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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 Intervene of the PJM Power Providers Group ("P3") 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,

*Joseph F. Accardo Jr.*

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BOARD OF PUBLIC UTILITIES  
TRENTON, NJ

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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 INTERVENE  
OF THE PJM POWER PROVIDERS GROUP**

On October 23, 2018, the PJM Power Providers Group ("P3") filed a motion to intervene ("Motion") and accompanying brief ("Brief") 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 P3 has not satisfied the regulatory or statutory criteria. First, the "nature and extent" of the movant's interests – expressly limited to "ensuring that competitive standards are addressed" and "ensuring fairness in the wholesale energy market" – have nothing to do with this proceeding. Permitting P3 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 that would interfere with the resolution of issues actually before the Board of Public Utilities ("Board" or "BPU") for a determination. Further, P3 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. If, despite the forgoing, the presiding Commissioner determines to allow P3 be involved in the case at all, 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”<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, P3 filed a motion to intervene seeking “to intervene as a Party in the above-entitled proceeding with all the rights provided therefore . . . .”<sup>4</sup>

## ARGUMENT

### **A. P3 Has Not Demonstrated That Its Participation is “Essential” To This Proceeding and Therefore Is Not Entitled to Confidential Financial Information**

P3 contends that it should be entitled “to intervene as a Party in the above-entitled proceeding with all the rights provided therefore, under all applicable rules, codes and statutes, including, but not limited to, receive copies of *all* pleadings, papers, documents and exhibits . . . .”<sup>5</sup> which apparently would include obtaining access to confidential financial information submitted by applicants. But under the ZEC Act, confidential financial information supplied by an applicant for the purpose of demonstrating eligibility is only available to entities that

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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. 1.

<sup>5</sup> *Id.* (emphasis added.)

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>6</sup> Even if P3 were granted status as an intervenor (which, as shown below, it should not be), P3 would still not be “essential” as required by the ZEC Act to review confidential financial submittals.

First, P3 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>7</sup> Because P3 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 dismissal of P3’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 determinations required under the ZEC Act, P3 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

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<sup>6</sup> N.J.S.A. 48:3-87.5(a).

<sup>7</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>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*

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 manpower, the Board is expressly provided by the ZEC Act with the ability to 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 P3 may claim to have, are redundant to the capabilities of the Board and the experts to which it will have access.

**B. P3 Has Not Even 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.

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*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”).

**2. P3 Has Failed to Demonstrate Cognizable Interests to Support Its Intervention**

P3 asserts an entitlement to intervenor status in this proceeding claiming that “the outcome of the proceeding will have direct economic consequences for P3 and its members.”<sup>9</sup> Its motion explains that “P3 proposes to advance industry-wide interests aimed at ensuring that competitive standards are addressed in a thorough manner,”<sup>10</sup> and asserts that “P3 has a unique interest in this proceeding, including in ensuring fairness in the wholesale energy market.”<sup>11</sup> These allegations are not sufficient to warrant participation as an intervenor, if at all.

First, despite its assertions to the contrary, P3’s motion fails to demonstrate how P3 will be “directly affected by the outcome of a contested case”. N.J.A.C. 1. 1-16. 1(a). The interests asserted by P3 in this proceeding relate to P3’s stated “mission [which] is to promote properly designed and well-functioning competitive wholesale electricity markets in the 13-state region and the District of Columbia served by PJM Interconnection.”<sup>12</sup> These interests are not “direct:” As a trade association, P3 is not itself an owner of nuclear power plants and the interests it seeks to promote for its members in this proceeding are related to potential impacts on wholesale markets in PJM. These interests clearly are speculative given that, at most, they concern indirect impacts that the legislation could have on the PJM market as whole. These assertions do not satisfy the statutory standards. The impact of the legislation on the PJM market is not at issue in this matter, which concerns the qualifications of applicant nuclear power plants under the statutory criteria. P3’s motion fails to provide any demonstration regarding how its intervention

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<sup>9</sup> Brief, p. 4.

<sup>10</sup> *Id.*, p. 5.

<sup>11</sup> *Id.*, p. 5.

<sup>12</sup> *Id.*, p. 1.



will assist the Board in evaluating applications under these criteria, and therefore does not satisfy the standard for intervention.

The Board's denial of an intervention request by another trade association purporting to represent the interests of generators in promoting competition is instructive. *In Matter of Petition of Public Service Elec. and Gas Co.*, 1995 WL 451010 (1995), the Independent Energy Producers of New Jersey ("IEPNJ") claimed an entitlement to intervene in a proceeding involving a rate reduction offered by PSE&G to a large energy consumer. IEPNJ claimed that it was a competitor of PSE&G under the theory that the customer could have installed co-generation facilities in lieu entering into the agreement for the reduced utility rates. IEPNJ eventually conceded that co-generation was not feasible for this customer but continued to "contend[] that the policy issues raised by this matter will impact the interests of IEPNJ because the Board's determination in this matter 'will affect the present and future competitive nature of New Jersey's energy market.'" Ultimately, the Board rejected IEPNJ's arguments:

Based on the circumstances of this case, as they are known at this time, it does not appear that IEPNJ's members will be "substantially, specifically or directly" affected by the outcome of this case. To the contrary, IEPNJ offers only vague nonspecific arguments as to how its members might be affected by the outcome of the case.<sup>13</sup>

P3 is similarly situated. It does not claim that the interests it seeks to address as a trade organization relate to any intention of its members to participate in the ZEC program; hence it does not represent the interests of a direct competitor that could supply the environmental and fuel diversity interests the ZEC Act is designed to preserve. Nor does P3 even attempt to explain how the implementation of the ZEC program will affect the wholesale markets. Rather P3 offers "only vague nonspecific arguments as to how its members might be affected by the

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<sup>13</sup> *In Matter of Petition of Public Service Elec. and Gas Co.*, 1995 WL 451010 (1995)

outcome of the case.”<sup>14</sup>

Second, P3’s stated interest in assuring that “competitive standards are addressed in a thorough manner” 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.”<sup>15</sup> 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.<sup>16</sup>

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

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<sup>14</sup> *Id.*, 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.”); *In Matter of Petition of Jersey Cent. Power & Light Co.*, 95 N.J.A.R.2d (BRC) 59 (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.”) ;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.”)

<sup>15</sup> September 11, 2018 notice, p. 2.

<sup>16</sup> *Id.*, p. 1.

address. Accordingly, the stated basis for the P3's intervention is not even tangentially within the scope of the proceeding as defined by the legislature and the Board.

Third, it is clear from P3's comments in other forums that P3 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 P3 seeks to pursue its own agenda rather than implementing the goals of the legislation. As P3 stated in a filing before the Federal Energy Regulatory Commission shortly after the ZEC Act became law:

On Wednesday, May 25, 2018, New Jersey Governor Phil Murphy signed into law Senate Bill 2313 that establishes a Zero Emission Credit ("ZEC") program in the state nuclear resources ("New Jersey Nuclear Subsidy Law"). It is critically important to understand what this law is and what this law is not. Simply stated, this is a law that was designed with the express intention of providing an out-of-market revenue stream to specific electric generation plants located in New Jersey – Salem and Hope Creek. This law was neither created nor intended to make wholesale generation markets more competitive by pricing an environmental externality. Rather, the New Jersey Nuclear Subsidy Law was designed and enacted with the express intent of being a targeted subsidy for specific units.<sup>17</sup>

Given P3's position that the stated goals of the ZEC Act are really a subterfuge for achieving other purposes, its participation as an intervenor would not be "constructive" but rather would be disruptive of the Board's ability to fulfill the ZEC Act's statutory directives.

### 3. P3's Reliance on The Holding In *IEPNJ v. NJDEP* Is Misplaced

P3's brief relies prominently on the holding of *In Independent Energy Producers of New Jersey v. New Jersey Department of Environmental Protection and Energy*, 275 N.J. Super. 46 (App.Div.), certif. denied 139 N. J. 187 (1994) ("*IEPNJ*") as support for "the broad right of trade

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<sup>17</sup> *PJM Interconnection, L.L.C.*, FERC Docket No. ER18-1314 *et al*, "Motion For Leave To Answer and Answer of the PJM Power Providers Group," filed June 1, 2018, p. 2-3. Lest P3's position be in any doubt, P3 further characterizes the ZEC Act as representing "the efforts of New Jersey to use direct subsidies to specific plants in order to discriminatorily pick which units in PJM will remain in the market" *id.*, p. 9 and as "inappropriately interfering with and 'influencing' the competitive wholesale market." *Id.*, p. 11." (<https://www.p3powergroup.com/siteFiles/News/26E3B393FAAEF3DBDD7A956B14EE1175.pdf>.)

association intervention, and more particularly, that the concerns of business competitors support a grant of intervention.”<sup>18</sup> But far from supporting P3’s intervention in this proceeding, the decision actually supports PSEG’s position that the standards for intervention are not met.

*IEPNJ* arose from a challenge initiated by IEPNJ over whether the NJDEP acted properly in granting certain environmental permits sought by PSE&G for its generation business. An initial question posed was whether IEPNJ, representing “business entities competing with the prospective permittee,”<sup>19</sup> had standing to make this challenge. The Court concluded that IEPNJ had standing but under a rationale that is not applicable here. In essence, the Court granted standing to IEPNJ as “the *only* institution[] with sufficient private interest in harmony with the public concern of the consumer” participating in the proceeding.<sup>20</sup> The Court explained:

If business competitors are not accorded standing *in such cases*, [i.e. cases in which competitive business are the only entities aligned with “the public concern of the consumer”] an administrative determination favorable to the permittee, whether right or wrong, proper or arbitrary, takes on a conclusive character to the possible great detriment of the people as a whole.<sup>21</sup>

In fact, the Court granted standing to IEPNJ with serious reservations, stating that “IEPNJ’s interest in the Department’s determination may be considered speculative and likened to that of a spoiler” and that “it is certainly arguable that . . . the members of IEPNJ have . . . an interest so conjectural as to bar the association from attacking the Department’s action.”<sup>22</sup>

The rationale used in *IEPNJ* for granting standing to the trade association does not apply here. First, as shown above, P3 is not even a direct competitor to the ZEC applicants and

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<sup>18</sup> Brief, p. 4.

<sup>19</sup> *In Independent Energy Producers of New Jersey v. New Jersey Department of Environmental Protection and Energy*, 275 N.J. Super. at 56.

<sup>20</sup> *Id.*, (emphasis added).

<sup>21</sup> *Id.*, (emphasis added) (citations and internal quotations omitted.)

<sup>22</sup> *Id.*

disputes the integrity of the New Jersey legislature in enacting the law. Its interests thus are even more attenuated than the “speculative” and “conjectural” interests of IEPNJ that the Court described. Second, P3 cannot claim that it will be the “only institution[] . . . in harmony with the public concern of the consumer” that participates in the case. Rate Counsel has indicated its intent to participate in this proceeding and has sought access as an “essential” party to confidential financial information.<sup>23</sup> As “the statutory representative of ratepayers”<sup>24</sup> and “as a representative of the public,”<sup>25</sup> Rate Counsel’s will advocate for “the public concern of the consumer.” Applying *IEPNJ* to the instant facts leads to the opposite holding: P3’s interests do not warrant a grant of intervenor status.

**4. P3’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

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<sup>23</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>24</sup> “Division of Rate Counsel Motion For Access to Confidential Information,” filed September 21, 2018, BPU Docket No. E018080899, p. 3


<sup>25</sup> *Id.*, p. 4

its decision. The matters that P3 seeks to litigate are not within the scope of the ZEC Act; in fact, they are direct challenges to the precepts of the ZEC Act. Allowing P3 to intervene, and potentially other entities that have sought to participate as intervenors or participants,<sup>26</sup> will inevitably slow down this process, introduce confusing, out-of-scope issues and impose extraordinary burdens on the Board in order to meet its statutory obligations in a timely manner.

### CONCLUSION

P3 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 P3 request for intervention should be denied. If the presiding Commissioner should decide to authorize P3’s involvement in this case at all, such involvement should be limited to Participant status.

Respectfully submitted,



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<sup>26</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, additional parties may seek to intervene and/or participate which could further burden the ability of the Board to comply with its statutory deadlines.