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CASE MANAGEMENT

NOV 07 2018

BOARD OF PUBLIC UTILITIES  
TRENTON, NJ

November 2, 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  
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BOARD OF PUBLIC UTILITIES  
TRENTON, NJ

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 Participate of the NRG Energy, Inc. 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 blue ink, appearing to read "Joseph F. Accardo Jr.", written in a cursive style.

Joseph F. Accardo Jr., Esq.

*EMS  
List Copied*

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BOARD OF PUBLIC UTILITIES  
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NOV 07 2018

STATE OF NEW JERSEY BOARD  
OF PUBLIC UTILITIES

BOARD OF PUBLIC UTILITIES  
TRENTON, NJ

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 PARTICIPATE  
OF THE NRG ENERGY, INC.**

On October 23, 2018, NRG Energy, Inc. ("NRG") filed a motion for participant status ("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 the Motion because NRG has not satisfied the regulatory or statutory criteria. In light of the nature of NRG's stated interest in this case, its participation will not add constructively to the case and instead will result in undue delay or confusion. Permitting NRG to participate would merely allow the introduction of a range of irrelevant and speculative issues into this proceeding that would interfere with the resolution of issues actually before the Board of Public Utilities ("BPU" or "Board") for a determination. Moreover, while participants are not entitled to review confidential materials under the terms of the applicable regulation, to the extent that NRG may seek access to confidential financial information, PSEG notes that NRG cannot demonstrate that its participation is "essential" as required by statute.

**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”<sup>2</sup> and that “nuclear power is an important component of a diverse energy portfolio.”<sup>3</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 23, 2018, NRG filed its motion requesting that it be granted full rights as a participant in this matter pursuant to N.J.A.C. 1:1-16.6(c).<sup>4</sup>

## **ARGUMENT**

### **A. NRG Has Not Demonstrated Its Entitlement to Become a Participant**

#### **1. Applicable Law**

*N.J.A.C. 1:1-16.6 (c)* provides that:

(a) Any person or entity with a significant interest in the outcome of a case may move for permission to participate.

(b) A motion to participate may be made at such time and in such manner as is appropriate for a motion for leave to intervene pursuant to N.J.A.C. 1:1-16.2. In deciding whether to permit participation, the judge shall consider whether the participant’s interest is likely to add constructively to the case without causing undue delay or confusion.

#### **2. NRG Has Failed to Demonstrate Cognizable Interests to Support Its Participation**

NRG asserts an entitlement to participate in this proceeding but does not explain how the outcome of the case will affect it. According to its motion, its participation is justified because it can provide “critical insight as to the method and application process for determining the

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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> *Id.*

<sup>4</sup> Motion, p. 2.

eligibility and selection of nuclear power plants.” NRG describes the nature of its business interests in an effort to explain why it has “critical insights” but never explains how it would be affected by implementation of the ZEC program. Given its failure to provide any explanation regarding how it would be affected, NRG clearly has not demonstrated “a significant interest in the outcome of [this] case.” N.J.A.C. 1.1-16.6.

Also, it is clear from NRG’s comments in other forums that NRG is not actually interested in assisting the Board in a “constructive[]” role of implementing the process for determining the eligibility and ranking of nuclear units that apply for ZECs under the ZEC Act. Rather NRG has its own agenda to pursue rather than implementing the goals of the legislation. As NRG stated in a filing before the Federal Energy Regulatory Commission shortly after the ZEC Act became law:

PJM is now faced with 5,000 MW of existing nuclear generators currently receiving, or expected to shortly receive, subsidies – but has no rules requiring these units to reflect their true costs in the PJM market. These units are among the largest generators on the grid and subsidies create obvious and massive economic distortions. As a result, these subsidized resources are discouraged from bidding their true costs into the PJM markets and thereby avoid retirement, even though they are demonstrably more costly than other capacity resources. These subsidies, by definition, prevent generators from competing on equal footing in either the energy or capacity markets.<sup>5</sup>

Given NRG’s position that the implementation of the ZEC Act will result in “obvious and massive economic distortions,” its participation would not be “constructive” but rather would be disruptive of the Board’s ability to fulfill the ZEC Act’s statutory directives.

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<sup>5</sup> “Protest of NRG Companies,” FERC Docket No. ER18-1314, filed May 7, 2018, p. 2 (<https://elibrary-backup.ferc.gov/idmws/common/opennat.asp?fileID=14912265>).

**3. NRG'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 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 ZEC 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 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. The matters that NRG would apparently seek to litigate based on its filings at FERC are not within the scope of the ZEC Act; in fact, they are direct challenges to the precepts of the ZEC Act. Allowing NRG to participate, and potentially other entities that have sought to participate as intervenors or participants,<sup>6</sup> will inevitably slow down this process and could impose extraordinary burdens that it will make it more difficult for the Board to meet its statutory obligations in a timely manner. Permitting NRG to pursue matters not properly before the Board in this docket, moreover, would sow confusion among potential ZEC applicants.

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<sup>6</sup> Applications have been made for intervenor or participant status by Rate Counsel, NJLEUC, NRG, 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, additional parties may seek to intervene and/or participate which could further burden the ability of the Board to comply with its statutory deadlines.

**B. NRG Has Not Alleged or Demonstrated That Its Participation is “Essential” To This Proceeding and Therefore Is Not Entitled to Confidential Financial Information**

NRG contends that it should be entitled to participate in this proceeding. NRG has not specifically stated that it seeks confidential financial data but the scope of its desired role suggests that it may seek such information at a later point.<sup>7</sup> As a preliminary matter, we note that as NRG appears to recognize, designation as a participant does not confer the right to review confidential material produced in a proceeding under N.J.A.C. 1:1-16.6(c). Moreover, 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>8</sup> Even if NRG were granted status as a participant (which, as explained above, it should not), NRG would still not be “essential” as required by the ZEC Act to review confidential financial submittals.

NRG cannot be granted access to confidential financial information under the ZEC Act because it cannot demonstrate that it is “essential” for the financial determinations required under the ZEC Act. That is, NRG cannot make the necessary showing that those financial determinations could not reasonably be made without its involvement because its participation was “basic and necessary” and “of the utmost importance.”<sup>9</sup> NRG states that it could provide

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<sup>7</sup> Although it does not appear to have done so in its October 23, 2018 filing, to the extent that NRG is seeking access to confidential financial information at this time, it has failed to demonstrate its entitlement to such information as an “essential” party as discussed in the text.

<sup>8</sup> N.J.S.A. 48:3-87.5(a).

<sup>9</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

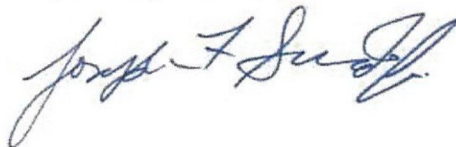


“critical insights” but does not support that claim beyond stating that it participated in other proceedings, that it participates in wholesale markets and that it supplies retail load. But this is not support for a finding that the information NRG may possess is not available from other sources. In 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.

### CONCLUSION

NRG has failed to meet the basic standards for participation in this proceeding. Its participation would simply create confusion and undue delay, and interfere with the Board’s ability to meet a strict statutory timeline without adding constructively to the resolution of the issues that need to be addressed. The request to participate should be denied. Further, to the extent that NRG may seek access to confidential financial data, it will not qualify as an “essential” party under the ZEC Act.

Respectfully submitted,



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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”).