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BOARD OF PUBLIC UTILITIES
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BOARD OF PUBLIC UTILITIES
TRENTON, NJ

HAND-DELIVERED

The Honorable Aida Camacho-Welch, Secretary
New Jersey Board of Public Utilities
44 S. Clinton Avenue, 3rd Floor, Suite 314
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 Secretary Camacho-Welch:

Please accept for filing an original and ten (10) copies of the response of the Division of Rate Counsel ("Rate Counsel") to the Motion to Intervene (the "Joint Motion to Intervene") filed in this matter on behalf of Public Service Electric and Gas Company ("PSE&G"), PSEG Power LLC ("PSEG Power") and PSEG Nuclear LLC ("PSEG Nuclear"). Enclosed is one additional copy. Please date stamp the copy as "filed" and return to our courier. Thank you for your consideration and attention to this matter.

INTRODUCTION

In this proceeding the Board of Public Utilities ("BPU" or "Board") is charged with deciding whether to award approximately \$300 million annually in ratepayer-funded subsidies to one or more nuclear power plants, and, if so, which plants will receive the subsidies. Rate Counsel is submitting this letter in response to a motion to intervene filed jointly by PSE&G and two of its electric generation-related affiliates, PSEG Power, and PSEG Nuclear. PSEG Power, which is a subsidiary of PSE&G's holding company, Public Service Enterprise Group ("PSEG")

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has five subsidiaries that operate nuclear, fossil and renewable generation facilities and provide energy trading and retail electric services. One of PSEG Power's five subsidiaries is PSEG Nuclear, which operates three nuclear units in Salem County, New Jersey and has a minority interest in two nuclear units located in Pennsylvania. See PSEG Corporate website, <https://corporate.pseg.com/aboutpseg/companyinformation/thepsegfamilyofcompanies/psegpower>. According to the Joint Motion, PSEG Nuclear intends to file an application to receive Zero Emission Certificates ("ZECs") for the three Salem County nuclear units.

For the reasons explained below, PSE&G should not be permitted to be represented jointly with its non-utility affiliates, as those affiliates' interests in this proceeding are in conflict with PSE&G's obligations as a public utility. The Joint Movants should be permitted to intervene only if PSE&G is represented by separate counsel and subject to the Board's direction to PSE&G to act in a manner consistent with its obligations to its ratepayers. Rate Counsel notes that the Joint Motion does not include a request by PSE&G for access to the confidential information contained in the ZEC applications to be filed by PSEG Power or others, or a request by PSEG Power and PSEG Nuclear to receive confidential information that may be submitted by applicants other than PSEG Nuclear. Rate Counsel reserves its rights to assert a position on behalf of ratepayers in the event such a request is filed.

ARGUMENT

While PSE&G and its affiliates have interests in this proceeding, those interests are very different. Indeed, the Joint Movants explain, "each company has a unique interest that cannot be represented by any other party." Joint Motion, par. 5. PSEG Nuclear has an interest in applying for and receiving the subsidy. Thus, PSEG Nuclear and its parent PSEG Power have an interest

in advocating for an application process and selection criteria that will facilitate a successful application by PSEG Nuclear.

PSE&G's interests are different by virtue of its obligation as a public utility subject to the Board's jurisdiction. New Jersey's public utilities are required to provide their customers with safe, adequate and proper utility service at rates that are just and reasonable. N.J.S.A. 48:2-21, N.J.S.A. 48:2-23. New Jersey's utility ratepayers are statutorily and constitutionally entitled to receive service at rates that are not unreasonably high. As the New Jersey Supreme Court has explained, "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 ... it cannot be permitted to inflict extortionate and arbitrary charges upon the public." In re Industrial Sand Rates, 66 N.J. 12, 23-24 (1974).

The obligation to provide service at "just and reasonable" rates presupposes diligent management by the utility. A utility is entitled only to those rates which will allow it to conduct its business "under efficient and economical operation" Public Service Coordinated Transport v. State, 5 N.J. 197, 225 (1950). "Good company management is required; honest stewardship is demanded; diligence is expected; careful, even hard, bargaining in the marketplace and at the negotiation table is prerequisite." In re Board's Investigation of Telephone Companies, 66 N.J. 476, 495 (1975).

The Board has recognized the potential conflicts between PSE&G's interests and the interests of PSE&G's electric generation affiliates since those affiliates were created as part of the electric industry restructuring mandated by the Electric Discount and Energy Competition Act of 1999, N.J.S.A. 48:3-49 et seq. The Board Order in the PSE&G electric restructuring proceeding noted that the transfer of PSE&G's generating assets to a separate corporate entity

was being allowed, in part, in response to “concerns ... that the original PSE&G proposal for functional separation of generation coupled with affiliate relations standards might not be sufficient to protect against cross-subsidies and ensure a level competitive electric generation playing field.” I/M/O Public Service Electric and Gas Company’s Rate Unbundling, Stranded Costs and Restructuring Filings, BPU Dkt. Nos. EO97070461, EO97070462 and EO91070463, 1999 PUC Lexis 11, Final Decision and Order at 99, 1999 PUC Lexis at *244 (Aug. 24, 1999) (the “PSE&G Electric Restructuring Order”). Thus, the Board recognized that the interests of PSE&G’s utility operations were sufficiently different from those of its electric generation operation to warrant “structural separation of the generation-related assets into a separate corporate entity ... to provide adequate protections.” Id. Final Decision and Order at 99-100, 1999 PUC Lexis 11 at *244.

The conflict between PSE&G and its electric generation affiliates has already been made clear in the context of the present proceedings. Comments filed jointly by PSE&G and PSEG Power on October 22, 2018 (the “Joint Comments”), concerning the ZEC application process and criteria argued several positions reflecting vigorous advocacy of the interest of PSEG Power and its subsidiary PSEG Nuclear in receiving ZECs, including the following:

1. An argument that the BPU has no authority to consider whether a charge of 0.4 cents per kilowatt hour to subsidize nuclear power plants would violate ratepayers’ constitutional and statutory rights to just and reasonable rates. Joint Comments p. 5-8.
2. A proposal to limit the Board’s ability to consider PSEG’s overall financial condition and corporate strategic planning to evaluate the likelihood that PSEG Nuclear’s nuclear units would shut down in the absence of a subsidy. Joint Comment, p. 8-10.

3. An objection to any requirement that the submissions in support of a ZEC application include audited, or even auditable, financial information. Joint Comments, p. 10-11.
4. A suggestion that the Board should summarily reject the possibility that a shut-down nuclear unit would be replaced by renewables. Joint Comments, p. 11-14.
5. A proposal to limit the types of direct and indirect payments that would disqualify a power plant from receiving ZECs. Joint Comments, p. 22.

PSE&G, PSEG Power and PSEG Nuclear have also filed objections to the petitions to intervene filed by the New Jersey Large Energy Users Coalition (opposition dated October 26, 2018) and the Independent Market Monitor of PJM (opposition dated October 29, 2018).

As a utility whose only role in the legislative scheme is collecting and paying out the proceeds of the ZEC charge, if one is implemented, PSE&G should, at most, have a neutral position on the issues listed above. If PSE&G chooses to assert any positions, those positions should be to advance an application process and criteria that would protect ratepayers against unnecessary or excessive subsidies for nuclear power plants, not one that would maximize PSEG Power's prospects of receiving a subsidy. Indeed, any argument against just and reasonable rates is antithetical to PSE&G's responsibilities as a regulated public utility.

The Board has the authority and the duty to assure that PSE&G's role in this proceeding is consistent with its status as a regulated public utility. Such authority has been reserved by the Board since the creation of PSEG in the mid-1980s. The Board's Order approving the formation of PSEG as PSE&G's holding company specifically noted that the Board's approval was subject to the Board's continuing regulatory authority to investigate and remedy "[p]otential problems such as unfair transfer prices, cross-subsidization and anticompetitive behavior" I/M/O the Petition of Public Service Electric and Gas Co. for Authorization Pursuant to N.J.S.A. 48:3-10 to

Transfer Upon its Books and Records All of the Issued and Outstanding Shares of its Common Stock to Public Service Enterprise Group Inc. and to Exchange Shares of its \$1.40 Dividend Preference Common Stock for a Certain Ratio of Shares of Public Service Enterprise Group for Cash, BPU Dkt. No. EM8507774, Order Authorizing Transfer of Capital Stock and Approval of Merger at 9 (Jan. 17, 1986) (“PSEG Order”). The PSEG Order included several conditions to maintain the Board’s ability to exercise that authority, including full access to all books and records “which pertain to any issue or transaction affecting or related to PSE&G and which may be deemed relevant by the Board,” a requirement to file a cost-allocation manual and maintain detailed records of cost allocations between the utility and PSEG, and a prohibition on the use of the utility’s assets to support the financing of any non-utility affiliate without prior approval by the Board. Id. at 4.

The Board’s authority to regulate the relationships between PSE&G and its non-utility affiliates was reaffirmed in 1993, following a focused audit of PSE&G, PSEG, and its unregulated affiliate Enterprise Diversified Holdings, Inc. (“EDHI”). The audit implementation plan that resulted from the focused audit included several measures to assure the proper representation of ratepayers’ interests within the PSE&G and PSEG corporate structure. I/M/O a Focused Audit of Public Service Enterprise Group, Inc. and Its Subsidiaries, BRC Dkt. No. EA92040459, 144 PUR 4th 351, Order Approving Audit Implementation Plans at 2 (May 25, 1993). These included a change in the composition of PSE&G’s Board of Directors, so that it would include outside directors on PSE&G’s board equal in number to, but different from, the outside directors serving on EDHI’s board. Id. at 5. The outside directors’ on PSE&G’s board were intended to provide a “special focus on the utility’s interest and concerns,” and to “assure that PSE&G’s interest will receive appropriate representation” at the holding company level. Id.

The Board specifically affirmed its authority to oversee PSE&G's relationship with its electric generation affiliates in the PSE&G Electric Restructuring Order, which included the following provision:

- 30) In addition to any other Affiliate Standard of Conduct that might apply to PSE&G the relationship and any transactions between PSE&G and Genco [i.e., PSEG Power], except as such relationship is defined in the BGS contract as reviewed and approved by the Board, will be governed by the affiliate relations standards adopted by the Board pursuant to section 8 of [EDECA], N.J.S.A. 48:3-56.

PSE&G Restructuring Order at 124, 1999 PUC Lexis 11 at *309-10. This provision affirmed the Board's continuing view that the corporate relationship between PSE&G and its electric generation affiliates should not be allowed to undermine its obligations as a regulated public utility.

The Board's duty to assure that the interests of customers of New Jersey's electric and gas public utilities are not harmed as a result of a utility's membership in a holding company structure is further affirmed in the Board's Public Utility Holding Company ("PUHC") Standards. N.J.A.C. 14:4-4.1 et seq. These standards were adopted in part to assure that electric and gas utility ratepayers would not be harmed by the business practices of the utilities' holding companies and nonregulated affiliates. 41 N.J.R. 1500(a) (April 6, 2009), response to Comment No. 1. Among other requirements, the PUHC Standards require PSE&G to be maintained as a separate corporate entity, and prohibit its holding company, PSEG, from being "operated in any way that materially impairs or could reasonably be expected to materially impair [PSE&G's] ... ability to provide safe, adequate and proper utility service at just and reasonable rates." N.J.A.C. 14:4-4.6 (a) & (b) and 14:4-4.7 (a).

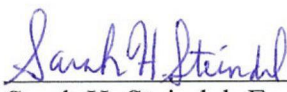
Allowing PSE&G's to intervene and be represented jointly with PSEG Power and PSEG Nuclear is contrary to PSE&G's obligation as a public utility to assure that its ratepayers are not subjected to unnecessary or excessive costs. The Board has authority to remedy this conflict pursuant to its general regulatory authority over PSE&G, as well as the specific provisions of the PUHC Standards. Thus, if PSE&G is granted intervenor or participant status, the Board should exercise its authority to require PSE&G to be represented by separate counsel, and to direct the Company to assure that its role in this proceeding is consistent with its obligations as a public utility.¹

CONCLUSION

PSE&G has a conflict of interest with PSEG Power and PSEG Nuclear in the context of the present proceeding. Accordingly, these entities should not be allowed to act jointly in these proceedings. They should be allowed to intervene only if PSE&G is represented by separate counsel, and subject the Board's direction to act in accordance with its obligations as a public utility.

Respectfully submitted,

STEFANIE A. BRAND
DIRECTOR, DIVISION OF RATE COUNSEL

By: 
Sarah H. Steindel, Esq.
Assistant Deputy Rate Counsel

¹ Rate Counsel notes also that the joint representation appears to be contrary to Rule 1.7 of the Rules of Professional Conduct ("RPC") for lawyers admitted to the New Jersey Bar. A lawyer is prohibited from representing two clients with conflicting interests unless both client give their informed consent to the representation and the lawyer "reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; ..." RPC 1.7 (b)(1) & (2). These conditions cannot be met in this matter because, as detailed above, the obligations of PSE&G as a public utility are inconsistent with counsel's vigorous advocacy for PSEG Nuclear's receipt of ZECs.

1/M/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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