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BOARD OF PUBLIC UTILITIES
TRENTON, NJ

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OCT 18 2018

October 16, 2018

Client/Matter No. 21561/2

BOARD OF PUBLIC UTILITIES
TRENTON, NJ

Honorable Gurbir S. Grewal
Office of the Attorney General
Richard J. Hughes Justice Complex
25 Market Street, PO Box 080
8th Floor, West Wing
Trenton, NJ 08625-0080

Aida Camacho-Welch, Secretary of the Board
Board of Public Utilities
44 South Clinton Avenue
3rd Floor, Suite 314
PO Box 350
Trenton, New Jersey 08625-0350

Re: I/M/O 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

Dear Attorney General Grewal and Secretary Camacho-Welch:

Enclosed for filing are an original and ten (10) copies of motion of New Jersey Large Energy Users Coalition to intervene in these proceedings and for the *pro hac vice* admission of Paul F. Forshay.

The parties on the distribution list have received copies of these motions via electronic mail this date.

Thank you for your anticipated courtesies in this matter.

Respectfully yours,

STEVEN S. GOLDENBERG

SSG/bmr

Encls.

cc: Distribution List ✓

Docs #3419580-v1

Service List

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

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STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

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BOARD OF PUBLIC UTILITIES
TRENTON, NJ

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

**MOTION TO INTERVENE OF
NEW JERSEY LARGE ENERGY USERS COALITION**

The New Jersey Large Energy Users Coalition ("NJLEUC"), an association whose members include large volume electric customers served by Public Service Electric and Gas Company ("PSE&G"), Jersey Central Power and Light Company ("JCP&L") and Atlantic City Electric Company ("ACE") (collectively, the "EDCs") hereby moves to (i) intervene in the above-captioned proceedings with full rights as a party and (ii) be afforded access to all information designated as confidential by applicants for Zero Emission Credits ("ZECs"). NJLEUC respectfully requests the Board to grant expedited approval of NJLEUC's motion in order to avoid delay and enable NJLEUC to fully and timely participate in all aspects of these time-limited proceedings. In support of its motion, NJLEUC states as follows:

1. All communications and correspondence concerning this proceeding should be directed to:

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700 Sixth Street, N.W., Suite 700
Washington, D.C. 20001-3980
Phone: 202-383-0100
Fax: 202-637-3593
paulforshay@eversheds-sutherland.com

2. On May 23, 2018, Governor Murphy signed into law L. 2018, c. 16, (the "Act") which, among other things, requires the Board to create a ZEC program and determine which

nuclear energy generators will be eligible to receive ZEC payments under the program. The Act requires the Board to convene several separate proceedings to establish the ZEC program, develop an application process to determine a nuclear plant's eligibility to obtain ZECs, certify and rank the nuclear plants determined to be eligible to participate in the ZEC program and to receive ZECs, and establish a mechanism for the EDCs to purchase ZECs from the selected nuclear plants. The Act requires each EDC to file a tariff to recover the \$0.004/kwh ZEC charge from its retail distribution customers.

3. The Act also provides for stakeholder participation in all aspects of these ZEC proceedings, including access to confidential information if approved by the Attorney General and Board, to assure that stakeholder participation is meaningful and consistent with due process.

WHEREFORE, in support of its application for intervention in the Board's ZEC proceedings described above, NJLEUC respectfully submits that all factors for intervention set forth in the Act and N.J.A.C. 1:1-16 weigh in favor of the granting of NJLEUC's motion to (i) intervene in all proceedings convened by the Board arising out of, or in connection with the implementation of the Act and (ii) subject to the approval of the Board and Attorney General, to obtain access to confidential materials in each such proceeding, subject to NJLEUC's entry into a standard non-disclosure agreement approved by the Attorney General:

1. NJLEUC formed, in part, to monitor regulatory and rate proceedings involving the State's electric utilities, including PSE&G, JCP&L and ACE, and has consistently been granted intervenor status in the EDCs' regulatory, energy restructuring, infrastructure, merger and rate proceedings. In addition, NJLEUC and certain of its individual members actively opposed the implementation of ZECs in the Legislative process that culminated in the enactment of the Act. The members of NJLEUC purchase electric distribution service from the EDCs and will pay the

statutory \$0.004/kwh ZEC charge to be assessed on all retail customers. Because NJLEUC members are among the State's largest consumers of power, some will be required to pay in excess of one million dollars annually, with the remaining members paying annual amounts in the hundreds of thousands of dollars. The Act provides for the collection of the ZEC tax for a period of ten years or more, thus exposing certain of NJLEUC's members to the potential payment of up to ten million dollars in ZEC taxes. Accordingly, NJLEUC members will be substantially and specifically affected by the outcome of this proceeding;

2. Given its capacity as an association of large end-use customers of the EDCs that will be required to pay a significant share of the approximately three billion dollars in nuclear subsidies authorized by the Act, NJLEUC's interests are unique from and not adequately represented by any other party. NJLEUC acknowledges the significant role of the Division of Rate Counsel as the statutory representative of all ratepayers. NJLEUC's members, however, are exposed to the potential payment of many millions of dollars in ZEC subsidies annually for ten years or more, as contrasted with the estimated \$30 annual cost to the "average" residential customers who are the primary focus of Rate Counsel. Moreover, unlike residential ratepayers, NJLEUC members are responsible for hundreds of employees in the State as well as the economic viability of their New Jersey operations, and the nuclear subsidies here at issue necessarily will affect corporate decisions regarding those employee levels and future capital investments in those facilities. Therefore, NJLEUC members must be accorded the right to speak for themselves in order avoid being deprived of their significant property interest in their capital and operations without due process. See, e.g. Mathews v. Eldridge, 424 U.S. 319, 332, 96 S.Ct. 893, 901 (1976) (in which the Supreme Court recognized an individual's interest in the continuing receipt of disability benefits to be a statutorily created property interest protected by the Fifth Amendment,

and that “(p)rocedural due process imposes constraints on governmental decisions which deprive individuals of “liberty” or “property” interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment”). See also, Greenberg v. Kimmelman, 99 N.J. 552, 568 (1985) (“The Fourteenth Amendment of the United States Constitution provides that no state shall “deprive any person of life, liberty or property, without due process of law. Article I, paragraph 1 of the New Jersey Constitution protects similar interests”). NJLEUC’s members’ interest in the tens of millions of dollars here at issue clearly constitutes a property right that is of constitutional dimension and, therefore, entitled to due process protections that mandate NJLEUC’s direct intervention in this proceeding.

3. In the circumstances of this proceeding, due process further requires that NJLEUC be afforded full access to the information marked as confidential by the applicants for ZECs, subject to NJLEUC’s execution of an appropriate non-disclosure agreement. Without such access, NJLEUC would effectively be denied the right to be heard “at a meaningful time and in a meaningful manner” that is a basic principle of due process. Matthews v. Eldridge, supra, 424 U.S. at 333, 96 S.Ct. at 902. It is evident from the language of the Act and the public statements made at the time of its signing that the Legislature and Governor assume that the Board and stakeholders will closely scrutinize the financial information pertaining to the nuclear plants and forecasts regarding the PJM markets to determine the critical issues associated with the award of ZECs. This can only be accomplished if intervenors are afforded access to these materials, the only result consistent with the constitutional requirement that their participation be “meaningful”. Without access to the confidential materials, intervenors would be relegated to a status as uninformed observers, effectively denied a meaningful voice in the process.

4. The Board has had experience with such issues in the past and has made similar confidential information available to stakeholders, subject to appropriate safeguards. In the proceedings that restructured the electric industry in the late 1990's, a significant issue arose regarding the valuation of the so-called "stranded costs" that PSE&G and others alleged their generation fleets would incur as a consequence of the transition to competitive generation markets. The Electric Discount and Energy Competition Act, N.J.S.A. 48:3-59, authorized utilities to recover, through a limited duration "market transition charge", stranded costs equivalent to the generation plant costs that the utilities were at risk of losing in a competitive supply market. The issues relating to the quantification of the utilities' alleged stranded costs were fully litigated in a contested proceeding in which considerable confidential financial information—information closely analogous to the financial information that the applicants will produce in these proceedings under Section 3 of the Act—was obtained from the utilities and provided to all intervenors that executed non-disclosure agreements. The financial information produced by PSE&G in its stranded cost proceeding related to the financial position and profitability of the utility's generation facilities (including forecasted annual expenditures for fuel, operation and maintenance expenses, capital additions, taxes, administrative and general expenses and other ancillary costs) as well as market price forecasts that projected future prices in the energy and capacity markets. This information was made available to the Board, Rate Counsel and a diverse group of intervenors that included PSE&G's customers and competitors. It was observed by the Appellate Division that "(t)he proceedings were marked by full and vigorous participation (by "thirty intensely interested intervenors of all stripes"), reflecting the full range of both public and special interests". I/M/O Public Service Electric and Gas Company's Rate Unbundling, Stranded Costs and Restructuring Filings, ("I/M/O PSE&G") 330 N.J. Super 65, 122 and 132 (2000); *aff'd* 167 N.J. 377 (2001). The

intervenors included the “New Jersey Business Users” group and the “New Jersey Industrial Customers Group”, the predecessors of NJLEUC that then represented the State’s large energy users, which were active intervenors in the stranded costs and other restructuring-related proceedings. The groups were permitted to conduct comprehensive discovery regarding these financial issues to present affidavits and financial testimony by numerous witnesses.

5. The amount of stranded costs that a utility could recover was determined in part by the market value of the generation assets that were transferred to an affiliated company. Therefore, in the stranded cost proceeding—similar to the instant proceeding—PSE&G was required to demonstrate the full market value of each eligible generating asset or power purchase commitment over its remaining useful life or term to fix the level of the market transition charge. I/M/O PSE&G, supra, at 124. As *I/M/O PSE&G* makes clear, all of this information was shared with a wide variety of active intervenors, including the competitors of PSE&G. The undersigned was afforded full access to PSE&G’s confidential information on an “attorney’s eyes only” basis in *I/M/O PSE&G* as counsel for Enron, which at the time was a leading competitor of PSE&G.

6. In light of the foregoing, there should be little question that NJLEUC, an organization comprised of large end-use customers of PSE&G and the other EDCs, should be afforded full access to the confidential documents that are relevant to these proceedings. Disclosure of these materials will not “harm competition”, the stated concern of Section 3(a) of the Act, as NJLEUC obviously does not compete with PSE&G and is willing to execute an appropriate non-disclosure agreement. The Board has consistently authorized the disclosure of confidential information in this manner, and this matter presents nothing new that would justify a departure from this longstanding and firmly-established practice. See, e.g. I/M/O Request for Solid Waste Utility Customer Lists, 106 N.J. 508, 522-524 (1987).

7. NJLEUC has a unique perspective and insight regarding the potential impact, on large customers, of the significant costs that will be associated with the implementation of the Act. As previously noted, NJLEUC's members employ hundreds of New Jersey residents and also pay significant state taxes. Its members continually assess the economic viability of their New Jersey operations and future assessments will doubtlessly take into account the outcome of these proceedings. No other party to this proceeding is similarly situated with NJLEUC in this regard.

8. NJLEUC's motion is timely and will not delay or otherwise disrupt the prosecution of these proceedings. Given the abbreviated time deadlines the Act imposes on the Board, and in order to avoid future delays and challenges to NJLEUC's long-recognized associational standing to represent its members in these proceedings, in accordance with longstanding Board policy, NJLEUC hereby identifies the following of its members for purposes of establishing NJLEUC's standing to represent its individual members: for PSE&G, Merck, Inc., Anheuser-Busch and Soundview Paper Company; for JCP&L, Novartis, DSM Nutritional Products, Inc. and Gerdau, Inc.; for ACE, PBF Energy.

9. Fundamental fairness and due process considerations require that NJLEUC be afforded an opportunity to fully participate as an Intervenor in these proceedings, the outcome of which will have a significant impact on the cost of electric service received from the EDCs by the members of NJLEUC. Given the potential impact this proceeding will have on the interests of the New Jersey business community, as well as NJLEUC's long-standing and well-recognized role as a leading representative of those interests in utility ratemaking matters, NJLEUC's unfettered participation is essential for the fair conduct of this proceeding;

10. The issues to be decided in this proceeding "substantially, specifically and directly affect" NJLEUC within the meaning of these terms as used in the Uniform Rules, thereby making

it appropriate for NJLEUC to intervene as a party;

11. Furthermore, the interests of NJLEUC's members as large end-use customers of PSE&G, JCP&L and ACE are substantially different from those of any other party seeking intervention. Therefore, NJLEUC's interests in this proceeding are unique on both a quantitative and qualitative basis;

12. NJLEUC's entry as a party would "measurably and constructively" advance this proceeding (N.J.A.C. 1:1-16.3(a)) because of the unique status of its members as large end-use customers on the EDC distribution systems. NJLEUC's entry as a party would promote an informed and balanced presentation of the issues;

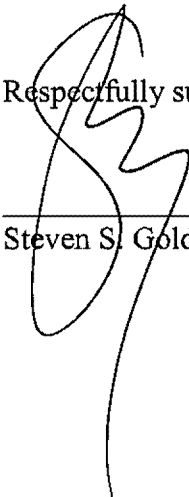
13. Notwithstanding its unique interests, where it is possible and practical for it to do so, NJLEUC will endeavor to work cooperatively with other parties in this proceeding in the interests of administrative efficiency and economy.

14. For the foregoing reasons, and because the cost of electric service to NJLEUC's members will be directly and substantially affected by the issues to be determined in these proceedings, NJLEUC has a direct and immediate interest in the outcome of these proceedings that cannot adequately be represented by any other party.

15. WHEREFORE, pursuant to the Act and N.J.A.C. 1:1-16.1, *et seq.*, NJLEUC respectfully requests that (i) it be permitted to intervene, with full procedural and substantive rights, in all proceedings convened by the Board to implement the Act; (ii) it be afforded access to all confidential information relevant to these proceedings, subject to NJLEUC's execution of a non-disclosure agreement authorized by the Attorney General; and that (iii) the Board grant the relief requested, and any other and further relief deemed appropriate in the circumstances, on an

expedited basis to enable NJLEUC to fully participate without delay in all proceedings that arise out of the Act.

Respectfully submitted,



Steven S. Goldenberg

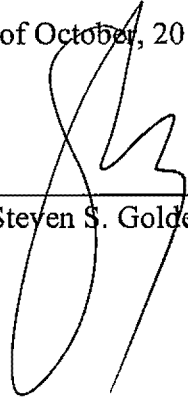
Dated: October 16, 2018

CERTIFICATION OF SERVICE

I hereby certify that I have this day served via electronic mail copies of the foregoing Motion to Intervene to the parties identified on the service list. An original and 10 copies have been forwarded via first class mail to Aida Camacho-Welch, Secretary of the Board of Public Utilities.

I certify I have simultaneously forwarded 10 copies via first class mail to Honorable Gurbir S. Grewal, Office of the Attorney General.

Dated at Red Bank, New Jersey, this 16th day of October, 2018.



Steven S. Goldenberg

Dated: October 16, 2018

In the Matter of the Implementation of L. 2018)
§. 16 Regarding the Establishment of a Zero) BPU Docket No. EO18080899
Emission Certificate Program for Eligible Nuclear)
Power Plants)

Washington)
) ss.
District of Columbia)

1. I am an attorney in good standing admitted to practice in the District of Columbia. I am not admitted to practice in New Jersey. I have no disciplinary proceedings pending against me in any jurisdiction and no discipline has been previously imposed on me in any jurisdiction.

2. I am associated in this matter with New Jersey counsel of record, Steven S. Goldenberg, Esq. of the firm of Giordano, Halleran & Ciesla, P.C. who is qualified to practice law in this State pursuant to R. 1:21-1.

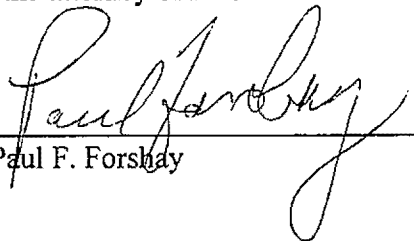
3. The New Jersey Large Energy Users Coalition ("NJLEUC") has requested my representation in this matter.

4. There is good cause for my admission *pro hac vice* in that I have had considerable experience representing large end-use customers in various proceedings, including utility rate and regulatory proceedings, before the Federal Energy Regulatory Commission and Board of Public Utilities and I have an attorney-client relationship with NJLEUC. The proceeding in which I seek admission involves a complex field of law in which I am a specialist.

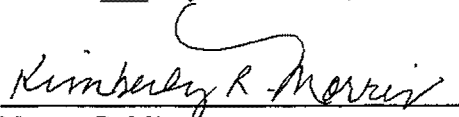
5. I have paid to the New Jersey Lawyers' Fund for Client Protection the fees required by R. 1:20-1(b) and 1:28-2.

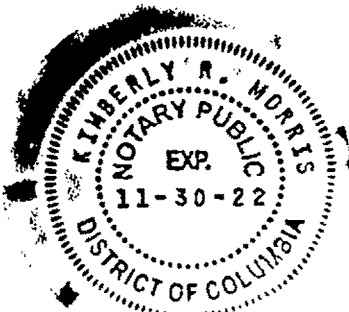
6. If this application to appear *pro hac vice* is granted, I agree to:

- a. abide by the New Jersey Court Rules, including all disciplinary rules;
- b. consent to the appointment of the Clerk of the Supreme Court as agent upon whom service of process may be made for all actions against me or my firm that may arise out of my participation in this matter;
- c. notify the Board of Public Utilities and Office of Administrative Law immediately of any matter affecting my standing at the bar of any court; and
- d. have all pleadings, briefs and other papers filed with the Board of Public Utilities and Office of Administrative Law signed by the attorney of record.


Paul F. Forshay

SUBSCRIBED AND SWORN to before
me this 12 day of October, 2018


Notary Public

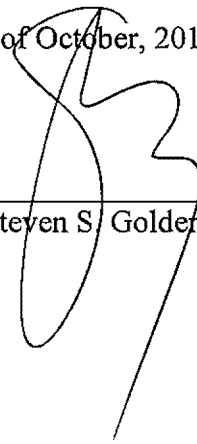


CERTIFICATION OF SERVICE

I hereby certify that I have this day served via electronic mail copies of the foregoing Motion for Admission *Pro Hac Vice* to the parties identified on the distribution list. An original and 10 copies have been forwarded via first class mail to Aida Camacho-Welch, Secretary of the Board of Public Utilities.

I certify I have simultaneously forwarded 10 copies via first class mail to Honorable Gurbir S. Grewal, Office of the Attorney General.

Dated at Red Bank, New Jersey, this 16th day of October, 2018.



Steven S. Goldenberg