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CASE MANAGEMENT

OCT 30 2018

BOARD OF PUBLIC UTILITIES
TRENTON, NJ

October 29, 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

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BOARD OF PUBLIC UTILITIES
TRENTON, NJ

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 copies of Public Service Electric and Gas Company's, PSEG Power LLC's and PSEG Nuclear LLC's Brief in Opposition to the Motion to Intervene of the Independent Market Monitor of PJM in the above-captioned proceeding.

By copy of this letter, copies of this opposition 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 dark ink, appearing to read "Joseph F. Accardo Jr.", written in a cursive style.

Joseph F. Accardo Jr., Esq.

*Case report
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 THE INDEPENDENT MARKET MONITOR OF PJM**

On October 19, 2018, the Independent Market Monitor of PJM ("IMM") 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 the IMM has not satisfied the statutory criteria. In particular, the IMM 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"). Permitting the IMM to participate as an intervenor would enable the introduction of a range of irrelevant and speculative issues that are outside the statutorily-defined scope of this proceeding, which would interfere with the resolution of issues actually before the Board for a determination. If, despite the forgoing, the presiding Commissioner determines to allow the IMM 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”).¹ In the ZEC Act the Legislature found that “[n]uclear power generation is a critical component of the State’s clean energy portfolio”² and that “nuclear power is an important component of a diverse energy portfolio.”³ 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 19, 2018, the IMM filed a motion to intervene seeking to “be granted leave to intervene in these proceedings as a party for all purposes.”⁴

ARGUMENT

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

The IMM contends that it should “be granted leave to intervene in these proceedings as a party for all purposes” which apparently would include obtaining access to confidential financial information submitted by applicants.⁵ 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.⁶ Even if the IMM were granted status as an intervenor (which, as shown below, it should not be), the IMM would still not be “essential” as required by the ZEC Act to review confidential financial submittals.

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

² N.J.S.A. 48:3-87.3(a)(7).

³ *Id.*

⁴ Motion, p. 4.

⁵ *Id.*

⁶ N.J.S.A. 48:3-87.5(a).

First, the IMM 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.⁷ Because the IMM fails even to allege – let alone support – the demonstration 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.

Second, even if the IMM’s request for access to confidential financial information under the ZEC Act was 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 determinations required under the ZEC Act, the IMM 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.”⁸ 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 the capabilities or the manpower, the Board is expressly provided by the ZEC Act with the ability to

⁷See 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 (App. Div. Dec. 10, 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”).

⁸ 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”).

hire any necessary consultants and, through the \$250,000 application fee required of each applicant plant, will have ample means to do so. Any capabilities the IMM may claim to have are redundant to the capabilities of the Board and the experts to which it will have access.

B. The IMM 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 provides 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. The IMM Has Failed to Demonstrate Cognizable Interests to Support Its Intervention

The IMM’s claims an entitlement to intervenor status in this proceeding based on its stated interest “in protecting the public interest in PJM markets regulated through competition.”⁹ The IMM maintains that “[i]f approved, these proposals could have a substantial impact on competition in the competitive wholesale electric markets administered by PJM Interconnection, L.L.C., which may, in turn, have a substantial impact on competition and rates

⁹ Motion, p. 3.

in the retail markets subject to the jurisdiction of this Board.”¹⁰ These allegations are not sufficient to warrant participation as an intervenor, if at all.

First, the IMM’s motion fails to demonstrate how the IMM will be “directly affected by the outcome of a contested case.” N.J.A.C. 1. 1-16. 1(a). The IMM does not claim an interest as either as a consumer or a provider of energy. The outcome of this proceeding thus has no “direct” impact on the IMM. Further, the effect on PJM markets that the implementation of the ZEC Act “may” have according to the IMM clearly is a speculative impact at most and does not support intervenor status. *See In Matter of Application of New Jersey Central Power and Light Co.*, 1996 WL 146752 (BPU 1996) (Board denying intervention to “potential competitor”, finding “it does not appear that [movant] has a specific and direct interest to warrant intervention in this case. To the contrary, in its submissions to the Board to date, [movant] has offered only speculative arguments as to how its members might, sometime in the future, be affected by the outcome of the case.”)¹¹

The IMM intimates in its intervention that wholesale and retail prices could go up if nuclear units receive ZEC payments. Yet, at the same time, the IMM insists in its comments that PSEG’s plants are profitable and that, applying “standard economics,” they would not retire.¹² This simply creates an analytical quagmire: The IMM claims that prices will go up if the plants remain in operation because they receive ZECs but, at the same time, that prices will not go up because the plants will continue to operate without ZECs. The Board should not (and need not)

¹⁰ *Id.*, pp. 2-3, *see also*, IMM Comments, p. 11 (“[B]oth New Jersey nuclear plants [i.e. Salem and Hope Creek] would cover their annual avoidable costs over the next four years (2018 through 2021).”)

¹¹ *See also*, *In re Bell Atlantic Corp.*, 1999 WL 536289 (BPU 1999) (Board denying intervention in circumstances in which “it is not at all clear at this stage of the case that Sprint’s competitive position in New Jersey will be substantially affected by the merger as it relates to potential changes in the New Jersey competitive market. Furthermore, Sprint’s status as a competitor does not alone warrant intervention.”)

¹² IMM Comments, p. 3.

grant intervention to a party seeking to introduce consideration of such speculative cost impacts into the instant proceeding. *See In Matter of Petition of Jersey Cent. Power & Light Co.*, 95 N.J.A.R.2d (BRC) 59 (BPU 1994) (Board rejecting both intervenor and participant status for “Movants [who] acknowledge that the . . . costs which they would have the Board consider as part of the comprehensive . . . analysis fundamental to a proper analysis of the [the matter before it], are as yet unknown.”)

Second, the IMM’s stated interest in “protecting . . . competition” is not within the defined scope of this proceeding. As the Board noted in initiating the instant proceeding, the ZEC Act requires the Board to issue an order that creates “a completed application process by November 19, 2018.”¹³ As further stated in the Board’s September 11, 2018 notice:

The Act requires that the Board complete a proceeding within 180 days after the date of enactment of the Act, i.e., by November 19, 2018, to allow for the commencement of a ZEC program. In the proceeding, the Board shall – after notice, the opportunity for comment, and public hearings – issue an order establishing a ZEC program for selected nuclear power plants. The Board’s Order shall include but need not be limited to: (i) a method and application process for determination of the eligibility and selection of nuclear power plants; and (ii) establishment of a mechanism for each EDC to purchase ZECs from selected nuclear power plants.¹⁴

Thus, the purpose of this proceeding is implementation of the ZEC Act - to develop a process through which the Board will be able to make an administrative determination of whether applicant nuclear plants are at risk of retiring and their contributions towards air quality, fuel diversity and resilience for New Jersey. Consideration of how the selection of a ZEC recipient may or may not affect competition in the PJM markets is in no way an issue that the BPU will

¹³ September 11, 2018 notice, p. 2.

¹⁴ *Id.*, p. 1.

address. Accordingly, the stated basis for the IMM's intervention is not even tangentially within the scope of the proceeding as defined by the Board.

Third, it is clear from the IMM's comments in this matter that the IMM is not actually interested in assisting the Board in implementing the process for determining the eligibility and ranking of nuclear units that apply for ZECs under the ZEC Act. Rather the IMM seeks to pursue its own agenda rather than implementing the goals of the legislation. One area of fundamental disconnect occurs between the IMM's views and the clearly stated standards of the ZEC Act for making the required financial determinations. As shown by the PSEG Companies in their comments, this process is laid out in detail in the law and focuses on whether the applicant will receive sufficient revenues to cover defined costs and risks. Yet, the IMM proposes to ignore the express language of the legislation and the clear intent of the legislature and substitute its preferred analysis which focuses on its own particular and radically-different definition of "avoidable costs" or "going forward costs." For example, the IMM states that the "operational risks" and "market risks" as the separate defined elements identified in the ZEC Act just do not exist.¹⁵ Introducing this issue (and other IMM claims inconsistent with the ZEC Act) into this proceeding would only be a distraction to the Board from meeting its statutory duties.

Further, although the IMM invokes the specter of impacts on retail rates, the IMM has not made any demonstration regarding how its involvement would affect the statutorily specified \$0.004/kWh rate for ZEC charges. Nor could it do so. Rate-setting is a legislative function under New Jersey law¹⁶ and for the "the delegation of the legislative function [of rate-making] to

¹⁵ IMM Comments, p. 5.

¹⁶ See, e.g., *Alexander v. New Jersey Power & Light Co.*, 21 N.J. 373, 377 (1956) (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).

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.*”¹⁷ 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,¹⁸ the IMM lacks any ability to influence the BPU into adopting a rate reduction in this docket.

3. The IMM’s Participation Would Result in Confusion and 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 must 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 –a period that includes the holiday season – to hire consultants, review and analyze 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 an order explaining its decision. The matters that the IMM wishes to litigate are not within the scope of the ZEC Act;

¹⁷ *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”).

¹⁸ 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.

in fact, they are direct challenges to the precepts of the ZEC Act. Allowing the IMM to intervene, and potentially other entities that have sought to participate,¹⁹ will inevitably slow down this process, introduce confusing, out-of-scope issues and impose extraordinary burdens on the Board's ability to meet its statutory obligations in a timely manner.

CONCLUSION

The IMM 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 confusion and undue delay, and interfere with the ability of the Board to meet a strict statutory timeline without adding anything constructive to the evaluation of the issues that must be addressed. Accordingly, the IMM's request for intervention should be denied. If the presiding Commissioner should decide to authorize the IMM's involvement in this case at all, such involvement should be limited to participant status.

Respectfully submitted,



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¹⁹ Applications have been made for intervenor or participant status by Rate Counsel, NJLEUC, NRG, PJM Power Providers and the IMM 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, additional parties may seek to intervene and/or participate which could further burden the ability of the Board to comply with its statutory deadlines.