



STATE OF NEW JERSEY
Board of Public Utilities
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DIVISION OF ENERGY

IN THE MATTER OF THE APPLICATION OF)	ORDER RULING ON MOTIONS
PSEG NUCLEAR, LLC AND EXELON)	TO INTERVENE AND
GENERATION COMPANY, LLC FOR THE ZERO)	PARTICIPATE, ADMISSION
EMISSION CERTIFICATE PROGRAM - SALEM)	PRO HAC VICE, AND ACCESS
UNIT 1)	TO CONFIDENTIAL
)	INFORMATION
)	
)	DOCKET NO. ER20080557

Parties of Record:

Jeanne J. Dworetzky, Esq., Assistant General Counsel, Exelon Generation Company, LLC
Stefanie A. Brand, Esq., Director, New Jersey Division of Rate Counsel
Grace H. Park, Deputy General Counsel and Chief Litigation Counsel, PSEG Nuclear
Steven S. Goldenberg, Esq., Giordano, Halleran and Ciesla, P.C. for New Jersey Large Energy Users Coalition
Paul F. Forshay, Esq., Eversheds Sutherland (US) LLP for New Jersey Large Energy Users Coalition
William Harla, Esq. and Alice Bergen, Esq., Decotiis, Fitzpatrick, Cole & Giblin, LLP for PJM Power Providers Group
Michael J. Ash, Esq., Carlin & Ward, PC, Attorney for Monitoring Analytics, LLC

BY PRESIDENT JOSEPH L. FIORDALISO

BACKGROUND

On May 23, 2018, Governor Phil Murphy signed into law L. 2018, c. 16 (C.48:3-87.3 to -87.7) ("Act"). The Act required the Board to create a program and mechanism for the issuance of Zero Emission Certificates ("ZECs"), each of which represents the fuel diversity, air quality, and other environmental attributes of one megawatt-hour of electricity generated by an eligible nuclear power plant selected by the Board to participate in the program.¹ Under the program, certain

¹ The Act identifies the basic steps for the Board to establish a ZEC program, including program logistics, funding, costs, application, eligibility requirements, selection process, and the timeframes for meeting several requirements of the Act. N.J.S.A. 48:3-87.5.

eligible nuclear power plants may be approved to provide ZECs for the State's energy supply, which in turn will be purchased by New Jersey's four investor-owned electric distribution companies, Atlantic City Electric ("ACE"), Jersey Central Power & Light Company ("JCP&L"), Public Service Electric and Gas Company ("PSEG"), and Rockland Electric Company ("RECO"), and municipal electric distribution company Butler Electric Utility ("Butler") (collectively, "EDCs").

Under N.J.S.A. 48:3-87.5(a), a ZEC applicant "shall provide to the board any financial information requested by the board pertaining to the nuclear power plant." Also, N.J.S.A. 48:3-87.5(e)(1) through (e)(5) specifies the criteria for an applicant to be certified by the Board as an eligible nuclear power plant. Four of the five criteria, N.J.S.A. 48:3- 87.5(e)(1), (2), (4), and (5)), deal with information that is readily ascertainable. The remaining criterion, N.J.S.A. 48:3-87.5(e)(3), requires the applicant to demonstrate to the satisfaction of the Board that, among other things, the fuel diversity, air quality, and other environmental attributes of the nuclear power plant "are at risk of loss because the nuclear power plant is projected to not fully cover its costs and risks, or alternatively is projected to not cover its costs including its risk-adjusted cost of capital, and that the nuclear power plant will cease operations within three years unless [it] experiences a material financial change." Id.

Because certain application information may be claimed to be confidential by the ZEC applicant, the Act provides:

The financial and other information required pursuant to this subsection may be submitted on a confidential basis and shall be treated and maintained as confidential by the board and shall not be subject to public disclosure, notwithstanding any law to the contrary, including the common law. The board and the Attorney General shall jointly approve the disclosure of such confidential information to a party that they deem essential to aid the board in making the determinations required under this subsection, provided that the party is not in a position such that disclosure could harm competition and the party agrees in writing to maintain the confidentiality of the confidential information.

[N.J.S.A. 48:3-87.5(a).]

PROCEDURAL HISTORY

On April 18, 2019, the Board determined that Salem 1, Salem 2, and Hope Creek were eligible to receive ZECs ("ZEC 1").² On August 12, 2020, the Board established the application process for the second eligibility period (June 1, 2022 – May 31, 2025) and ordered that the application period be open and remain open until October 1, 2020 ("ZEC 2").³ The Board designated President Joseph L. Fiordaliso as Presiding Commissioner, authorized him to rule on all matters that arise during the proceeding, and granted him authority to modify any schedules that may be set as necessary to secure a just and expeditious determination of the issues, subject to ratification by the full Board in any final decision.

² I/M/O 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; EO18121337; EO18121338; EO18121339 (April 18, 2020) (Agenda Item 9A), Commissioner Chivukula Dissenting.

³ I/M/O 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 (August 12, 2020) (Agenda Item 9A).

On August 19, Exelon Generation Company, LLC (“Exelon Generation”) and PSEG Nuclear, LLC (“PSEG Nuclear”) submitted a Notice of Intent to File Applications for the Zero Emissions Certificate Program for Salem Unit 1. The Notice provided that PSEG Nuclear owns 57.41 percent of Salem Unit 1 and is the NRC-licensed operator of the unit. Exelon Generation is the owner of 42.59 percent of Salem Unit 1.⁴

On September 10, 2020, I ordered that all entities seeking to intervene or participate file the appropriate application with the Board on or before September 16, 2020, and file any opposition thereto, or support thereof, with the Board on or before September 22, 2020.⁵ Additionally, I extended the deadline to file requests for access to confidential information to September 16, 2020, and extended the deadline to file any opposition thereto, or support thereof, to September 22, 2020. I further ordered that any entity seeking access to confidential information included in the non-redacted version of the application shall sign and submit the Agreement of Non-Disclosure of Information Claimed to Be Confidential (“NDA”), signed on behalf of the applicant, as part of any Request for Access to confidential information. I also set a Procedural Schedule for ZEC 2.

On September 15, 2020, I again extended the deadline to file Motions to Intervene and Participate to Monday, September 21, 2020, and extended the deadline to file opposition to September 25, 2020.⁶ I ordered that any party previously granted access to confidential information during ZEC 1 need not re-apply during ZEC 2. With regard to entities not granted access to confidential information in ZEC 1, I extended the deadline to resubmit such requests to September 21, 2020, and the deadline to file any opposition thereto or support thereof to September 25, 2020. I directed any entity seeking access to confidential information included in the non-redacted version of the application to sign and submit the Agreement of Non-Disclosure of Information Claimed to Be Confidential (“NDA”), signed on behalf of the applicant, as part of any Request for Access to confidential information.⁷ I also amended the Procedural Schedule to be consistent with my rulings.

⁴ The same ownership information applies to Salem Unit 2; however, Salem Unit 2 has a separate docket number, as Exelon Generation expects to submit the applications for the Salem units jointly with PSEG Nuclear and to submit separately supplemental information not shared with PSEG Nuclear.

⁵ I/M/O/ The Application of PSEG Nuclear, LLC and Exelon Generation company, LLC, for the Zero Emission Certificate Program – Salem Unit 1, BPU Docket No. ER20080557 (September 10, 2020).

⁶ I/M/O/ The Application of PSEG Nuclear, LLC and Exelon Generation company, LLC, for the Zero Emission Certificate Program – Salem Unit 1, BPU Docket No. ER20080557 (September 15, 2020).

⁷ The September 10, 2020 and September 15, 2020 Orders further provided that: (1) In accordance with N.J.S.A. 48:3-87.5(a), any party seeking confidential information must certify that it meets the disclosure criteria set forth in N.J.S.A. 48:3-87.5(a); (2) If the NDA has not been fully executed, the applicant shall serve the redacted, public version of the application on the entity electronically, with a hard copy of only a cover letter and an index of the included documents to the Board and other parties to be determined. In the event the Board determines it needs individual or full hard copies, they will be requested and provided within 10 days of request. Applicants shall also serve one electronic copy each to participants; (3) If the NDA has been fully executed on or before the date of service, or once the NDA has been fully executed, the applicant shall electronically serve the full application, including all information provided on a confidential basis, to the entities granted access to confidential information, as described above; and (4) Applicants shall submit spreadsheets in an Excel or comparable format. See I/M/O/ The Application of PSEG Nuclear, LLC and Exelon Generation company, LLC, for the Zero Emission Certificate Program – Salem Unit 1, BPU Docket No. ER20080557 (September 10, 2020); See I/M/O/ The Application of PSEG Nuclear, LLC and Exelon Generation company, LLC, for the Zero Emission Certificate Program – Salem Unit 1, BPU Docket No. ER20080557 (September 15, 2020).

MOTIONS

The following entities filed motions in this matter:

1. The New Jersey Energy Users Coalition - Motion to Intervene, a request for access to confidential information, and Admission *Pro Hac Vice* of Paul F. Forshay, Esq.;
2. PSE&G - Motion to Participate;
3. The Independent Market Monitor - Motion to "Participate in the Review" and a request for access to confidential information; and
4. PJM Power Providers Group - Motion to Intervene and a request for access to confidential information.

The following entities filed objections in this matter:

1. PSEG Nuclear and Exelon Generation jointly filed one brief in opposition to the Motion to Intervene and Request for Confidential Information filed on behalf of the New Jersey Large Energy Users Coalition; and
2. PSEG Nuclear filed a brief in opposition to the PJM Power Providers Group Motion to Intervene and request for access to confidential information.

The following entity filed a response to objections:

1. New Jersey Large Energy Users Coalition filed a memo in response to PSEG Nuclear and Exelon Generation's brief in opposition to the Motion to Intervene and Request for Confidential Information filed on behalf of the Large Energy Users Coalition.

New Jersey Large Energy Users Coalition

a. Motion to Intervene, Motion for Admission *Pro Hac Vice*, and Request for Access to confidential information

By motion dated September 21, 2020, the New Jersey Large Energy Users Coalition ("NJLEUC"), an association whose members include large volume electric customers served by PSE&G, JCP&L, and ACE, submitted a Motion to Intervene, a request for *Pro Hac Vice* Admission of Paul F. Forshay, Esq., and a request for access to confidential information.

With regard to its request to intervene, NJLEUC argued that no other party to this proceeding is similarly situated because the outcome of this proceeding will have a significant impact on the cost of electric service received by the members of NJLEUC. NJLEUC explained that some of its members pay the usage-based ZEC charge in amounts that exceed one million dollars annually, with the remaining members paying hundreds of thousands of dollars, and as such, NJLEUC members could be exposed to ZEC charges up to ten million dollars each.⁸ Therefore, its interests are different from any other party because its members are exposed to the potential continuing payment of millions of dollars in annual ZEC subsidies, as contrasted with the estimated \$30 annual cost to the "average" residential customers.

⁸ NJLEUC notes that it opposed the authorization of ZECs in the Legislative process that culminated in the enactment of the Act, and are currently parties to an appeal of the BPU Order that awarded ZECs to the Salem I and II and Hope Creek nuclear stations in ZEC 1.

NJLEUC also stated that its members are responsible for the economic viability of their New Jersey operations, including responsibility for thousands of employees, a responsibility made more difficult by the challenges associated with the COVID-19 pandemic. NJLEUC claims that the nuclear subsidies will affect corporate decisions regarding future capital investments in those facilities and employment levels. NJLEUC argues that its members' interest in the tens of millions of dollars here at issue, the continuing viability of their businesses in the COVID-19 environment, and their responsibility to employees clearly constitute property rights that are of constitutional dimension are some of the reasons they should be granted intervention status.

With regard to access to confidential information, NJEUC claimed that due process considerations require that NJLEUC be afforded access to the information, subject to execution of the prescribed non-disclosure agreement. Without such access, NJLEUC argued it would be denied the right to be heard. Specifically, NJLEUC explained that based upon the language of the Act and the public statements made at the time of its signing, the Legislature and Governor assumed that the Board and stakeholders would be afforded the opportunity to closely scrutinize the financial information pertaining to the nuclear plants to determine the critical issues associated with the award of ZECs. Without access to the confidential materials, NJLEUC claimed it would be relegated to an inferior status of uninformed observers.⁹

And finally, by Motion dated September 21, 2020, Steven S. Goldenberg, Esq., moved for the admission *pro hac vice* of Paul F. Forshay, Esq. Mr. Goldenberg stated that Mr. Forshay is a member in good standing admitted to the bar of the District of Columbia, has significant experience representing the interests of large end-use customers in utility rate and regulatory proceedings, and has an attorney-client relationship with NJLEUC. The Motion included a sworn affidavit by Mr. Forshay, in which he represents that he is associated with Mr. Goldenberg as New Jersey counsel of record, NJLEUC has requested his representation in this matter, and he has experience representing large end-use customers before the Federal Energy Regulatory Commission and the Board. He states that his experience includes involvement in regulatory matters and issues, with a particular emphasis on the litigation of utility rate cases and the regulatory treatment of rate-related issues. Mr. Forshay represents that he has paid the fees required by R. 1:20-1(b) and 1:28-2, and he agrees to abide by the other requirements for admission *pro hac vice*. Mr. Forshay forwarded proof of payment of the fees required by R. 1:20-1(b) and 1:28-2 to Board Staff ("Staff").

b. PSEG Nuclear and Exelon Generations' Opposition to NJLEUC's Motion to Intervene and Access to confidential information

On September 25, 2020, PSEG Nuclear and Exelon Generation (collectively "Petitioners") filed a brief in opposition to NJLEUC's Motion to Intervene and request for access to confidential information. The Petitioners claimed that NJLEUC was denied intervenor status and access to

⁹ NJLEUC stated that this is not a new issue facing the Board. In the late 1990's, an issue arose regarding the valuation of stranded costs that PSE&G and others alleged their generation fleets would incur as a consequence of the transition to competitive generation markets. Information was made available to the Board, Rate Counsel and a diverse group of intervenors that included PSE&G's customers and competitors. NJLEUC noted that the Appellate Division commented that "(t)he proceedings were marked by full and vigorous participation (by "thirty intensely interested intervenors of all stripes"), reflecting the full range of both public and special interests". I/M/O Public Service Electric and Gas Company's Rate Unbundling, Stranded Costs and Restructuring Filings, ("I/M/O PSE&G") 330 N.J. super 65, 122 and 132 (2000); aff'd 167 N.J. 377 (2001)

confidential information with a “virtually identical motion in the first ZEC application round.”¹⁰ As such, the Petitioners now argue that NJLEUC’s current Motion suffers “the same fatal flaw[s]” and thus, “warrants denial.”¹¹

Specifically, the Petitioners argue that NJLEUC’s interest is not sufficiently different from that of any party such that it would measurably and constructively contribute to the scope of the proceeding. See N.J.A.C. 1:1-16.1; N.J.A.C. 1:1-16.3. The Petitioners claim that NJLEUC’s argument that its members pay significant ZEC charges is insufficient to warrant granting intervention. NJLEUC wrongly contends that plants selected to receive ZECs will be entitled to payments for 10 years because ZEC 2 only pertains to payments for a three-year eligibility period. The Petitioners also argue that NJLEUC’s interests will be adequately represented by Rate Counsel because there nothing in Rate Counsel’s statutory authority that limits its public advocacy role. Since NJLEUC does not measurably and constructively contribute to the scope of the proceeding, the Petitioners claim its presence will cause confusion and undue delay, thereby “inevitably slow[ing] down this process and could impose extraordinary burdens on the BPU in order to meet its statutory obligations in a timely manner.”¹² Similarly, since NJLEUC failed to demonstrate that it will measurably and constructively contribute to the scope of ZEC 2, it follows that, regard access to confidential information, NJLEUC cannot show that it is “essential” to aid the Board in making determinations under the Act. See N.J.S.A. 48:3-87.5(a)

And finally, the Petitioners note that if the decision is made to allow NJLEUC to be involved in the case, that involvement should be as a participant rather than as an intervenor.

c. **NJLEUC’s Letter Memorandum in Further Support of NJLEUC’s Motions to Intervene and Access to confidential information, and in Response to the Opposition Motions filed on behalf of PSEG Nuclear and Exelon.**

NJLEUC claims that the Petitioners’ argument that NJLEUC failed to demonstrate that it is an “essential” party, “erroneousl[y] conflate[s] the standard for intervention in contested administrative proceedings, as set forth in N.J.A.C. 1:1-16 et seq., with the so-called ‘essential party standard’ that was included in Section 3 of the ZEC Law, N.J.S.A. 48:3-87.5, to limit access to confidential information regarding the nuclear plants.”¹³

Specifically, NJLEUC explained that intervention and access to confidential information are two separate issues, and nothing in the Act changes the longstanding standard for intervention. NJLEUC argued that it has been granted intervenor status in “literally every contested proceeding in which [NJLEUC] sought party status over the past fifteen years.”¹⁴ Because there has never been a question regarding NJLEUC’s eligibility for full party status in the Board’s contested proceedings, and because the operative intervention standard remains the same, NJLEUC argues that there should be no issue regarding NJLEUC’s eligibility to intervene in ZEC 2.

¹⁰ See PSEG Nuclear, LLC’s and Exelon Generation Company, LLC’s Brief in Opposition to the Motion to Intervene of New Jersey Large Energy Users Coalition, September 25, 2020, p. 1.

¹¹ Id. at p. 3-4.

¹² See PSEG Nuclear, LLC’s and Exelon Generation Company, LLC’s Brief in Opposition to the Motion to Intervene of New Jersey Large Energy Users Coalition, September 25, 2020, p. 8.

¹³ See New Jersey Large Energy User’s Coalition Letter Memorandum in further support of the New Jersey Large Energy Users Motions, and in Response to Opposition Motions filed on behalf of PSEG Nuclear and Exelon, September 29, 2020, p.1.

¹⁴ Id.

With regard to confidential information, NJLEUC stated that the Act introduced, for the first time, the “essential party” standard. NJLEUC explained that this standard “was included as part of PSEG’s continuing effort to limit the scope of inquiry regarding the companies’ eligibility for ZEC subsidies by excluding as many parties as possible from the ZEC proceedings, including the company’s brazen attempt to exclude Rate Counsel.”¹⁵ NJLEUC urged the Board to not “countenance this type of regulatory overreach” because similar confidential information was shared in past proceedings.¹⁶ NJLEUC further notes that the Board’s authority in ZEC 2 is broader than in ZEC 1, including the right to adjust the amount of the ZEC subsidy. As such, NJLEUC argues that the Board has more latitude in determining the parties in ZEC 2 as well.

NJLEUC further argues that the “essential party standard” is “wholly unknown” in administrative law practice and procedure. As provided in NJLEUC’s response memo:

One searches in vain for any precedent, rule or administrative code provision that purports to establish such a standard, or the burden of proof a party would be required to satisfy to prove itself “essential” to the conduct of an administrative proceeding. PSEG’s flimsy references to dictionary definitions of the word “essential” as authority for its position prove the point that no such standard exists. Accordingly, any determination made under this “standard” will be arbitrary and capricious given the absence of any known criteria that would guide the Board’s determination. The Board’s Order denying NJLEUC’s intervention in the ZEC 1 proceedings is currently on appeal before the Appellate Division for precisely this reason.¹⁷

As such, NJLEUC reiterates that it has a “constitutionally-recognized right” to intervene in ZEC 2 because its members’ significant financial and property rights will be affected. NJLEUC concluded that, “if the exposure to payment of many millions of dollars in unjustified subsidies and the layers of economic harm that would flow from these payments do not satisfy the ‘essential party standard.’ the standard has no meaning.”¹⁸

PSE&G’s Motion to Participate

On August 26, 2020, PSE&G filed a Motion to Participate in this matter. According to its Motion, PSE&G states that it is an electric distribution company subject to the requirements of the Act to file a tariff, and has an interest in expressing its views about the value of the Act and the potential benefits of the applicant nuclear facilities to its customers. As such, it has an interest in the outcome of the case under NJAC 1:1-16.6. Further, as indicated by its August 19, 2020 Notice of Intent to File Applications in this matter, PSEG Nuclear LLC, a wholly owned direct subsidiary of PSEG Power, intends to file an application for the receipt of ZECs for the three nuclear units it operates at its Hope Creek and Salem plant sites.

PSE&G also argues that since it was granted participant status in ZEC 1, it respectfully requests that it be granted participant status in ZEC 2 as well. The Board found that PSE&G’s “interest in implementation of the Act in a fair and reasonable manner, as well as its interest in expressing its

¹⁵ Id. at p.2.

¹⁶ Id. (citing examples such as the electric industry restructuring proceedings and the PSEG/Exelon merger proceeding using non-disclosure agreements similar to the one NJLEUC has executed here).

¹⁷ Id.

¹⁸ Id. p. 2-3.

views about the value of the Act to PSE&G customers [,] may be deemed significant interests.” The Board also concluded that “PSE&G may add constructively to this proceeding without causing undue delay or confusion.” For the same reasons expressed in the Board’s prior Order, PSE&G believes participation should be granted

Independent Market Monitor Motion to “Participate in the Review” and Access to confidential information

On August 26, 2020, Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor (“IMM”) for PJM Interconnection, L.L.C. (“PJM”), submitted a request to participate in the review of applications for ZEC 2. Additionally, the IMM requests access to information submitted on a confidential basis, arguing that it was granted intervention and access during ZEC 1, and thus should be granted the access during ZEC 2.

PJM Power Providers Group

a. Motion to Intervene and Access to confidential information

By Motion dated September 21, 2020, the PJM Power Providers Group (“P3”) filed a Motion to Intervene and a request for access to confidential information. P3 is a non-profit organization whose members are independent electric power suppliers located in the PJM market who are competitors of Salem 1, Salem 2, and Hope Creek. P3’s mission 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.” According to P3, its members own over 67,000 megawatts of generation assets in PJM, produce enough power to supply over 50 million homes. P3 works with state and federal policymakers and other stakeholders, including PJM and the Organization of PJM States, to advance the group’s mission.

P3 claims it would “suffer competitive harm” by the institution of the subsidies. P3 noted that in the Board’s November 19, 2018 Order, the Board found that “the outcome of this proceeding will have direct economic consequences for P3 and its members based on impacts on competition and rates in wholesale electricity markets, if ZECs are issued,” and “P3 may potentially contribute to the development of the record and scope of the proceeding and thereby aid the Board in understanding the issues,” and finally, that “P3 may add constructively to this proceeding without causing undue delay or confusion.” Thereby, P3 argues that it satisfies all of the criteria for intervention. More specifically, P3 “demonstrated in the original ZEC docket that P3 is substantially, specifically and directly affected by these proceeding because, among other things, the award of ZEC subsidies will advantage one power generator to the detriment of competing power producers who are members of P3 and place them at a competitive disadvantage in the PJM market.”

With regard to confidential information, although denied access in ZEC 1 by the Board, P3 continues to assert that the ruling was in error, as it conflated the standard for full party intervention, which P3 argues it has clearly met, with the standard in the Act for access to confidential information. According to P3, these are two separate and distinct standards and should not have been analyzed in conjunction to deny P3 full Party status. P3 submitted the requested signed agreements to protect the confidential nature of information submitted by the parties. Thus, P3 argues it meets the statutory requirements for access to confidential information.

b. PSEG Nuclear's Opposition

On September 25, 2020, PSEG Nuclear filed a brief in opposition to P3's Motion to Intervene and access to confidential information. PSEG Nuclear claims that P3's Motion should be denied for the same reasons the Board denied P3's Motion in ZEC 1.¹⁹ PSEG Nuclear explained that in ZEC 1 the Board ruled that P3 had "not made a showing that its interest in this matter warrants granting its motion intervene, giving the statutory scheme with its numerous opportunities for public participation through public comments and public hearings, the explicit provisions at N.J.S.A. 48:3-87.5(a) concerning confidential documents, and the need for prompt and expeditious administrative proceedings."²⁰ With regard to the disclosure of confidential information, PSEG Nuclear argued that the Board previously ruled, in ZEC 1, that "disclosure of confidential information could harm competition, given that P3 members are power providers."²¹ As such, The Board in ZEC 1 denied P3 intervenor status and access to confidential information.

In ZEC 1, P3 filed an emergent appeal with the Appellate Division. PSEG Nuclear explained that on December 6, 2018, the Board filed a brief opposing P3's request, and the very next day, the Appellate Division affirmed the Board's decision denying P3 intervenor status and access to confidential information.²² PSEG Nuclear notes that P3 only mentions the positive dicta in the Board's November 19, 2018 Order, and neglects the ultimate ruling of both the Board and the Appellate Division. Instead, PSEG Nuclear states that P3 claims "in passing" that the Board's Order was erroneous, but fails to state why, or how P3 is able to meet the legal standard this time but was unable to meet such standard in ZEC 1.

PSEG Nuclear further argues that P3 has not demonstrated that it is "essential" to the proceeding to allow access to confidential information.²³ PSEG Nuclear stated that simply signing the NDA is not a substitute for satisfying the statutory requirement. P3 must show that determinations could not be reasonably be made without its involvement because its participation is "basic and necessary" and "of the utmost importance."²⁴ Additionally, P3's participation as an intervenor "would simply create undue delay and interfere with the ability of the BPU to meet a strict statutory timeline without adding constructively to the resolution of the issues that need to be addressed."²⁵ And finally, PSEG Nuclear stated that if P3 has any involvement in this matter, it should be limited to participant status.

¹⁹ See PSEG Nuclear's Brief in Opposition to the Motion to Intervene of PJM Power Providers, September 25, 2020, p. 3.

²⁰ Id. citing I/M/O the Implementation of L. 2018, c. 16 Regarding the Establishment of a Zero Emission Certificate Program for Eligible Nuclear Power Plants, BPU Docket No. E018080899 (November 19, 2018) (Agenda Item 9B).

²¹ Id.

²² Order on Emergent Motion, Docket No. AM-000161-18 (App. Div. Dec. 7, 2018).

²³ See PSEG Nuclear's Brief in Opposition to the Motion to Intervene of PJM Power Providers, September 25, 2020, p. 5.

²⁴ Id. at 6 (citing Air Master & Cooling, Inc. v. Selective Ins. Air Master & Cooling, Inc., 452 N.J. Super 35, 53 (App. Div. 2017)).

²⁵ Id. at 10.

DISCUSSION AND FINDINGS

These motions are consistent with the legislative scheme contemplated in the Act regarding the numerous opportunities for public comment and public hearings, N.J.S.A. 48:3-87.5(a) regarding access to confidential documents, and Title 1 of the New Jersey Administrative Code regarding intervenor and participant status.

With regard to access to confidential documents, N.J.S.A. 48:3-87.5(a) provides as follows:

The board and the Attorney General shall jointly approve the disclosure of such confidential information to a party that they deem essential to aid the board in making the determinations required under this subsection, provided that the party is not in a position such that disclosure could harm competition and the party agrees in writing to maintain the confidentiality of the confidential information.

[N.J.S.A. 48:3-87.5(a)]

The standards for considering intervention motions are set forth at N.J.A.C. 1:1-16.3(a). That rule requires that the decision-maker consider the following factors:

1. The nature and extent of the moving party's interest in the outcome of the case;
2. Whether that interest is sufficiently different from that of any other party so as to add measurably and constructively to the scope of the case;
3. The prospect for confusion and delay arising from inclusion of the party; and
4. Other appropriate matters.

Alternatively, motions for intervention may be treated as a request for permission to participate pursuant to N.J.A.C. 1:1-16.5 if, in the discretion of the trier of fact, the addition of the moving party is likely to add constructively to the case without causing undue delay or confusion. N.J.A.C. 1:1-16.6(c).

Additionally, application of these standards involves an implicit balancing test. The need and desire for development of a full and complete record, which involves consideration of a diversity of interests, must be weighed against the requirements of the New Jersey Administrative Code, which recognizes the need for prompt and expeditious administrative proceedings by requiring that an intervenor establish that it would be substantially, specifically, and directly affected by the outcome of the proceeding and that its interest is sufficiently different from that of the other parties so as to add measurably and constructively to the scope of the case. See In re the Joint Petition of Public Service Electric and Gas Company and Exelon Corporation for Approval of a Change in Control, Docket No. EM05020106 (June 8, 2005).

NJLEUC Motion to Intervene, Motion for Admission *Pro Hac Vice*, and Request for Access to confidential information

I considered NJLEUC's Motion, Petitioners' brief in opposition, and NJLEUC's response. I am convinced that NJLEUC has an interest in this matter due to the potential impact of ZECs on rates in retail electric markets which could, in turn, potentially impact corporate decisions regarding employees and capital investments, particularly during the COVID-19 pandemic. After weighing

the issues carefully, I **HEREBY FIND** that NJLEUC made a showing that its interest in this matter warrants granting its Motion to Intervene, having satisfied the requirements set forth at N.J.A.C. 1:1-16.3(a). I **FURTHER FIND** that NJLEUC will likely contribute to the Board's understanding of issues in this proceeding, and therefore is essential to aid the Board in making these determinations, and its status as a party in this proceeding will not cause any undue delay. See In re the Joint Petition of Public Service Electric and Gas Company and Exelon Corporation for Approval of a Change in Control, Docket No. EM05020106 (June 8, 2005). As such, I **HEREBY GRANT** NJLEUC's Motion for Intervention.

With regard to access to confidential information, I **HEREBY FIND** that due process considerations do not require that NJLEUC be afforded access to the information deemed confidential by the applicants. As such, I **HEREBY DENY** NJLEUC's request for access to information deemed confidential by the ZEC applicants.

Finally, I reviewed NJLEUC's motion for admission *pro hac vice* and the supporting affidavit of Mr. Forshay. I **HEREBY FIND** that Mr. Forshay satisfied the conditions for admission *pro hac vice*, and has submitted to the Board proof of payment to the New Jersey Lawyers' Fund for Client Protection of the fees required by R. 1:20-1(b) and 1:28-2. Therefore, Mr. Forshay is **HEREBY ADMITTED** to practice before the Board *pro hac vice* in this matter, provided that he shall:

- (1) Abide by the Board's rules and all applicable New Jersey court rules, including all disciplinary rules;
- (2) Consent to the appointment of the Clerk of the Supreme Court as agent upon whom service of process may be made for all actions against each of them that may arise out of his participation in this matter;
- (3) Notify the Board immediately of any matter affecting his standing at the bar of any other jurisdiction; and
- (4) Have all pleadings, briefs and other papers filed with the Board signed by an attorney of record authorized to practice in this State, who shall be held responsible for them and for the conduct of this cause and the admitted attorney therein.

PSE&G Motion to Participate

Based upon the information provided by PSE&G, I agree that the addition of PSE&G will add constructively to ZEC 2 without causing undue delay or confusion. As such, I **HEREBY GRANT** participant status to PSE&G, limited to the right to argue orally and file a statement or brief as provided in N.J.A.C. 1:1-16.6(c)(1) and (2).

Independent Market Monitor Motion to "participate in the review" and Access to confidential information

While designated as a request to "participate in the review," I recognize the request by the IMM to access information and provide analysis as essentially a request to intervene. I will treat it as such. As provided in the Board's November 11, 2018 Order, the Board both acknowledged and supports the IMM's mandate.²⁶ The Board, individually and as a member of the Organization of

²⁶ I/M/O The Implementation of L. 2018, c. 16 Regarding the Establishment of A Zero Emissions Certificate Program For Eligible Nuclear Power Plants, Order Establishing the Program, Application, and Procedural Process, BPU Docket No. EO18080899 (11/19/18) (Agenda Item 9A).

PJM States, Inc. (“OPSI”), has repeatedly supported the IMM’s ability to independently engage in proceedings before the FERC.²⁷ The Board and OPSI both recognize that the IMM helps to ensure public confidence in the competitiveness and legitimacy of wholesale markets.²⁸ In light of the foregoing, I **HEREBY FIND** that the IMM has an interest in the outcome of this proceeding and that the IMM’s participation in this proceeding will add measurably and constructively to the scope of this proceeding. Given its unique familiarity, knowledge, and expertise in the functioning of PJM wholesale electric markets, I **HEREBY FIND** that the IMM’s ability to contribute to a complete and thorough review of financial information submitted by applicants will constructively contribute to the Board’s understanding and determination of the issues in this proceeding without causing undue delay or confusion. As such, I **HEREBY GRANT** the IMM intervenor status

Also, in its November 11, 2018 Order, the Board acknowledged that the IMM is in a unique position to review the financial viability of nuclear power plants seeking ZECs based upon its experience reviewing generators’ costs in the PJM capacity markets, and as part of reviewing unit-specific competitive offers. Consistent with the Act, the Attorney General reviewed the IMM’s motion and approved the disclosure of confidential information to the IMM. Therefore, in its November 11, 2018 Order, the Board approved the disclosure of information to the IMM claimed to be confidential by ZEC applicants, conditioned upon execution of the standard NDA utilized in public utility cases filed with the Board. Furthermore, pursuant to the September 15, 2020 Order, I held that any party previously granted access to confidential information during ZEC 1 need not re-apply during ZEC 2, and thus, all grants of access to confidential information shall remain in full force and effect as if ruled upon under this docket.²⁹ Therefore, I **HEREBY APPROVE** the disclosure of information to the IMM claimed to be confidential by the Petitioners, conditioned upon execution of the standard NDA utilized in public utility cases filed with the Board.

PJM Power Providers Group Motion to Intervene and Access to confidential information

I reviewed P3’s Motion to Intervene, PSEG Nuclear’s opposition brief, and the Board’s November 19, 2018 Order and subsequent affirmation by the Appellate Division. In considering P3’s Motion to Intervene, I acknowledge that if ZECs are issued, the outcome of this proceeding will have a direct economic consequence for P3 and its members based upon the impact on competition and rates in wholesale electricity markets. In addition, I believe P3 could contribute to the development of the record and scope of the proceeding, and that the views of competitors are essential to the Board in understanding the issues. Furthermore, I agree with P3 that the award of ZEC subsidies could possibly advantage one power generator to the detriment of competing power producers who are associates of P3, and place them at a competitive disadvantage in the PJM market. I also agree that their admission as a intervenor will not cause delay or confusion of the issues. Therefore, I **HEREBY GRANT** P3’s Motion to Intervene.

With regard to P3’s request for access to confidential information, I **HEREBY FIND**, similar to the Board’s prior ruling on November 19, 2018 during the First ZEC Eligibility Period, that disclosure of information deemed confidential to P3 could harm competition, given that P3 members are

²⁷ See, e.g., Joint Reply and Motion for Leave to Reply of the Pennsylvania Public Utility Commission, New Jersey Board of Public Utilities, and Delaware Public Service Commission, FERC Docket No. ER16-372 (Mar. 31, 2017) (“The Joint State Commissions have traditionally been supportive of a strong IMM role”); see, e.g., Motion for Leave to Answer and Answer of the Organization of PJM States, Inc., FERC Docket No. ER16-372 (May 9, 2017) (providing background of OPSI’s continued support of a strong and truly independent market monitor) (“OPSI Answer”).

²⁸ OPSI Answer at 7-8.

²⁹ I/M/O/ The Application of PSEG Nuclear, LLC and Exelon Generation company, LLC, for the Zero Emission Certificate Program – Salem Unit 1, BPU Docket No. ER20080557 (September 15, 2020).

power providers. Therefore, I **HEREBY DENY** P3's request to access information deemed confidential by the ZEC applicants.

Therefore, in summary, and as noted above, I **HEREBY ORDER** that the following entities are **HEREBY GRANTED** the following:

1. Access to confidential information³⁰:
 - a. New Jersey Division of Rate Counsel; and
 - b. IMM.

2. Intervenor Status:
 - a. IMM
 - b. NJLEUC; and
 - c. P3

3. Participant Status:
 - a. PSE&G

This ruling is subject to ratification or modification by the Board as it deems appropriate during the proceedings in this matter.

This Order shall be effective on September 29, 2020.

DATED: September 29, 2020

BY:



JOSEPH L. FIORDALISO
PRESIDENT

³⁰ In accordance with N.J.S.A. 48:3-87.5(a), the Office of the Attorney General has submitted a letter to the Board noting that only Rate Counsel and the IMM qualify to receive access to confidential information. This letter is attached.

IN THE MATTER OF THE APPLICATION OF PSEG NUCLEAR, LLC AND EXELON
GENERATION COMPANY, LLC FOR THE ZERO EMISSION CERTIFICATE PROGRAM -
SALEM UNIT 1

DOCKET NO. ER20080557

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September 29, 2020

By Electronic Mail and Inter-Office Mail

The Honorable Joseph L. Fiordaliso
President, New Jersey Board of Public Utilities
44 South Clinton Avenue, 7th Floor, Box 350
Trenton, New Jersey 08625

**Re: In the Matter of the Application of PSEG Nuclear, LLC
and Exelon Generation Company, LLC for the Zero Emission
Certificate Program - Salem Unit 1
BPU Docket No. ER20080557**

**In the Matter of the Application of PSEG Nuclear, LLC
and Exelon Generation Company, LLC for the Zero Emission
Certificate Program - Salem Unit 2
BPU Docket No. ER20080558**

**In the Matter of the Application of PSEG Nuclear, LLC
for the Zero Emission Certificate Program - Hope Creek
BPU Docket No. ER20080559**

Dear President Fiordaliso:

Regarding the above-captioned matters, the Office of the Attorney General ("OAG") understands that on May 23, 2018, Governor Phil Murphy signed into law L. 2018, c. 16, codified as N.J.S.A. 48:3-87.3 to -87.7, ("Act"), which requires the New Jersey Board of Public Utilities ("Board") to create a program and mechanism for the issuance of Zero Emission Certificates ("ZECs"), each of which represents the fuel diversity, air quality, and other environmental attributes of one megawatt-hour of electricity generated by an eligible nuclear power plant selected by the Board



to participate in the program.

By Order dated April 18, 2019 in the initial ZEC Proceeding ("ZEC 1"), the Board concluded ZEC 1 and certified the Hope Creek, Salem 1, and Salem 2 nuclear power plants to receive ZECs for an initial eligibility period from April 18, 2019 until May 31, 2022¹. On August 12, 2020, the Board established the application process for the second eligibility period (June 1, 2022 - May 31, 2025) and ordered that the application period be open and remain open until October 1, 2020 ("ZEC 2")². Also, the Board designated you as Presiding Commissioner, authorized to rule on, among other things, all matters that arise during the proceeding, subject to ratification by the full Board in any final decision.

Because ZEC 2 applications are expected to include certain information claimed to be confidential, various entities have moved to receive such confidential information, as provided under the Act. Specifically, N.J.S.A. 48:3-87.5(a) provides in part:

The board and the Attorney General shall jointly approve the disclosure of such confidential information to a party that they deem essential to aid the board in making the determinations required under this subsection, provided that the party is not in a position such that disclosure could harm competition and the party agrees in writing to maintain the confidentiality of the confidential information.

Please note that based on OAG's review of the motions to receive confidential information, it has been determined that only the New Jersey Division of Rate Counsel and the Independent Market Monitor for PJM Interconnection, L.L.C. should be deemed essential to aid the Board in making the applicable determinations as required under the Act. Also, parties receiving confidential information are required to execute and abide by the standard Agreement of Non-Disclosure of Information Claimed To Be

¹ I/M/O the Implementation of L. 2018, c. 16 Regarding the Establishment of a Zero Emission Certificate Program for Eligible Nuclear Power Plants, BPU Docket Nos. EO18080899, EO18121337, EO18121338, and EO18121339, Order dated April 18, 2020 (Agenda Item 9A).

² I/M/O 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, Order dated August 12, 2020 (Agenda Item 9A).

Joseph L. Fiordaliso, President
September 29, 2020
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Confidential, which is routinely used in proceedings at the Board.
Thank you for your consideration.

Respectfully submitted,

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY

By: /s/ David C. Apy
David C. Apy
Assistant Attorney General

c: Service List (by electronic mail)
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