

Jan
11/16/18

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NOV 14 2018

**BOARD OF PUBLIC UTILITIES
TRENTON, NJ**

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November 13, 2018

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**BOARD OF PUBLIC UTILITIES
TRENTON, NJ**

Ms. Aida Camacho-Welch, Secretary
New Jersey Board of Public Utilities
44 South Clinton Avenue, 3rd Floor, Suite 314
P.O. Box 350
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 Nuclear Power Plants
BPU Docket No.: EO18080899**

**I/M/O Public Service Electric and Gas Company's Request for Approval of a
Zero Emission Certificate Recovery Charge
BPU Docket No.: EO18091004**

Dear Secretary Camacho-Welch:

On behalf of the PJM Power Providers Group ("P3") we submit herewith an original and ten (10) copies of a Reply Letter Brief in Further Support of P3's Motion to Intervene as a Party and in reply to the opposition brief submitted by Public Service Electric and Gas Company ("PSE&G"), PSEG Power and PSEG Nuclear in the above-referenced matters, along with an accompanying Certification in support and Certification of Service.

Thank you for your attention to this matter.

Very truly yours,

**DECOTIIS, FITZPATRICK,
COLE & GIBLIN, LLP**

By: *WH*
William Harla

Encls.
WH/sh

cc: BPU Service List (via e-mail only)

Case mgmt

Legal
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Sup
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Zero Emission Certificate Recovery Charge
BPU Docket No.: EO18091004**

Dear Secretary Camacho-Welch:

We represent the PJM Power Providers Group ("P3")¹ in these matters and submit this letter reply brief on behalf of P3 in further support of its Motion to Intervene and in reply to the opposition brief submitted by Public Service Electric and Gas Company ("PSE&G"), PSEG Power and PSEG Nuclear.² This submission also constitutes a follow up to our October 31, 2018

¹ The comments contained herein represent the position of P3 as an organization, but not necessarily the views of any particular member with respect to any issue. For more information on P3, visit www.p3powergroup.com.

² P3's Motion of October 23, 2018 was filed to reserve its right and/or to formally intervene in the ZEC application docket and in the tariff docket only to the extent that proceeding evolves into a surrogate for the ZEC proceedings. Out of an abundance of caution, P3 included a proposed form of Order and Notice of Motion along with its letter brief in support of its motion pending further procedural direction by the Board.



letter to the Hon. Joseph L. Fiordaliso, President urging the Board to issue a supplemental order in the Zero Emission Certificate Program ("ZEC") proceedings setting forth an intervention and motion schedule to address discovery issues, including the sharing of confidential information.

At the outset, it deserves mentioning that although PSE&G, PSEG Power and PSEG Nuclear (hereinafter collectively "PSE&G") have moved to intervene in the ZEC proceeding, that motion has yet to be granted. Accordingly, they have no standing to oppose P3's intervention. It is also important to note that the Ratepayer Advocate, by letter dated November 9, 2018, supports P3's intervention in this proceeding as a Party.

Nonetheless, in one of many examples of PSE&G's efforts to dictate the scope of this proceeding, PSE&G has now opposed every motion to intervene as a party filed with the Board (including even the motion by NRG to join simply as a participant) reflecting its desire to limit this proceeding to the Board, the Ratepayer Advocate and PSE&G affiliated companies only and to exclude knowledgeable, interested parties capable, in addition to the Ratepayer Advocate and Board staff, of assisting the Board in the tasks imposed on it by L. 2018, c.16. This is in stark contrast to the mandate expressed repeatedly by Governor Murphy, the sponsors and the legislative leadership that these proceedings be conducted in a transparent manner to ensure that ratepayers not be asked to pay for a subsidy, and that power producers not be asked to compete against subsidized competition that upsets the PJM market, that is not authorized by statute, proven, or not needed due to the profitability of potential recipient facilities.³

Despite PSE&G's assertions to the contrary, P3 has satisfied each of the factors required for intervention set forth at N.J.A.C. 1:1-16.1. Indeed, the standard is not "essential" as posited by PSE&G, rather, the standard for intervention in an administrative proceeding

³ P3 refers in particular to the November 2, 2018 letter of the New Jersey Large Energy Users Coalition ("NJLEUC"), p. 2.

provides that “[a]ny person or entity not initially a party, who has a statutory right to intervene or 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. 1:1-16.1(a) (emphasis added). In this regard, the BPU is instructed to evaluate: (1) the nature and extent of the movant’s interests in the outcome of the case; (2) determination of whether 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; (3) the prospect of confusion or undue delay arising from the movant’s inclusion; and, (4) any other appropriate matters. N.J.A.C. 1:1-16.3.

As set forth in P3’s moving papers, these factors are met. P3 is substantially, specifically and directly affected by this proceeding because the award of ZEC subsidies will advantage one power generator (PSEG Nuclear) to the detriment of competing power producers who are members of P3 and place them at a competitive disadvantage in the PJM market. (Thomas Cert. ¶7).

The legislation vests the Board with discretion to determine whether a nuclear facility has satisfied the objectives of the Act, and if it does not, the Board is under no obligation to certify such nuclear plant as eligible, c. 16, Sec. 3(d) (“If the board determines, in its discretion, that no nuclear plant that applies pursuant to subsection c. of this section satisfies the objectives of this act, then the board shall be under no obligation to certify any nuclear power plant as an eligible nuclear power plant.”) (Emphasis supplied). P3, as the representative of power generators in the PJM market who compete with PSEG Nuclear, has an interest in its representational capacity in assisting the Board with this determination. The Act thus creates the potential for subsidy for nuclear plants and in determining whether this subsidy is harmful to the competitive interests of P3, P3 has a direct and material interest in assisting the Board in its determination of whether the broad statutory criteria have been met.

As set forth in the Independent Market Monitor's ("IMM") Reply Brief in Support of its Motion to Intervene, dated November 2, 2018, "ZECs will affect competition based on how many are awarded and based on which generators receive them ... ZECs will affect competition only to the extent that a generator or generators can establish eligibility to receive them. The more ZECs received, the greater the impact on competition." Furthermore, the IMM goes on to state, "[m]eet[ing] the applicable criteria ... will minimize the harmful impact on competition. The point of this proceeding is to award ZECs only if needed." (IMM Br. at pg. 4). If the program is not properly established, the competition interests of P3's power producing members will be adversely affected.

The subsidization of any assets, especially if they are profitable, will have undeniable negative impacts on New Jersey's wholesale and retail markets. (Thomas Cert., ¶6). The negative impact on competition directly impacts the properly designed and well-functioning market that P3 members rely upon. (Thomas Cert., ¶7). Specifically, in a market based on competitive principles, the subsidization of certain resources creates winners and losers. Billions of dollars have been invested in the PJM market by P3 members and other market participants with the assumption and expectation that the most competitive resources will be rewarded. Ibid. Whenever resources that would otherwise be unprofitable are given a financial subsidy that makes them more cost competitive than unsubsidized resources -- the goal of the ZEC proceedings -- the playing field is undeniably slanted in the favor of the subsidized units and hurts competing power providers like the members of P3. Ibid. Providing subsidies to profitable units only compounds the unfairness of the market. Ibid.

P3, as a representative of its individual member power generators who compete with PSEG Power and PSEG Nuclear, and who will be harmed by the market contortions created by the ZEC subsidy, are entitled under the criteria to intervene in this matter as a Party so that its

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specific interests as an association of nuclear, natural gas, coal, wind, solar and biomass facilities that generate power are appropriately represented, protected and have the opportunity to be heard on the significant issues in this proceeding that will affect their economic interests, including the adequacy of the statutory predicate that a facility must establish to receive a subsidy and the amount of any subsidy (notwithstanding the assertion the Board has no authority to adjudicate the level of any ZEC subsidy even if it is not needed due to a facility's unprofitability or because the subsidy will result in "unjust and unreasonable rates." (Thomas Cert., ¶8). P3 will bring the sophisticated expertise of its members to the hearing to insure that the issues related to the issuance of subsidies and their impacts are fully and accurately addressed. (Thomas Cert., ¶9). P3's intervention will thus serve to assist and inform the Board, and also help the Board meet the massive resources PSE&G brings to this proceeding in support of its subsidy application. (Thomas Cert., ¶10).

Moreover, P3's interest is sufficiently different from that of any party. It represents competitors of PSEG Power and PSEG Nuclear. Parenthetically, it is worth noting that those two entities, which enjoy the same status as power producing competitors as members of P3, have likewise moved to intervene in this proceeding. Here, the different participants bring different perspectives and expertise: the Ratepayer Advocate acts as a "watchdog" to represent and protect the issues important to ratepayers of all classes, from residential ratepayers on up; the NJLEUC represents sophisticated, large industrial consumers of energy which requires it to be well versed in market conditions; the Independent Market Monitor -- with an emphasis on its independence -- monitors the PJM market to ensure and protect competition. P3 represents the interests of actual competitors of PSE&G. Each brings a unique perspective and expertise which will serve to assist the Board in conducting a complete, meaningful and informed hearing and record. By bringing its real world expertise to this matter, P3 will assist the board in

formulating its decision. The resources of PSE&G dwarf those of the Board and its staff, and the Ratepayer Advocate, and the expertise and knowledge that the additional relevant parties will bring to these proceedings will only inform the Board and its decision making.

Likewise, PSE&G's attempts to distinguish the case law that supports the broad rights of intervention for trade associations should be disregarded by the Board. In In re Pub. Serv. Elec. & Gas Co.'s Rate Unbundling, Stranded Costs & Restructuring Filings, 330 N.J. Super. 65, 132-33 (App. Div. 2000), aff'd sub nom., 167 N.J. 377 (2001), the Board permitted the Independent Energy Producers of New Jersey (IEPNJ), a group of power producers, along with "over thirty intensely interested intervenors of all stripes" to participate in the proceedings, at which PSE&G generating assets were valued for stranded cost purposes, to intervene in the electric deregulation proceedings. The groups were permitted to conduct comprehensive discovery regarding financial issues to present affidavits and financial testimony by numerous witnesses. And, contrary to PSE&G's argument, in Independent Energy Producers of New Jersey v. New Jersey Department of Environmental Protection and Energy, 275 N.J. Super. 46 (App. Div.), certif. den. 139 N.J. 187 (1994), the court emphasized the true need to permit intervention for PSE&G's competitors even where such competitors had only, "a speculative possibility of a business advantage in the outcome of this litigation". The court found this was because such competitors are often the only parties sufficiently invested in the issue to protect the public interest. Without such competitor involvement, the court concluded, "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.'" Id. (quoting Elizabeth Fed. S. & L. Ass'n v. Howell, 24 N.J. 488, 501 (1957)). Thus, the Court granted standing even though IEPNJ's interest in the Department's determination might have been considered speculative. Id. at 56-57.

PSE&G's assertion that P3's intervention in this matter would result in undue delay and confusion is meritless. P3 is well aware of the mandatory deadlines set forth in c. 16 which require that the ZEC program be completed no later than 330 days after enactment, or by April 18, 2019. In fact, P3 has written the Board on numerous occasions already noting these short deadlines, and urging the issuance of a supplemental scheduling order on ZEC intervention and discovery.

In making this argument, PSE&G is twisting the standard of undue delay -- which normally means forcing the proceeding to slow down to allow late entrants to catch up -- to something else: an argument to the effect that allowing any interested parties to intervene in this matter would "slow down the process" because of the knowledge they bring to the matter. This is hardly the first proceeding imposing a tight schedule on the Board to act. The Hearing Officer is experienced in enforcing those deadlines and he is fully capable of, and has ample authority, to manage the proceedings in a timely and efficient manner. P3 will abide by all established deadlines. (Thomas Cert. ¶11). Similarly, PSE&G's understandable reluctance to face questions from knowledgeable participants who can inform the decision maker, whether they gain that knowledge from their positions as competitors, consumers or independent market monitors, in a matter involving a potential outlay of over \$1 billion of ratepayer-funded subsidy is not redundant, and only supplemental to the expertise possessed by the Board, its staff and the Ratepayer Advocate. This is not "confusion", rather, it is the competent gathering of evidence to support informed decision making, and it is not a basis to challenge a proposed intervention.

Finally, PSE&G contends that P3 is not entitled to review confidential information that may be revealed in discovery. Any resolution of that issue now is premature, unrelated to the standards for intervention, and should be addressed in a further Board order, which should also

provide a schedule for an appropriate motion practice to properly, timely and adequately address any procedural or substantive issues involving confidentiality.

As it noted in its October 31 letter, the issue of whether, when and if P3 is entitled to access to confidential information is a determination that is separate and distinct from its right to participate as a party in the ZEC proceedings. The Act clearly contemplates that decisions as to party status are to be resolved first, with determinations of access to confidential information to be decided after a ruling on intervention. (L. 2018, c. 16, Section 3(a), empowering the Board and the Attorney General to provide access to a “party.”). That is the sequence normally followed in litigation whether in courts or in an administrative proceeding, and the Board may and should presume the Legislature accepted ordinary litigation precepts in this regard.

PSE&G is attempting to conflate the standards for intervention, N.J.A.C. 1:1-16.1, and merge them with the statute’s requirement that only an “essential ... party” may see confidential information. They are unrelated. They are separate and distinct standards, and it is premature to address issues of confidentiality when weighing whether to grant intervention.

Such matters are more properly addressed after intervention decisions are made, like any other procedural dispute involving discovery, qualification of experts, and dispositive motions among others. PSE&G’s merger of intervention and confidentiality is not just confusing and a departure from accepted litigation norms, it is legally wrong: the ability to gain access to confidential information is not a prerequisite nor is it an element of the standards for intervention. If the Board accepted such a proposition, it would have the effect of precluding a party from exploring discovery in the non-confidential areas as well, like the “environmental attributes” of the nuclear facilities as set forth in L. 2018, c. 16 (3)(e)(3). As

noted above however, the statute frames these proceedings broadly, and is not limited to confidential information only.

Even parties who do not qualify for access to confidential information, whether because they refuse to sign a non-disclosure agreement, or for some other reason, have the right to seek discovery as to non-confidential information that would bear on the Board's implementation of the subsidy Act. This is just another example of PSE&G attempting to bar the door against a meaningful examination of the standards and qualification for obtaining a ZEC by using any argument to exclude knowledgeable, informed parties from the proceeding.

Putting aside that PSE&G's self-developed standard for "essential" is directly contrary to more accepted notions in this context, i.e., that "essential" should focus on the ability of a party to materially aid in the Board's regulatory decision making -- a standard easily met by P3, NJLEUC, and the IMM, the fact is that the Board and the Hearing Officer have ample means to address the disclosure and dissemination of confidential information, all in keeping with decades of time-honored Board practice. It has the ability to require the execution of non-disclosure agreements which can be appropriately tailored to deal with the specific parameters of this matter. PSE&G is artfully attempting to hijack the Board's control of these proceedings, and the Board should not tolerate these attempts. There are also other ways in which the Board could deal with potential access to confidential information, for instance, by limiting access to certain persons, or by closely scrutinizing and then narrowing PSE&G's assertions as to what constitutes confidential information.

However, the Board need not reach these issues now. It should as a matter of law and good practice avoid redundant and potentially unnecessary motion practice and adjudication of these issues until intervention status is resolved for all potential parties, including PSEG

Power and PSEG Nuclear. To do otherwise is premature and wasteful. The Board need not succumb to PSE&G's efforts to structure the proceeding to suit its interests rather than the public's and the ratepayer's.

For all of the foregoing reasons, as well as those set forth in P3's submission dated October 23, P3 should be granted permission to intervene in the ZEC proceedings as a Party to ensure that its specific interests are appropriately represented and protected.

Respectfully submitted,

**DECOTIIS, FITZPATRICK,
COLE & GIBLIN, LLP**

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Attorneys for the PJM Power Providers Group ("P3")

By: 
William Harla

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Encl.

cc: Attached BPU Service List

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Attorneys for PJM Power Providers Group ("P3")

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

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BOARD OF PUBLIC UTILITIES
TRENTON, NJ

I/M/O THE IMPLEMENTATION OF L. 2018, c. 16
REGARDING THE ESTABLISHMENT OF A ZERO
EMISSION CERTIFICATE PROGRAM FOR
NUCLEAR POWER PLANTS

BPU Docket No. EO18080899

I/M/O PUBLIC SERVICE ELECTRIC AND GAS
COMPANY'S REQUEST FOR APPROVAL OF A
ZERO EMISSION CERTIFICATE RECOVERY
CHARGE

BPU Docket No. EO18091004

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I, Glen Thomas, of full age, do hereby certify as follows:

BOARD OF PUBLIC UTILITIES
TRENTON, NJ

1. I am the President of the PJM Power Providers Group ("P3"), which moves to intervene in these matters as a Party. I am familiar with the facts and circumstances concerning these matters and I make this Certification in support of and on behalf of P3's Motion to Intervene.

2. P3 is a non-profit organization made up of power providers whose mission it 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. Combined, P3 members own more than 84,000 megawatts of generation assets in PJM, produce enough power to supply over 20 million homes and employ over 40,000 people. The power providers work with state and federal policymakers and other stakeholders, including PJM and the Organization of PJM States, to advance the group's mission.

3. As a non-profit organization dedicated to promoting properly designed and well-functioning markets in the PJM footprint, which includes New Jersey, P3 has a unique interest in this proceeding that cannot be represented by any other party. P3 members have a variety of business perspectives in the PJM markets. P3 members own generation in the form of nuclear, natural gas, coal, wind, solar and biomass facilities. P3 members also provide demand response/energy efficiency and serve load as competitive retail providers in states throughout the PJM footprint. Despite these varied interests in the PJM market, P3 is united in its belief that consumers benefit when competitive markets operate as intended.

4. P3 has been actively involved in the development of New Jersey energy policy and has commented in prior proceedings before the Board of Public Utilities (“BPU” or the “Board”). Among other things, P3 testified multiple times before the New Jersey Senate and Assembly in opposition to the Long-Term Capacity Pilot Program legislation. Following passage of the legislation, P3 actively participated in the proceedings before the BPU that eventually led to the creation of the SOCA contracts.¹ During that proceeding, P3 supported PSEG’s position that, “[w]ell designed competitive markets in which nonsubsidized developers can respond to price signals is overarching goal that the PSEG Companies support.....”².

5. P3 also has actively participated in the development of the 2011 Energy Master Plan and is participating in the development of the 2019 Plan. During both EMP processes, P3 consistently supported the position that New Jersey’s homes and businesses benefit when the market is allowed to directly respond to consumer demands within the context of a properly

¹ See <https://nj.gov/bpu/pdf/energy/P3%20Hearing%20Comments.pdf> and also <https://www.nj.gov/bpu/about/divisions/energy/capacity.html>

² <https://www.nj.gov/bpu/pdf/energy/PSEG%20Reply%20Comments.pdf> at 5.

structured market. Specifically, in its comments on the 2019 EMP, P3 encouraged New Jersey to pursue environmental goals through market-based mechanisms.³

6. The subsidization of any assets - particularly profitable ones such as Hope Creek and Salem - will have undeniable impacts of New Jersey's wholesale and retail markets. As the PJM Independent Market Monitor has observed, "[s]ubsidies are an effort to reverse market outcomes with no commitment to a regulatory model and no attempt to mitigate negative impacts on competition."⁴

7. This "negative impact on competition" directly impacts the properly-designed and well-functioning market that P3 members rely upon. Specifically, in a market based on competitive principles, the subsidization of certain resources creates winners and losers. Billions of dollars have been invested in the PJM market by P3 members and other market participants with the assumption and expectation that the most competitive resources will be rewarded. Whenever resources that would otherwise be unprofitable are given a subsidy that makes them more cost competitive than unsubsidized resources -- the goal of the ZEC proceedings -- the playing field is undeniably slanted in the favor of the subsidized units and hurts competing power providers like the members of P3. Providing subsidies to profitable units makes the problem worse and results in nothing but a windfall for the recipient.

8. For all of the reasons stated herein, P3, as a representative of its individual member power generators who compete with PSEG Power and PSEG Nuclear, and who will be harmed by the market contortions created by the ZEC subsidy, must be permitted to intervene in

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<https://www.p3powergroup.com/siteFiles/News/1C191E2E539B94FE805F945B2743C21A.pdf>

⁴ http://www.monitoringanalytics.com/reports/PJM_State_of_the_Market/2017/2017-som-pjm-sec1.pdf at 1

this matter as a Party so that its specific interests as an association of power providers of nuclear, natural gas, coal, wind, solar and biomass facilities are appropriately represented and protected and it has the opportunity to be heard on significant issues that affect the viability and future of the association and its members, including the adequacy of the statutory predicate that a facility must establish to receive a subsidy and the amount of any subsidy (notwithstanding the assertion the Board has no authority to adjudicate the level of any ZEC subsidy even if it is needed or results in “unjust and unreasonable rates”).

9. P3 also seeks intervention and Party status to ensure that the issues related to the issuance of subsidies and their impact are fully and accurately addressed.

10. As set forth above, P3’s intervention will serve to assist the Board, as its members bring unique knowledge to these proceedings.

11. Accordingly, P3 requests permission to intervene in the matter as a Party, with the full rights and obligations of a Party, to participate in conferences, discovery, testimony and cross-examination, settlement, and to be heard on all issues before the Board. P3 understands that it must take the proceedings as it finds them.

12. All correspondence, filings, discovery, reports, and documentation generally regarding this matter should be sent to the following persons:

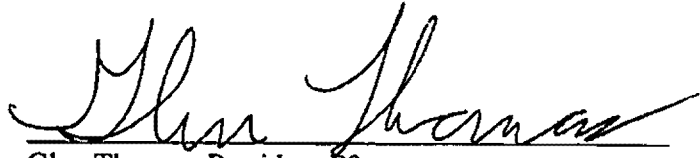
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I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.


Glen Thomas, President P3

Dated: November 13, 2018

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Attorneys for PJM Power Providers Group ("P3")

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COMPANY'S REQUEST FOR APPROVAL OF A
ZERO EMISSION CERTIFICATE RECOVERY
CHARGE

BPU Docket No. EO18091004

CERTIFICATION OF SERVICE

I, William Harla, an Attorney at Law of the State of New Jersey, hereby certifies as follows:

1) On November 13, 2018, I caused to be served via overnight mail and email an original and ten (10) copies of the enclosed Reply Letter Brief and Certification in Further Support of P3's Motion to Intervene as a Party, and in reply to the opposition brief submitted by Public Service Electric and Gas Company ("PSE&G"), PSEG Power and PSEG Nuclear on the Secretary to the New Jersey Board of Public Utilities; and

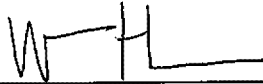
2) On the same date, I also caused to be served by electronic mail a copy of the enclosed Letter Reply Brief and Certification, on each party on the Service List.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

**DECOTIS, FITZPATRICK,
COLE & GIBLIN, LLP**

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Attorneys for the PJM Power Providers Group ("P3")

By:  _____
William Harla

Dated: November 13, 2018