings, the Board has specific authority to "ensure that the ZEC program remains affordable to New Jersey retail distribution customers," by considering a lower ZEC charge. N.J.S.A. 48:3-87.5(j)(3)(a). This provision is an explicit direction to the Board to exercise its authority over the rates charged to ratepayers during the second and subsequent ZEC eligibility periods.

The Board has long had an obligation to ensure that any rates it sets are just and reasonable. See, N.J.S.A. 48:2-21(b) (which obligates the BPU to ensure that any rates it approves are "just and reasonable") and N.J.S.A. 48:3-1 (which prohibits utilities from charging rates that are unjust or unreasonable). The rates subject to the Board's authority are defined broadly. A rate is defined broadly to include any charge that is imposed on ratepayers. See, In re Redi-Flo Corp., 76 N.J. 21, 40-41 (1978) (holding that N.J.S.A. 48:2-21(d) defines a rate from the standpoint of the consumer and that any increase that causes an increase in the consumer's out-of-pocket expenditure is a "rate increase" under the statute). The Board's obligation to

consider the reasonableness is also broadly defined to apply whether or not a rate is established through the traditional ratemaking process. See, In re Board's Investigation of Local Exchange Carrier Intrastate Access Rates, 2012 N.J. Super Unpub. LEXIS 1430 at *42 ("The requirement for 'just and reasonable' rates applies whether the BPU is setting rates under a traditional methodology or under a plan of alternative regulation"(citations omitted)).

The Board's duty to assure that rates are reasonable is derived from constitutional principles. The New Jersey Supreme Court has held:

> ... the system of rate regulation and the fixing of rates thereunder are related to constitutional principles which no legislative or judicial body may overlook. For if the rate for the service supplied be unreasonably low it is confiscatory of the utility's right of property, and if unjustly and unreasonably high (bottomed as it is on the exercise of the police power of the state), it cannot be permitted to inflict extortionate and arbitrary charges upon the public. And this is so even where the rate or limitation on the rate is established by the Legislature itself.
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> In re Proposed Increased Intrastate Industrial Sand Rates, 66 N.J. 12, 23-24 (1974)(citations omitted).

See also, State v. Trenton, 97 N.J.L. 241, 247 (E. & A. 1922)("rates fixed by legislation must be reasonable, and to that end must be subject to judicial review").

In the ZEC I Affirmance this Court found a clear expression of legislative intent to deny the Board the authority to alter

the $0.004 per kilowatt-hour ZEC rate for the first ZEC eligibility period. ZEC I Affirmance, 467 N.J. Super at 185-86. This ruling is not applicable in proceedings below where the Board had explicit statutory authority to consider a lower rate that would be "affordable" to ratepayers. N.J.S.A. 48:3-87.5(j)(3)(a). In the second ZEC proceeding, unlike the first, the Legislature expressed its explicit intent not to override the Board's broad and longstanding obligation to assure that utility rates are reasonable.

The Board failed to make a determination on the subsidy's fairness, despite there being substantial evidence in the record that the full ZEC subsidy was an unreasonable burden to ratepayers. Rate Counsel witness Ms. Crane noted the unfairness of requiring ratepayers, who have already paid hundreds of millions of dollars in stranded costs in exchange for a transaction that was intended to transfer the risks of ownership to the nuclear plants' owners, to pay again to provide a virtual guarantee of profits these regulated entities. (Aa288-90). Moreover, this is a one-sided allocation of risks and rewards. As one of PSEG Nuclear's witnesses acknowledged on cross-examination, the ZEC Act, with limited exceptions, does not provide a mechanism for ratepayers to share in higher-than-expected profits. (T19-2 to T20-15) Further, the Applicants have made it clear that an award of ZECs will not guarantee that

they will keep the plants open. (Aa278-79) Thus, ratepayers could pay hundreds of millions of dollars in subsidies, and the plants could still close.

Rate Counsel witness Ms. Crane also identified two external factors that should have been considered in assessing the fairness of the requested subsidies. First, the proceedings below were conducted against the backdrop of an historic pandemic that has resulted in serious economic distress for many New Jersey ratepayers. (Aa279) Second, New Jersey already has relatively high electric rates. (Aa279) As Rate Counsel's witness explained, it was incumbent upon the Board to carefully consider whether to continue to burden ratepayers to provide subsidies to unregulated entities whose corporate parents are providing millions of dollars in dividends annually to their shareholders. (Aa279).

There was ample evidence in the record that the full ZEC rate was unreasonable. The Board's decision to disregard and not even address the evidence in the face of an explicit legislative directive to consider affordability was in error.

In addition, the Board failed to consider evidence that the subsidy exceeded the value of the in-state carbon emissions that would be avoided by preventing retirement of the nuclear units. The ZEC Act presumes that the subsidy will be lower than the social cost of carbon for avoided New Jersey emissions. In its

determinations, the Legislature explained, "The zero emission certificate program set forth in this act is structured such that its costs are guaranteed to be significantly less than the social cost of carbon emissions avoided by the continued operation of selected nuclear power plants, ensuring that the program does not place an undue financial burden on retail distribution customers." N.J.S.A. 48:3-87.3(b)(8) (emphasis supplied). Therefore, the social cost of carbon value of avoided carbon emissions is the upper limit to any ZEC rate.

Rate Counsel witness Mr. Chang provided an appropriate calculation for the social cost of carbon value of the avoided emissions. Using a report submitted as part of the Applications, Mr. Chang determined that the value of the incremental in-state carbon emissions that would result from the retirement of the three nuclear plants was **[BEGIN PSEG CONFIDENTIAL]** [redacted] **[END PSEG CONFIDENTIAL]** million, corresponding to a value of **[BEGIN PSEG CONFIDENTIAL]** [redacted] **[END PSEG CONFIDENTIAL]** per megawatt-hour for the second ZEC eligibility period, which is substantially less than the $10 per megawatt-hour value of the statutory maximum ZEC subsidy. (Aca257-60)

In the proceedings below, the Applicants took issue with Mr. Chang's calculations and his focus on air pollution in New Jersey, arguing that the emissions reduction benefits of the

plants should be based on avoided emissions occurring over the entire Eastern Interconnection, which includes the entire eastern two-thirds of the continental United States and parts of Canada. (Aca179-80, T144-20 to T151-1, T174-18 to T175-8) See, U.S. Energy Information Administration: Today in Energy, "U.S. Electric System is Made up of Interconnections and Balancing Authorities," (July 20, 2016), available at https://www.eia.gov/todayinenergy/detail.php?id=27152.

The Legislature certainly recognized that, in order to meet air quality standards in New Jersey, it needed to address the electric power provided to the customers in New Jersey, whether that power was generated in New Jersey or not. See, N.J.S.A. 48:3-87.3(a)(4); N.J.S.A. 48:3-87.3(a)(8); N.J.S.A. 48:3-87.3(a)(12). The Legislature was clear, however, that its primary concern was in-state air quality. The Legislative findings point to the fact that the existing renewable energy portfolio and the growth of renewable energy generation has served "to reduce air pollution in New Jersey." N.J.S.A. 48:3-87.3(a)(6). In an effort to justify nuclear power as "clean energy," the Legislature further found that "The retirement of nuclear power generation will inevitably result in an immediate increase in air emissions within New Jersey due to increased reliance on natural gas-fired generation and coal-fired generation." N.J.S.A. 48:3-87.3(a)(9) (emphasis added). The

Legislature further discussed its concern that "poor air quality has a disproportionate impact on the most vulnerable citizens of New Jersey ...." N.J.S.A. 48:3-87.3(a)(10) (emphasis added). The Legislature further emphasized that "as a coastal state, New Jersey is particularly exposed to many of the effects of global climate change ...." N.J.S.A. 48:3-87.3(a)(11). In the Legislative determinations, the Legislature noted that "increased reliance on natural gas-fired and coal-fired generation will substantially impede the State's ability to meet those federal and State air quality standards and emissions level requirements." N.J.S.A. 48:3-87.3(b)(2) (emphasis added).

The Legislature was clearly concerned about air quality in New Jersey. The Applicants' position, which would have New Jersey ratepayers pay the value of emissions avoided over a geographic area covering two-thirds of the continental United States and parts of Canada, is contrary to legislation's intent. The ZEC subsidy should have been limited to the value of the emissions avoided in New Jersey. However, the Board failed to consider the evidence before it.

In summary, it is clear that the Board's decision to award the maximum subsidy was not based on an objective analysis of the evidence in the record before it. The Board found the full subsidy was needed in response to a threat, rather than on a review of the financial information in the record. It

erroneously relied on the ZEC I Affirmance to disregard evidence that the full ZEC subsidy would unreasonably burden ratepayers. Furthermore, it awarded a subsidy that exceeded the value of avoided in-state carbon emissions in contravention of the intent of the ZEC Act. For these reasons, the Board's decision to grant the statutory maximum subsidy of $0.004 per kilowatt-hour should be reversed.

## CONCLUSION

For the all of the reasons stated above, the Board's decision below should be reversed.

Respectfully submitted,

STATE OF NEW JERSEY
DIVISION OF RATE COUNSEL

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Dated: October 12, 2021