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March 11, 2019

Via Electronic Mail and Hand Delivery
Ms. Aida Camacho-Welch, Secretary
New Jersey Board of Public Utilities
44 South Clinton Avenue, 3rd Floor
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Post Office Box 350
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Re: I/M/O the Implementation of L. 2018, C. 16 Regarding the Establishment of a Zero Emission Certificate Program for Eligible Nuclear Power Plant BPU Dkt. No. EO18080899

Dear Secretary Camacho-Welch:

Enclosed for filing please find an original and ten copies of this letter as the response of the New Jersey Division of Rate Counsel ("Rate Counsel") to the "Request for Interlocutory Review" of the Board's February 27, 2019 Order Approving Ranking Criteria in I/M/O the Implementation of P.L. 2018, c. 16 Regarding the Establishement of a Zero Emission Certificate Program for Eligible Nuclear Power Plants, et al., BPU Docket No. EO18080899, EO18121337, EO18121338, EO18121339, filed by PSEG Nuclear , LLC ("PSEG Nuclear" or "Company") on March 6, 2019. Copies are being provided to the parties on the service list by electronic and USPS regular mail. We have also enclosed one

additional copy of the materials transmitted. Please stamp and date the copy as "filed" and return to our courier.

INTRODUCTION

Rate Counsel opposes PSEG Nuclear's request for a number of reasons set forth below. The request, while styled as one for "interlocutory review," is more in the nature of a motion for reconsideration. Yet PSEG Nuclear has failed to argue, much less demonstrate, that a motion for reconsideration or for interlocutory review is warranted under applicable law. Moreover, the clarification that the Company seeks of the Board's Order is highly inappropriate given that PSEG Nuclear (and its partner Exelon) are the sole applicants in this process. What PSEG Nuclear seeks to do in this "request" is question the interpretation by the Board of the ZEC statute and mold the Board's review of PSEG Nuclear's applications. This level of involvement by an applicant in establishing the criteria to be used to review its applications is inappropriate and highly unusual. It threatens the integrity of the process and should not be granted.

ARGUMENT

I. PSEG Nuclear has Failed to Establish that Reconsideration on an Interlocutory Basis is Justified.

PSEG Nuclear does not even make an attempt to argue that its request is justified under the law establishing when an interlocutory review or motion for reconsideration should be granted. The standards for granting interlocutory review in an administrative proceeding were set forth by the Supreme Court in In re Uniform Administrative Procedure Rules, 90 N.J. 85 (1982). In that case, the Court held that interlocutory review may be granted "only in the interest of justice or for good cause shown." Id. In defining "good cause," the Court stated:

> In the administrative arena, good cause will exist whenever, in the sound discretion of the agency head, there is a likelihood that such an interlocutory order

> will have an impact upon the status of the parties, the number and nature of claims or defenses, the identity and scope of issues, the presentation of evidence, the decisional process, or the outcome of the case.

[Id.]. See also, In The Matter Of Middlesex Water Company For Approval Of An Increase In Its Rates For Water Service And Other Tariff Changes, BPU Docket No. WR17101049 (January 31, 2018), 2018 N.J. PUC LEXIS 6, *1 (N.J. P.U.C. Jan. 31, 2018).

The standard for granting a Motion for Reconsideration was set forth by the Supreme Court in D'Atria v. D'Atria, 242 N.J.Super. 392 (Ch.Div.1990), where the Court noted that "[r]econsideration is a matter within the sound discretion of the Court, to be exercised in the interest of justice." Id. at 401. The Court in D'Atria specifically noted:

> Reconsideration should be utilized only for those cases which fall into that narrow corridor in which either 1) the Court has expressed its decision based upon a palpably incorrect [***12] or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence. . . .
>
> Alternatively, if a litigant wishes to bring new or additional information to the Court's attention which it could not have provided on the first application, the Court should, in the interest of justice (and in the exercise of sound discretion), consider the evidence. Nevertheless, motion practice must come to an end at some point, and if repetitive bites at the apple are allowed, the core will swiftly sour. Thus, the Court must be sensitive and scrupulous in its analysis of the issues in a motion for reconsideration.

Id. at 401-02. See also, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996).

Here, PSEG Nuclear does not argue that the Board's decision was irrational or that there are any new facts or law that should cause the Board to reconsider its decision on an interlocutory basis. Nor do its concerns involve the status of parties or claims or defenses. In essence, PSEG Nuclear is asking the BPU to reconsider its own decision because PSEG Nuclear is concerned that the BPU is not interpreting the criteria set forth in the ZEC statute in a way that favors PSEG Nuclear. That is not grounds for reconsideration on an interlocutory basis. If,

ultimately, PSEG Nuclear thinks the Board interpreted the statute wrongly or has applied the ranking criteria wrongly, those issues can easily be addressed on appeal. There is simply no basis or "good cause" to reconsider the Order now. Thus, the request for reconsideration on an interlocutory basis should be denied.

II. The Board's Order Approving Ranking Criteria is Well Within its Authority and Consistent with the ZEC Act.

PSEG Nuclear raises seven concerns with the Board's Order. With respect to each of these concerns, the Board's decision is well within its authority to interpret the statutory language. PSEG Nuclear's arguments seem to be that the Board's interpretations do not comport with its own. This is not grounds to reconsider or modify the decision.

(1) Fuel Diversity

PSEG Nuclear argues that the Board failed to recognize "fuel diversity" as a factor in the ZEC Ranking Criteria and should do so in order to comply with the intent of the ZEC Act. "Fuel diversity," however, is not a defined term in the statute. While it may be a factor in looking at fuel security and resilience, it is not a factor in and of itself that is valued by the industry. As stated in a recent PJM analysis, "More diverse portfolios are not necessarily more reliable; rather, there are resource blends between the most diverse and least diverse portfolios which provide the most generator reliability attributes." https://www.pjm.com/~/media/library/reports-notices/special-reports/20170330-pjms-evolving-resource-mix-and-system-reliability.ashx. (p. 9 of 44). Moreover, there is no point to considering "fuel diversity" in the ranking criteria. All three applicants, as required by the statute, are nuclear power plants. Thus, they will all have the same ranking in terms of "fuel diversity." The Board's decision not to consider this factor in its

ranking criteria is thus completely logical and consistent with the Act. There is no reason to reconsider this sound decision.

(2) Unit Economic Viability Metric

PSEG Nuclear complains that the Board has not indicated clearly enough how it will consider risks in evaluating a unit's average going forward costs, and that it should not consider market changes that are not yet complete or that do not relate to "fuel diversity, resilience, impact on air quality or other environmental attributes" even if those market changes will result in increased revenues for the units that improve their financial viability. The Company does not really explain why the Board's Order is incorrect or unclear, but merely states that it is a "bit broader" than the statutory language and without any explanation asserts, "it would appear that the Board could consider changes in the PJM market construct that *might* increase revenues at a future date." While the language in the Board's Order appears to be virtually identical to the statute, even if it were not, the Board is well within its authority to interpret the statute as long as its interpretation does not contradict the language or purpose of the Act. As the Supreme Court stated in In re Public Serv. Elec. & Gas Company's Rate Unbundling, 167 N.J. 377, 384 (2001):

> Because "[t]he grant of authority to an administrative agency is to be liberally construed to enable the agency to accomplish the Legislature's goals," Gloucester Cty. Welfare Bd. v. State Civil Serv. Comm'n, 93 N.J. 384, 390, 461 A.2d 575 (1983), we defer to "[t]he agency's interpretation . . . provided it is not plainly unreasonable." Merin v. Maglaki, 126 N.J. 430, 437, 599 A.2d 1256 (1992). Likewise, when reviewing an administrative agency's factual findings, our function is not to substitute our judgment for that of the agency, particularly when that judgment reflects agency expertise. Flanagan v. Department of Civil Serv., 29 N.J. 1, 12, 148 A.2d 14 (1959); see Close v. Kordulak Bros., 44 N.J. 589, 599, 210 A.2d 753 (1965) (stating that courts should afford due deference "to the agency's expertise where such expertise is a pertinent factor").

The Company's arguments in no way suggest that the Board's interpretation is "plainly unreasonable." Thus, there is no basis for reconsideration of the Order in this regard.

(3) Annual Unit Generation Net Of Power Exports Out of State

PSEG Nuclear expresses concern with this criterion because "it is unclear as to whether this criterion will serve its intended purpose." *PSEG Nuclear Request for Interlocutory Review* p.4. The Company argues that by scoring units by comparing their output to a base year of 2017, rather than the total quantity delivered to New Jersey, the criterion favors an out of state facility rather than an in-state facility. Id. p. 5. This argument falls short for a few reasons. First, the criterion *does* look at the output delivered to New Jersey. It simply nets out exports, so that a realistic number can be calculated. It also makes sense to compare it to a base year to provide consistency and prevent any efforts to game the system by ramping up or down exports in a single year. Finally, since all three of the applicants are from within New Jersey, the Company's complaints appear to have no impact on the applications currently before the Board. If in the future a concern develops regarding how this criterion is applied, the Board can certainly address that in a future order. There is therefore no reason for the Board to reconsider this criterion.

(4) Full Time Annual Payroll Plus Property Taxes For Payments in Lieu of Taxes

PSEG Nuclear's complaint regarding this criterion appears to be that it could be applied in a way that reaches an absurd result. *PSEG Nuclear Request for Interlocutory Review* p.5. However, there is absolutely no reason to believe that the Board will apply it in a way that reaches an absurd result. The Board is not required to clarify for each criterion that it will apply it reasonably.

(5) Emissions

Similarly, the Company's complaint regarding the Emissions criteria appears to be that they could be applied in a way that produces an absurd result by failing to take into account proximity and actual air impacts in New Jersey. *PSEG Nuclear Request for Interlocutory*

Review p.6. There is no reason to believe that the representatives from the Department of Environmental Protection and BPU would do so. In addition, there are no applicants from outside New Jersey at this juncture. If a concern develops in the future, the Board can address it then. The Company's arguments provide no basis for the Board to reconsider its emissions criteria.

(6) "Eligibillity" and "Ranking" Phases of the ZEC Act.

This is perhaps the most egregious of the Company's complaints. In essence, it seeks to have the Board limit its own authority under the ZEC Act based on PSEG Nuclear's interpretation of the Act. It would be an affront to the process for the applicant to dictate to the decision-maker how its decision must be reached. The Board is perfectly capable of interpreting the ZEC Act on its own. While PSEG Nuclear has attempted throughout the legislative process and the administrative process to say the ZEC Act severely constrained the Board's authority and discretion, the legislative history and statutory language shows that the intent was for the Board to conduct an honest and fair process to determine if the findings required by the ZEC Act could be made, and whether the subsidies sought by the applicants should be granted. If the Board were to grant the Company's request and adopt the applicant's reading of the statute, the process would be severely constrained and undermined. There is no reason for the Board to reconsider its Order in this regard and, in fact, many reasons not to. Moreover, the intent of the Board was clear. The ranking criteria will apply only to eligible units, which shall be ranked accordingly. There is no other reading of this language, and PSEG Nuclear 's objection is nothing more than its attempt to require the Board to apply the Act consistent with the Company's interpretation.

(7) Percentages and points in the Ranking Criteria

The Company argues that the Board's criteria and point system does not add up to 100. This appears to be an error on the Company's part in failing to consider that criteria 1 and 2 are each afforded a 20% weight, while the emissions criteria are each weighted at 15% and the other criteria are weighted at 10%. When the full points for each criteria are properly weighted, the total possible score equals 100.

CONCLUSION

For the foregoing reasons, the Board should not grant PSEG Nuclear's request for reconsideration on an interlocutory basis. There has been no showing that the standards for reconsideration or interlocutory review have been met. Nor should the Board countenance the efforts by the applicants to limit the Board's discretion under the ZEC Act to steer the process to one predetermined outcome. Such an analysis would be inconsistent not only with the clear intent of the legislature for a fair an open process, but with sound principles of due process and administrative law.

Respectfully submitted,

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BOL/lg

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