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CASE MANAGEMENT**

**OCT 30 2018**

**BOARD OF PUBLIC UTILITIES  
TRENTON, NJ**

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**OCT 30 2018**

**BOARD OF PUBLIC UTILITIES  
TRENTON, NJ** October 26, 2018

**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**

**VIA ELECTRONIC DELIVERY & OVERNIGHT MAIL**

Aida Camacho-Welch, Secretary  
New Jersey Board of Public Utilities  
44 South Clinton Avenue, Suite 314  
P.O. Box 350  
Trenton, New Jersey 08625-0350

Dear Secretary Camacho-Welch:

Enclosed are an original and ten of Public Service Electric and Gas Company, PSEG Power LLC and PSEG Nuclear LLC's Brief in Opposition to Motion to Intervene of New Jersey Large Energy Users Coalition in the above-captioned proceeding.

By copy of this letter, copies of the motion are being forwarded on this date via electronic mail to all persons whose name appears on the attached Service List.

Thank you for your anticipated courtesies.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Joseph F. Accardo Jr.", written in a cursive style.

Joseph F. Accardo Jr., Esq.

*Case Mgmt  
List Copied*

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OCT 30 2018

BOARD OF PUBLIC UTILITIES  
TRENTON, NJ

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

In the Matter of the Implementation of L. 2018, )  
c.16 Regarding the Establishment of a Zero ) BPU Docket No. E018080899  
Emission Certificate Program for Eligible Nuclear )  
Power Plants )

**PUBLIC SERVICE ELECTRIC AND GAS COMPANY'S,  
PSEG POWER LLC'S AND PSEG NUCLEAR LLC'S BRIEF  
IN OPPOSITION TO MOTION TO INTERVENE  
OF NEW JERSEY LARGE ENERGY USERS COALITION**

On October 16, 2018, the New Jersey Large Energy Users Coalition (“NJLEUC”) filed a motion for intervention (“Motion”) in the above referenced docket involving the application process for the Zero Emission Certificate program. Public Service Electric and Gas Company, PSEG Power LLC, and PSEG Nuclear LLC (“PSEG” or the “PSEG Companies”) oppose this intervention because NJLEUC has not satisfied the statutory or regulatory criteria. NJLEUC’s interest is not sufficiently different from that of any party so as to add measurably and constructively to the scope of the unusual proceeding. In particular, NJLEUC has not demonstrated that it is an “essential” participant so as to be entitled to review confidential financial information that will be submitted by applicants to the Board of Public Utilities (“Board” or “BPU”). Therefore, under the plain statutory language the movant cannot, and should not, contribute meaningfully to the Board’s selection of the plant or plants that will receive Zero Emission Certificates (“ZECs”). Moreover, in contrast to the situation in the previous BPU matters in which NJLEUC has participated, the non-bypassable charge to cover the cost of ZECs at issue here -- \$0.004 per kWh – has been established by the Legislature. Therefore, NJLEUC cannot impact how much ratepayers will pay for ZECs and thus has no genuine interest in the outcome of the case; its presence can only cause confusion and undue delay.

If, despite the forgoing, the presiding Commissioner is considering allowing NJLEUC to be involved in the case, that involvement should be as a participant rather than as an intervenor.

## FACTS

On May 23, 2018, Governor Murphy signed legislation into law that created a “Zero Emission Certificate” or “ZEC” program to provide support payments for at-risk nuclear power plants that serve New Jersey (the “ZEC Act”).<sup>1</sup> In the ZEC Act, the Legislature found that “[n]uclear power generation is a critical component of the State’s clean energy portfolio” and that “nuclear power is an important component of a diverse energy portfolio.”<sup>2</sup> The ZEC Act requires that the BPU develop a completed application process for implementation of the ZEC program by November 19, 2018. This instant docket was established by the BPU for this purpose. On October 16, 2018, NJLEUC filed a motion to intervene seeking (i) intervention with full rights as a party, and (ii) access to all information designated as confidential by applicants for ZECs.

## ARGUMENT

### **A. NJLUC Has Not Demonstrated That Its Participation is “Essential” To This Proceeding and Therefor Is Not Entitled to Confidential Financial Information**

NJLEUC contends that it should be entitled “to obtain access to confidential materials in [this] proceeding, subject to NJLEUC's entry into a standard non-disclosure agreement approved by the Attorney General.”<sup>3</sup> But under the ZEC Act, confidential financial information supplied by an applicant for the purpose of demonstrating eligibility is only available to entities that have been “deem[ed] essential [by the Board and the Attorney General] to aid the board in making the determinations required” in this proceeding.<sup>4</sup> Even if NJLEUC were granted status as an intervenor (which, as shown below, it should not), NJLEUC would still not be “essential” as required by the ZEC Act to review confidential submittals.

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<sup>1</sup> The ZEC Act has been codified at N.J.S.A. 48:3-87.3-7.

<sup>2</sup> N.J.S.A. 48:3-87.3(a)(7).

<sup>3</sup> Motion, p. 2.

<sup>4</sup> N.J.S.A. 48:3-87.5(a).

First, NJLEUC never alleges in its motion that it is “essential to aid the board in making the [financial] determinations” required for establishing eligibility under the ZEC Act. It is fundamental that dismissal of a claim is required when the moving party fails even to allege the legally necessary elements.<sup>5</sup> Because NJLEUC fails even to allege – let alone support an allegation – that it is essential to aid the Board in making the financial determinations required under the ZEC Act, it cannot be granted access to confidential financial information submitted by ZEC applicants.

Indeed, NJLEUC compounds its error. Not only does NJLEUC fail to allege compliance with the “essential” standard, it even denies its existence. Specifically, NJLEUC contends that “[t]he Board has consistently authorized the disclosure of confidential information [subject to execution of a confidentiality agreement], and this matter presents nothing new that would justify a departure from this longstanding and firmly-established practice.”<sup>6</sup> In fact, even assuming the existence of the “longstanding and firmly established practice” that NJLEUC claims, this proceeding does very clearly present “something new” which would justify “a departure” from past practices; namely a new statutory standard that imposes a requirement to demonstrate an “essential” need to assist the Board. NJLEUC’s claim that its participation as an intervenor in the stranded cost proceedings under the Electric Discount And Energy Competition Act in the 1990s is precedent for a grant of intervenor status here<sup>7</sup> is misplaced for this reason: there was no requirement in those cases that intervenors demonstrate that their participation in the Board’s financial evaluation was “essential” to the Board’s deliberations.

Second, even if dismissal of NJLEUC’s request for access to confidential financial information under the ZEC Act were not barred by its failure to plead the necessary elements to establish an entitlement, it would still not be eligible. To demonstrate that it is “essential” for the financial

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<sup>5</sup> See e.g., *Printing Mart-Morristown v. Sharp Electronics Corp.*, 116 N.J. 739, 708 (1989) (“It is not enough for plaintiffs to assert, as they did at argument of the motion, that any essential facts that the court may find lacking can be dredged up in discovery.”); *Hodge v. McGrath* 2014 WL 6909499 (Super. Ct. N.J. 2014) (Court dismissing cause of action as facially defective in circumstances in which “Plaintiff failed to allege in his pleadings all of the elements necessary to prove [his] claim”).

<sup>6</sup> Motion, p. 6.

<sup>7</sup> See Motion, pp. 5-6.

determinations required under the ZEC Act, NJLEUC would need to show that those determinations could not reasonably be made without its involvement because its participation was “basic and necessary” and “of the utmost importance.”<sup>8</sup> No such demonstration was made here. Nor could one be made. In fact, the Board itself has the inherent capabilities to make the financial determinations required under the ZEC Act with its own personnel. And if it lacked such capabilities, the Board is expressly provided by the ZEC Act with the ability to hire any necessary consultants and, through a \$250,000 fee for each applicant plant, will have ample means to do so.

## **B. NJLEUC Has Not Demonstrated Its Entitlement to Become an Intervenor**

### **1. Applicable Law**

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

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

### **2. NJLEUC Has Failed to Allege Cognizable Interests to Support Its Intervention**

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<sup>8</sup> See *Air Master & Cooling, Inc. v. Selective Insurance Air Master & Cooling, Inc. v. Selective Insurance* 452 N.J.Super. 35, 53 (App. Div. 2017) (Court applying “standard dictionary definitions for ‘essential’” and citing “*Black’s Law Dictionary* 663 (10th ed. 2014), defining “‘essential’ as . . . “[o]f utmost importance[.]” or “basic and necessary”); *Raush v. Raush*, 2017 Westlaw 3722545 (Super. Ct., App. Div. 2017) (“Essential terms are those that are ‘[o]f the utmost importance’ or are ‘basic and necessary’ to the parties’ agreement”, citing *Black’s Law Dictionary* 663 (10th ed. 2014); cf. *Mars, Inc. v. JCM American Corp.*, 2006 WL 3373284 (U.S. Dist. Ct., N.J. 2006) (Court dismissing claims for summary judgement in patent case dependent on whether materials incorporated by reference were “essential” because movant failed to show that “without [the incorporated materials], one skilled in the art is not sufficiently ‘enabled’ to produce the invention”).

The essence of NJLEUC's claimed interests that would justify its intervention is explained in its motion as follows:

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; . . . 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.<sup>9</sup>

NJLEUC's allegations are insufficient to demonstrate a cognizable interest that would justify granting it the rights of an intervenor. NJLEUC claims that its members will be aggrieved by the payment of the ZEC charges but fails to show how its participation could reduce those amounts. Specifically, NJLEUC states that its members "will pay the statutory \$0.004/kWh ZEC charge" -- which under the terms of the ZEC Act is not subject to reduction during the application process -- without explaining how its participation might reduce the level of its member's obligations.

Rate-setting is a legislative function under New Jersey law<sup>10</sup> and for the "the delegation of the legislative function [of rate-making] to be valid under our Constitution it is essential that adequate standards be prescribed by the Legislature and *adhered to by its agent, in this instance the Board.*"<sup>11</sup>

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<sup>9</sup> Motion, p. 2-3.

<sup>10</sup> See, e.g., *Alexander v. New Jersey Power & Light Co.*, 21 N.J. 373, 377 (1956) (NJ Supreme Court) (Court "[i]nvoking the basic doctrine that rate-making is a legislative . . . function . . .") (internal quotations omitted); *Atlantic City Sewerage Co. v. Board of Public Utility Com'rs*, 128 N.J.L. 359, 364 (1942) ("Rate making is essentially a legislative function"); *Petition of Public Service Elec. and Gas Co.*, 304 N.J.Super. 247, 264 (App. Div. 1997) ("Our Supreme Court has observed that rate making is a legislative . . . function . . .") (internal quotations omitted).

<sup>11</sup> *Petition of Public Service Coordinated Transport*, 5 N.J. 196, 214 (1950) (emphasis added); see also *Atlantic City Sewerage*, 128 N.J.L. at 368 ("Agencies to whom this legislative power [to set rates] has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances").



Because the legislature has not conferred any authority upon the Board under the ZEC Act to reduce the level of the \$0.004/kWh rate in the initial application review proceeding,<sup>12</sup> NJLEUC lacks the ability to influence the BPU into adopting a rate reduction in this docket.

NJLEUC's failure to explain its intended role in limiting the amounts paid by its members must also be coupled with the recognition that, as shown above, NJLEUC will not be entitled to review the financial information under the statutory language limiting access to "essential" parties. Accordingly, NJLEUC will not be able to make any contribution in the review of that information. In addition, NJLEUC wrongly contends that plants selected to receive ZECs in this proceeding will be entitled to payments for 10 years. In fact, the proceeding before the Board only deals with payments for the initial three-year eligibility period at the statutorily prescribed level of \$0.004/kWh; selected plants need to reapply for subsequent periods and therefore payments after three years are not even at issue in this proceeding. In sum, NJLEUC has exaggerated the impact that this proceeding could have on its membership and has not explained in a meaningful manner how its participation would "measurably and constructively" aid in the resolution of any of the issues before the Board in this matter.

**3. Assuming that the Board Grants The Intervention of Rate Counsel, NJLEUC's Interests Will Be Adequately Represented**

The New Jersey Division of Rate Counsel ("Rate Counsel") has filed an intervention in this matter that has not been opposed by any party. Assuming that the Board does grant Rate Counsel's motion for intervention, including its request to have access to the confidential financial submittals of applicants, NJLEUC's interests will be adequately represented such that its intervention will not be

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<sup>12</sup> Under the ZEC Act, the BPU has been given authority to change the \$0.004/kWh charge in limited circumstances. See N.J.S.A. 48:3-87.5(j)(3)(a) (allowing \$0.004/kWh charge to be reset in second and subsequent three-year periods); N.J.S.A. 48:3-87.5(j)(3)(c) (allowing \$0.004/kWh charge to be changed for last year of first three-year period if Board decides to discontinue program). Nothing in the ZEC Act, however, provides the BPU with any authority to modify the \$0.004/kWh charge at the beginning of the first eligibility period as part of the application process. Because the BPU can have no more authority than that granted by the New Jersey legislature, the level of the rate is not at issue in this docket.

warranted.<sup>13</sup> Rate Counsel “is the statutory representative of ratepayers”<sup>14</sup> and operates “as a representative of the public.”<sup>15</sup> NJLEUC disparages Rate Counsel’s ability to represent its members, contending that “residential customers . . . are the primary focus of Rate Counsel.” However, there is nothing in Rate Counsel’s statutory authority that limits Rate Counsel’s role as an advocate for the public interest. As stated on Rate Counsel’s website:

The New Jersey Division of Rate Counsel is an independent state agency in but not of the NJ Department of Treasury. Formerly the Division of the Ratepayer Advocate within the now-defunct Department of the Public Advocate, the Division represents the interests of consumers of electric, natural gas, water/sewer, telecommunications, cable TV service, and insurance (residential, small business, *commercial and industrial customers*).<sup>16</sup>

Further, in this case, given that the ZEC charge applies to all distribution customers across-the-board without regard to rate class designations, the interests of residential, commercial and industrial customers are fully aligned. In sum, NJLUEC’s claim that Rate Counsel will not adequately represent the interests of businesses – large or small -- is incorrect.

**4. NULEUC’s Participation Could Result in Undue Delay In Completion of The ZEC Application Review Process Consistent with the Statutory Deadlines of The ZEC Act**

The ZEC Act sets forth mandatory time lines for completion of the Board’s deliberations. The Board must issue an order describing the application process by November 19, 2018, applications will need to be filed by December 19, 2018, and Board will be required to make a decision regarding whether and to whom to award ZECs by April 18, 2019. This means that the Board will have about four months – including a period that encompasses the holiday season – to hire consultants, review and analyze

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<sup>13</sup> On September 21, 2018, Rate Counsel filed its motion for access to confidential financial information on the basis that Rate Counsel is an “essential” participant. While the PSEG Companies do not agree that Rate Counsel’s claim that its participation in the review process for ZEC applications is “essential,” neither they nor any other party filed an objection to its motion.

<sup>14</sup> Division of Rate Counsel Motion For Access to Confidential Information, filed September 21, 2018, BPU Docket No. E018080899, p. 3

<sup>15</sup> *Id.*, p. 4

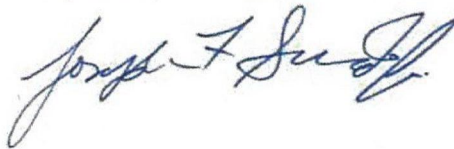
<sup>16</sup> See “Learn About the Division,” (<https://www.nj.gov/rpa/about/>) (emphasis added).

application submittals, obtain additional information as needed, review and analyze additional information submittals, identify plants that meet the eligibility requirements, determine ranking criteria, rank eligible plants and prepare its order explaining its decision. Allowing NJLEUC to intervene, and potentially other entities that have sought to participate as intervenors or participants,<sup>17</sup> will inevitably slow down this process and could impose extraordinary burdens on the Board in order to meet its statutory obligations in a timely manner.

### CONCLUSION

NJLEUC has failed to justify its entitlement to confidential financial information as an “essential” party needed to assist the Board, and has also failed to meet the basic standards for intervention in this proceeding. Its participation as an intervenor would simply create undue delay and interfere with the ability of the Board to meet a strict statutory timeline without adding constructively to the resolution of the issues that need to be addressed. The request for intervention should be denied. In the alternative, should the presiding Commissioner decide to authorize the NJLEUC’s involvement in this case at all, such involvement should be limited to Participant status.

Respectfully submitted,



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<sup>17</sup> Applications have been made for intervenor or participant status by Rate Counsel, NJLEUC, NRG Energy Inc., PJM Power Providers and the PJM Independent Market Monitor to date. Certain parties have claimed that the Board’s August 29, 2018 order setting an intervention filing date does not apply to the ZEC application proceeding. If so, other parties may seek to intervene and/or participate which could further burden the ability of the Board to comply with its statutory deadlines.