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November 2, 2018

Client/Matter No. 21561-0002

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

Re: I/M/O 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 this letter memorandum as the response of the New Jersey Large Energy Users Coalition ("NJLEUC") to the opposition of Public Service Electric and Gas Company ("PSE&G" or the "Company") to NJLEUC's intervention in this proceeding. PSE&G's opposition can be distilled down to the dubious arguments that because NJLEUC is not in a position to reduce the ZEC surcharge, it cannot have an impact on the case, has no interest in its outcome, and its involvement would only cause confusion and delay. PSE&G therefore argues that NJLEUC's intervention should be denied or, in the alternative, it should only be admitted as a participant and denied access to the PSE&G financial documents that are the focus of this proceeding.

Notwithstanding the *ipse dixit* nature of its arguments, it is obvious that PSE&G has renewed its efforts, begun when the ZEC bill was first introduced in the Legislature, to control and strictly limit (i) the financial disclosures the Company will be required to make to establish its entitlement to receive ZECs, and (ii) the stakeholders that will be afforded a role in these proceedings, in which the sufficiency of PSE&G's ZEC application will be considered. The Company's unprecedented opposition to intervention by its customers, the PJM Independent Market Monitor ("IMM") and its competitors—indeed, anyone other than the Board itself--underscores the Company's transparent and continuing effort to prosecute this proceeding, in which hundreds of millions and potentially billions of dollars are at issue, on a PSE&G "invitation-only" basis, and to short-circuit the thorough analysis of the Company's financials and market conditions that must occur before a decision of this magnitude may properly be made.

CMS
Lisa Gurkas

The cynicism and hypocrisy that underlies the Company's favored approach to ZEC determinations is best demonstrated by its "evolving" view of the role of Rate Counsel in this proceeding. In the Legislature, Ralph Izzo argued in several Committee hearings that Rate Counsel was not essential to the BPU proceedings because Rate Counsel's legislative mandate extended only to "rate proceedings" and the ZEC proceeding was not such a proceeding. PSE&G thereafter successfully opposed the inclusion of a provision in the ZEC Act specifically authorizing Rate Counsel's involvement in these proceedings. PSE&G has now apparently deigned to allow Rate Counsel to intervene, but seeks to leverage Rate Counsel's party status as a bar to intervention by other ratepayer representatives. Thus, in a complete reversal of its earlier arguments before the Legislature, PSE&G now acknowledges the "essential" role of Rate Counsel as the "statutory representative of ratepayers" and "representative of the public", including commercial and industrial customers, to provide a basis for the Company's argument that other ratepayer representatives like NJLEUC are excess baggage and need not apply.

It is noteworthy that PSE&G's narrow view of ratepayer participation stands in stark contrast to the view espoused by Governor Murphy who, during the signing ceremony for the ZEC Act, responded to criticisms that the law did not authorize sufficient oversight of the BPU proceedings, leaving ratepayers vulnerable and under-represented:

> "The ratepayer will be well represented, and I think there are a lot of safeguards in this bill that will prevent some of the sort of general swirling around, 'the money's going to go out of state, the ratepayer won't have representation, they'll get the subsidy even if they don't need it'. None of that is true."

Nor should it be. NJLEUC has consistently acknowledged the important role served by Rate Counsel for ratepayers generally. However, that role was not intended and has never been interpreted to preclude the intervention of other ratepayer representatives in BPU proceedings. Rather, to state the obvious, Rate Counsel and NJLEUC have jointly litigated, with other ratepayer representatives like AARP, the vast majority of BPU contested matters during the fifteen years of NJLEUC's existence. It is noteworthy that PSE&G's argument, which is essentially that Rate Counsel "occupies the field" in terms of ratepayer representation, is singularly inconsistent with the New Jersey Administrative Code, which provides:

> In cases where one of the parties is a State agency authorized by law to represent the public interest in a case, no movant shall be denied intervention solely because the movant's interest may be represented in part by said State agency.

N.J.A.C. 1:1-16.3(b).

This provision applies with full force here.

PSE&G's pleading attempts to side-step these inconvenient facts by arguing that NJLEUC is not an "essential" party and that our intervention motion made no attempt to show otherwise. In reality, our motion demonstrated why NJLEUC's intervention is essential, both on the basis of the interests NJLEUC represents and its members' fundamental due process rights.

It is no secret that PSEG wrote the ZEC Act. As now "interpreted" by PSE&G, the "essential party" standard that PSE&G included in the ZEC Act (to narrow the scope of parties afforded access to PSE&G's financial information) is an impossible one for any party to satisfy. The "essential party" standard that PSE&G espouses--the standard that will determine which parties will have a meaningful role in this proceeding--is unknown to administrative law practice and likely would be struck down by an appellate court. It is therefore not surprising that one searches in vain for any precedent that purports to establish the elements a party must satisfy to establish itself as "essential" in this or any other administrative context.

Indeed, as PSE&G's own arguments make clear, no intervenor could ever satisfy PSE&G's "new statutory standard" which, according to the Company, would require an intervenor to demonstrate that the determinations to be made in this proceeding "could not reasonably be made without its involvement". (Brief at 3-4, citing the Black's Law Dictionary definition of "essential"). The futility of such an effort under PSE&G's standard is underscored by the Company's further argument that "the Board itself has the inherent capabilities to make the financial determinations required under the ZEC Act with its own personnel" independently or as assisted by retained consultants. Accordingly, in PSE&G's view, because the Board could itself resolve the issues presented without the assistance of intervenors, no other party can claim to be "essential" within the PSE&G interpretation of its own "new standard". Not surprisingly, PSE&G concludes that NJLEUC did not make the required demonstration here and concedes "nor could one be made" if the PSE&G interpretation is adopted. (Brief at 4).

Despite PSE&G's transparent efforts to exclude intervenors through this new and unprecedented regulatory barrier, it should be abundantly clear that the requirements of due process cannot be so easily circumvented. Indeed, if there is one thing that is truly "essential" to this proceeding, it is that the due process rights of NJLEUC and all other parties who will be directly affected by the Board's action here must be honored, and the parties afforded a right to be heard in a meaningful way, with full access to PSE&G's financial information. No such barrier was interposed in the stranded cost proceedings described in I/M/O Public Service Electric and Gas Company's Rate Unbundling, Stranded Costs and Restructuring Filings, 330 N.J. Super 65, 122 and 132 (App. Div. 2000); *aff'd* 167 N.J. 377 (2001), which involved a similar review of PSE&G financial information and market data by a broad spectrum of intervenors, and none is required here. (See discussion in NJLEUC's motion, which is incorporated by reference).

As noted in NJLEUC's motion, due process requires that its members be afforded the right to speak for themselves in order to avoid being deprived of their significant property interests in their capital and New Jersey operations. *See*, Mathews v. Eldridge, 424 U.S. 319, 332, 96 S. Ct. 893, 901 (1976); *see also*, Greenberg v. Kimmelman, 99 N.J. 552, 568 (1985)("The Fourteenth

Amendment of the United States Constitution provides that no state shall "deprive any person of life, liberty or property without due process of law. Article I, paragraph 1 of the New Jersey Constitution protects similar interests").

Contrary to the unsupported conclusions contained in PSE&G's reply, NJLEUC's members, which include some of the State's largest businesses, have an extraordinary financial stake in the outcome of this proceeding. Unlike the "average" residential ratepayer who faces a $40 annual ZEC increase—PSE&G's preferred focus--most NJLEUC member companies face potential multi-million dollar exposures during the proposed ten year duration of the ZEC program.

These businesses are also distinguishable from Rate Counsel and other intervenors in that they have a superior understanding of the business and market economics that affect corporate investments and decisions to invest capital in or abandon facilities, knowledge that is directly relevant—indeed essential—to determining whether the financial condition of a particular nuclear plant merits a ratepayer-funded subsidy. Moreover, any decision to provide subsidies to nuclear plants will have an inevitable ripple effect across the state's business community, as it would significantly increase the cost of doing business in New Jersey, something that NJLEUC's members are uniquely positioned to address. For the Board to render a fully informed determination regarding nuclear plant eligibility for subsidies, it must consider all of the economic impacts of its actions and the potential deprivation of the business community's property interests, not merely the narrow financial interests of PSE&G's management and shareholders.

The competitive, commercial and business management interests identified in NJLEUC's intervention motion—interests that Rate Counsel does not seek to represent—provide NJLEUC members with a direct and substantial interest in assuring that only qualified nuclear plants receive the ZEC subsidy. The potential magnitude of the annual ZEC surcharge as applied to large businesses makes NJLEUC's intervention on behalf of these businesses essential to conducting a proceeding that satisfies the minimum requirements of due process, a concept that is curiously absent from PSE&G's analysis. PSE&G's preference for a narrow and "private" regulatory proceeding should be dismissed out of hand as diametrically contrary to fundamental due process requirements.

PSE&G's final claim—that NJLEUC's intervention would sow "confusion" and delay the proceeding by imposing "extraordinary burdens" on the Board—amounts to little more than crocodile tears shed in the hope of avoiding a fully informed review of the central issue in this proceeding: whether nuclear plants that have cleared the most recent PJM auction and, by their own admission will remain profitable for years to come, qualify for an extraordinary ratepayer-funded subsidy. While PSE&G's belated concern regarding the burden this proceeding has imposed upon the Board is truly touching, PSE&G's acknowledgement of the Board's "inherent capabilities" to resolve the issues at hand should obviate any concern that NJLEUC's intervention will somehow confuse the Board. We would also like to think that NJLEUC's consistent interventions in literally all PSE&G matters before the Board in the past fifteen years (in which NJLEUC was consistently afforded access to documents claimed to be "confidential" by the

Company), facilitated, rather than frustrated, the development of a complete record and, ultimately, assisted the Board's resolution of these matters.

We note in closing that PSE&G has made similar arguments regarding the non-necessity of the proposed intervention of the PJM Independent Market Monitor, who is charged with guarding the public interest and competitiveness of the PJM markets. The IMM's motion argues that the ZEC program and associated subsidies will affect the competitiveness of the PJM wholesale markets and, by extension, the retail rates subject to Board regulation and therefore implicates matters within the IMM's purview. The IMM is also privy to significant financial data and market information and forecasts that are directly relevant to the issues to be determined in this proceeding, and has the ability, access to information and resources required to critically analyze the applications made by PSE&G and others for ZEC subsidies. The participation of the IMM in this proceeding would presumably be of inestimable value to the Board and other stakeholders and greatly assist the resolution of the issues at hand.

Not surprisingly, PSE&G dismisses out of hand any potential role for the IMM here, arguing that the IMM would merely "introduce irrelevant and speculative issues" into the case and "interfere with the resolution of the issues actually before the Board". This is nonsense. We anticipate that PSE&G will offer similar specious arguments in opposition to the intervention motion filed by its competitors, and anyone else for that matter (unless, of course, they are supportive of PSE&G). These arguments should be rejected as well.

In a word, PSE&G's arguments against all prospective intervenors represent little more than self-serving attempts to conflate "contrary views" with "confusion" and should be rejected out of hand. While it may be confusing to PSE&G that parties have positions that differ from its own, and that these parties also have a right to be heard by the Board, fundamental guarantees of due process, applicable law and Governor Murphy's public assurances require that this be the case here.

For the foregoing reasons, NJLEUC's intervention motion should be granted in all of its particulars.

Respectfully submitted,

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