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BOARD OF PUBLIC UTILITIES
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September 21, 2020

Client/Matter No. 21561/2

Aida Camacho-Welch, Secretary of the Board
Board of Public Utilities
44 South Clinton Avenue
3rd Floor, Suite 314
PO Box 350
Trenton, New Jersey 08625-0350

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

Dear Secretary Camacho-Welch:

Enclosed for filing are an original and ten (10) copies of motions of New Jersey Large Energy Users Coalition to intervene in these proceedings and for the *pro hac vice* Admission of Paul F. Forshay to appear.

The parties on the distribution list have received copies of these motions via electronic mail this date.

Thank you for your anticipated courtesies in this matter.

Respectfully yours,

STEVEN S. GOLDENBERG

SSG/rad

Encls.

cc: Distribution List

Docs #4625442-v1

CM S
S. Peterson, Energy

K. Sheehan

K. Nedza

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S. Patmaude, Legal

DAG

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

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BOARD OF PUBLIC UTILITIES
TRENTON, NJ

In the Matter of the Application of PSEG)
Nuclear, LLC and Exelon Generation)
Company, LLC for the Zero Emission) Docket No. ER20080558
Certificate Program—Salem Unit II)

**MOTION TO INTERVENE OF
NEW JERSEY LARGE ENERGY USERS COALITION**

The New Jersey Large Energy Users Coalition (“NJLEUC”), an association whose members include large volume electric customers served by Public Service Electric and Gas Company (“PSE&G”), Jersey Central Power and Light Company (“JCP&L”) and Atlantic City Electric Company (“ACE”) (collectively, the “EDCs”) hereby moves (i) to intervene in the above-captioned second Zero Emission Credits (“ZECs”) eligibility period application with full rights as a party and (ii) to be afforded access to the information designated as confidential by applicants. In support of its motion, NJLEUC states as follows:

1. All communications and correspondence concerning this proceeding should be directed to:

Steven S. Goldenberg, Esq.
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2. On May 23, 2018, Governor Murphy signed into law L. 2018, c. 16, (the “Act”) which, among other things, required the Board to create a ZEC program and determine which nuclear energy generators would be eligible to receive ZEC payments under the program. The Act required the Board to convene separate proceedings to establish the ZEC program, develop an

application process to determine a nuclear plant's eligibility to obtain ZECs, certify and rank the nuclear plants determined to be eligible to participate in the ZEC program and to receive ZECs, and establish a mechanism for the EDCs to purchase ZECs from the selected nuclear plants. The Act also required each EDC to file a tariff to recover the \$0.004/kwh ZEC charge from its retail distribution customers.

3. The Act provides for stakeholder participation in the individual proceedings brought by the applicants for ZEC subsidies, including access to confidential information, to assure that the stakeholder participation is meaningful and consistent with due process.

WHEREFORE, in support of its applications for intervention and access to confidential materials in this proceeding, NJLEUC respectfully submits that (i) all factors for intervention set forth in N.J.A.C. 1:1-16 weigh in favor of the granting of NJLEUC's motion to intervene in this proceeding, and (ii) NJLEUC is eligible to obtain access to confidential materials under the Act because the group is not a competitor of applicants, has entered into the prescribed non-disclosure agreement, has unique interests that will not be addressed by other parties, and has a constitutional due process right to protect its significant financial and other property interests in this proceeding.

1. NJLEUC formed, in part, to monitor regulatory and rate proceedings involving the State's electric utilities, including PSE&G, JCP&L and ACE, and has consistently been granted intervenor status in the EDCs' regulatory, energy restructuring, infrastructure, merger and rate proceedings. NJLEUC actively 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 the first ZEC eligibility period. The members of NJLEUC purchase electric distribution service from the EDCs and pay the statutory \$0.004 per kilowatt hour ZEC charge assessed on all retail customers. Because

NJLEUC members are among the State's largest consumers of power, some pay the usage-based ZEC charge in amounts that exceed one million dollars annually, while the remaining members pay annual charges in the hundreds of thousands of dollars. The Act provides for the potential collection of the ZEC subsidy for a period of ten years or more, thereby exposing certain NJLEUC members to the potential payment of ZEC charges during that period of up to ten million dollars each. Accordingly, NJLEUC members will be substantially and specifically affected by the outcome of this proceeding in which the continuing eligibility of the Salem II nuclear station to receive the ZEC subsidy will be determined;

2. Given its capacity as an association of large end-use customers of the EDCs that have paid millions of dollars for the nuclear subsidies authorized for applicants in the first ZEC eligibility period (and equivalent stranded cost payments during the preceding fifteen years) and that have the same exposure in the instant proceeding, NJLEUC's interests are unique from and not adequately represented by any other party. NJLEUC acknowledges the significant role of the Division of Rate Counsel as the statutory representative of all ratepayers. However, NJLEUC's members are exposed to the potential continuing payment of many millions of dollars in annual ZEC subsidies, as contrasted with the estimated \$30 annual cost to the "average" residential customers who are the primary focus of Rate Counsel. NJLEUC members are also responsible for the economic viability of their New Jersey operations, including responsibility for thousands of employees, a responsibility made more difficult by the many challenges associated with the COVID-19 pandemic. The nuclear subsidies here at issue necessarily will affect corporate decisions regarding future capital investments in those facilities and employment levels. Therefore, NJLEUC members deserve the right to speak for themselves in order avoid being deprived of their significant property interest in their capital and operations without due process. See, e.g. Mathews

v. Eldridge, 424 U.S. 319, 332, 96 S.Ct. 893, 901 (1976) (in which the Supreme Court recognized an individual's interest in the continuing receipt of disability benefits to be a statutorily created property interest protected by the Fifth Amendment, and that "(p)rocedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment"). 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"). NJLEUC's members' interest in the tens of millions of dollars here at issue, the continuing viability of their businesses in the COVID environment and their responsibility to employees clearly constitute property rights that are of constitutional dimension and, therefore, entitled to due process protection. These considerations mandate NJLEUC's direct intervention in this proceeding with full rights as a party. It should be underscored that nothing in the Act purported to change the standard for intervention that has long been embodied in N.J.A.C. 14:1-1-16, which remains the operative standard. NJLEUC has consistently satisfied this standard in a multitude of matters before the Board, and it does so in this proceeding as well.

3. With regard to the separate issue of access to confidential materials, given the circumstances of this proceeding, due process considerations similarly require that NJLEUC be afforded access to the information deemed confidential by the applicants, subject to execution of the prescribed non-disclosure agreement. Without such access, NJLEUC would effectively be denied the right to be heard "at a meaningful time and in a meaningful manner" that is a basic principle of due process. Matthews v. Eldridge, *supra*, 424 U.S. at 333, 96 S.Ct. at 902. It is evident from the language of the Act and the public statements made at the time of its signing that 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. This can only be accomplished if intervenors are afforded access to confidential materials, the only result consistent with the constitutional requirement that their participation be “meaningful”. Without access to the confidential materials, parties granted intervenor status would be relegated to an inferior status of uninformed observers, effectively denied a meaningful voice in this proceeding.

4. The Board has had experience with similar issues in the past and has made comparable confidential information available to stakeholders, subject to appropriate safeguards. In the proceedings that restructured the electric industry in the late 1990’s, a significant issue arose regarding the valuation of the so-called “stranded costs” that PSE&G and others alleged their generation fleets would incur as a consequence of the transition to competitive generation markets. The Electric Discount and Energy Competition Act, N.J.S.A. 48:3-59, authorized utilities to recover, through a limited duration “market transition charge”, stranded costs equivalent to the generation plant costs that the utilities were at risk of losing in a competitive supply market. The issues relating to the quantification of the utilities’ alleged stranded costs were fully litigated in a contested proceeding in which considerable confidential financial information—information closely analogous to the financial information that the applicants will produce in this proceeding under Section 3 of the Act—was obtained from the utilities and provided to all intervenors that executed non-disclosure agreements. The financial information produced by PSE&G in its stranded cost proceeding related to the financial condition and profitability of the utility’s generation facilities (including profitability, forecasted annual expenditures for fuel, operation and maintenance expenses, capital additions, taxes, administrative and general expenses and other

ancillary costs) as well as market price forecasts that projected future prices in the energy and capacity markets. This information was made available to the Board, Rate Counsel and a diverse group of intervenors that included PSE&G's customers and competitors. It was observed by the Appellate Division 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). The intervenors included the New Jersey Business Users group and the New Jersey Industrial Customers Group, the predecessors of NJLEUC that then represented the State's large energy users, which were active intervenors in the stranded costs and other restructuring-related proceedings. The groups were permitted to conduct comprehensive discovery regarding these financial issues and to present affidavits, financial testimony and analysis by expert witnesses who were afforded full access to the PSE&G financial information.

5. The amount of stranded costs that the utility would be permitted to recover was determined in part by the market value of the generation assets that were transferred to an affiliated company. Therefore, in the stranded cost proceeding, as in the instant proceeding, PSE&G was required to demonstrate the full market value of each eligible generating asset, including the nuclear stations, and each power purchase commitment over its remaining useful life or term to fix the level of the market transition charge. I/M/O PSE&G, supra, at 124. As *I/M/O PSE&G* makes clear, all of this information—precisely the same types of information that will be reviewed in this proceeding--was shared with a wide variety of intervenors, including the competitors of PSE&G. The undersigned was afforded full access to PSE&G's confidential information on an "attorney's eyes only" basis in *I/M/O PSE&G* as counsel for Enron and Shell Energy, which were

then PSE&G's leading competitors.

6. In light of the foregoing, there should be little question that NJLEUC, an organization comprised of large end-use customers of PSE&G and the other EDCs, should be afforded access to the confidential materials that are relevant to these proceedings. Disclosure of these materials to NJLEUC will not "harm competition", the stated concern of Section 3(a) of the Act, as NJLEUC obviously does not compete with PSE&G and has executed the prescribed non-disclosure agreement. The Board has consistently authorized the disclosure of confidential information in this manner, and this matter presents nothing new that would justify a departure from this longstanding and firmly-established practice. See, e.g. I/M/O Request for Solid Waste Utility Customer Lists, 106 N.J. 508, 522-524 (1987).

7. NJLEUC has a unique perspective and insight regarding the potential impact, on large customers, of the significant costs that are at issue in this proceeding. As previously noted, NJLEUC's members employ thousands of New Jersey residents and also pay significant state taxes. Its members continually assess the economic viability of their New Jersey operations and future assessments will doubtlessly take into account the outcome of these proceedings. No other party to this proceeding is similarly situated with NJLEUC in this regard.

8. NJLEUC's motion is timely and will not delay or otherwise disrupt the prosecution of these proceedings.

9. Fundamental fairness and due process considerations require that NJLEUC be afforded an opportunity to fully participate as an Intervenor in this proceeding, the outcome of which will have a significant impact on the cost of electric service received by the members of NJLEUC. Given the potential impact this proceeding will have on the interests of the New Jersey business community, as well as NJLEUC's long-standing and well-recognized role as a leading

representative of those interests in utility regulatory matters, NJLEUC's full participation and access to confidential information is essential for the fair conduct of this proceeding;

10. The issues to be decided in this proceeding "substantially, specifically and directly affect" NJLEUC within the meaning of these terms as used in the Uniform Rules, thereby making it appropriate for NJLEUC to intervene as a party;

11. Furthermore, the interests of NJLEUC's members as large end-use customers of the EDCs are substantially different from those of any other party seeking intervention. Therefore, NJLEUC's interests in this proceeding are unique on both a quantitative and qualitative basis;

12. NJLEUC's entry as a party would "measurably and constructively" advance this proceeding (N.J.A.C. 1:1-16.3(a)) because of the unique status of its members as large end-use customers on the EDC's distribution systems. NJLEUC's entry as a party would promote an informed and balanced presentation of the issues;

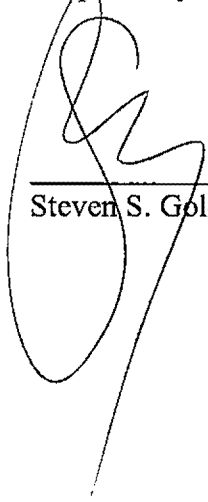
13. Notwithstanding its unique interests, where it is possible and practical for it to do so, NJLEUC will endeavor to work cooperatively with other parties in this proceeding in the interests of administrative efficiency and economy.

14. For the foregoing reasons, and because the cost of electric service to NJLEUC's members will be directly and substantially affected by the issues to be determined in this proceeding, NJLEUC has a direct and immediate interest in the outcome of this proceeding that cannot adequately be represented by any other party.

WHEREFORE, pursuant to N.J.A.C. 1:1-16.1, *et seq.*, and the Act, NJLEUC respectfully requests that it be (i) permitted to intervene in this proceeding with full procedural and substantive

rights and (ii) afforded access to the confidential information relevant to these proceedings.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'S. Goldenberg', written over a horizontal line.

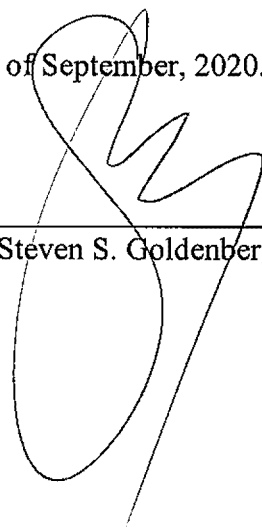
Steven S. Goldenberg

Dated: September 21, 2020

CERTIFICATION OF SERVICE

I hereby certify that I have this day served via electronic mail copies of the foregoing Motion to Intervene to the parties identified on the service list in this proceeding. An original and 10 copies have been forwarded via first class mail to Aida Camacho-Welch, Secretary of the Board of Public Utilities.

Dated at Red Bank, New Jersey, this 21st day of September, 2020.



Steven S. Goldenberg

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

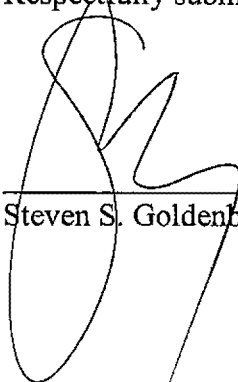
In the Matter of the Application of PSEG)
Nuclear, LLC and Exelon Generation)
Company, LLC for the Zero Emission) Docket No. ER20080558
Certificate Program—Salem Unit II)

MOTION FOR ADMISSION *PRO HAC VICE*

The undersigned counsel, a member in good standing of the bar of the State of New Jersey and willing to serve as attorney of record in this proceeding, hereby moves for the admission *pro hac vice* of Paul F. Forshay, Esq. Mr. Forshay is a member in good standing of the bar of the District of Columbia. There is good cause for Mr. Forshay to be admitted *pro hac vice* because he has had significant experience representing the interests of large end-use customers in utility rate and regulatory proceedings, he has an attorney-client relationship with the New Jersey Large Energy Users Coalition, and this proceeding involves a complex field of law in which he is a specialist.

As evidenced by his affidavit attached hereto, Mr. Forshay has paid to the New Jersey Lawyers' Fund for Client Protection the fees required by R. 1:20-1(b).

Respectfully submitted,



Steven S. Goldenberg

Dated: September 21, 2020

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

In the Matter of the Application of PSEG)
Nuclear, LLC and Exelon Generation)
Company, LLC for the Zero Emission) Docket No. ER20080558
Certificate Program—Salem Unit II)

**AFFIDAVIT IN SUPPORT OF REQUEST
TO APPEAR *PRO HAC VICE***

Washington)
) ss.
District of Columbia)

I, Paul F. Forshay, duly sworn according to law, depose and say:

1. I am an attorney in good standing admitted to practice in the District of Columbia. I am not admitted to practice in New Jersey. I have no disciplinary proceedings pending against me in any jurisdiction and no discipline has been previously imposed on me in any jurisdiction.

2. I am associated in this matter with New Jersey counsel of record, Steven S. Goldenberg, Esq. of the firm of Giordano, Halleran & Ciesla, P.C. who is qualified to practice law in this State pursuant to R. 1:21-1.

3. The New Jersey Large Energy Users Coalition (“NJLEUC”) has requested my representation in this matter.

4. There is good cause for my admission *pro hac vice* in that I have had considerable experience representing large end-use customers in various proceedings, including utility rate and regulatory proceedings, before the Federal Energy Regulatory Commission and Board of Public Utilities and I have an attorney-client relationship with NJLEUC. The proceeding in which I seek admission involves a complex field of law in which I am a specialist.

5. I have paid to the New Jersey Lawyers' Fund for Client Protection the fees required by R. 1:20-1(b) and 1:28-2.

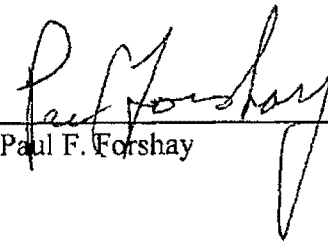
6. If this application to appear *pro hac vice* is granted, I agree to:

a. abide by the New Jersey Court Rules, including all disciplinary rules;

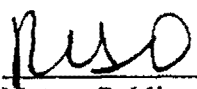
b. consent to the appointment of the Clerk of the Supreme Court as agent upon whom service of process may be made for all actions against me or my firm that may arise out of my participation in this matter;

c. notify the Board of Public Utilities and Office of Administrative Law immediately of any matter affecting my standing at the bar of any court; and

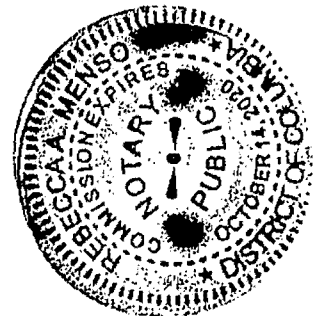
d. have all pleadings, briefs and other papers filed with the Board of Public Utilities and Office of Administrative Law signed by the attorney of record.


Paul F. Forshay

SUBSCRIBED AND SWORN to before me this 17th day of September, 2020


Notary Public

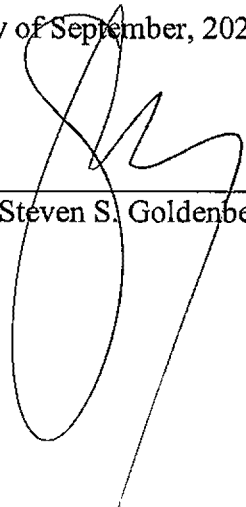
REBECCA A. MENSO
Notary Public, District of Columbia
My Comm. Exp. October 14, 2020



CERTIFICATION OF SERVICE

I hereby certify that I have this day served via electronic mail copies of the foregoing Motion for Admission *Pro Hac Vice* to the parties identified on the distribution list. An original and 10 copies have been forwarded via first class mail to Aida Camacho-Welch, Secretary of the Board of Public Utilities.

Dated at Red Bank, New Jersey, this 21st day of September, 2020.



Steven S. Goldenberg

Docs #4615651-v1

ATTACHMENT I

STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

IN THE MATTER OF THE APPLICATION OF PSEG NUCLEAR LLC AND EXELON GENERATION COMPANY, LLC FOR THE ZERO EMISSION CERTIFICATE PROGRAM - SALEM UNIT 2	DOCKET NO. ER20080558
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ACKNOWLEDGMENT OF AGREEMENT

The undersigned is an attorney, employee, or consultant, or expert for a party or an intervenor who, under N.J.S.A. 48:3-87.5(a), has received, or is expected to receive, Confidential Information provided by **APPLICANT** or by another party (Producing Party) which has been identified and marked by the Producing Party as "Confidential Information." The undersigned acknowledges receipt of the Agreement of Non-Disclosure of Information Claimed to be Confidential and agrees to be bound by the terms of the Agreement.

Dated: 9/21/20

By:  _____

(Name, Title and Affiliation)

NS LANGE (Energy) *NS LANGE (Energy)
 Consultant*

ATTACHMENT I

STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

IN THE MATTER OF THE APPLICATION OF PSEG NUCLEAR LLC AND EXELON GENERATION COMPANY, LLC FOR THE ZERO EMISSION CERTIFICATE PROGRAM - SALEM UNIT 2	DOCKET NO. ER20080558
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The undersigned is an attorney, employee, or consultant, or expert for a party or an intervenor who, under N.J.S.A. 48:3-87.5(a), has received, or is expected to receive, Confidential Information provided by **APPLICANT** or by another party (Producing Party) which has been identified and marked by the Producing Party as "Confidential Information." The undersigned acknowledges receipt of the Agreement of Non-Disclosure of Information Claimed to be Confidential and agrees to be bound by the terms of the Agreement.

Dated: 9/17/20

By: Paul Forshey

(Name, Title and Affiliation)

Paul Forshey
Attorney
NJLEUC

SERVICE LIST

IN THE MATTER OF THE APPLICATION OF PSEG NUCLEAR, LLC AND EXELON
GENERATION COMPANY, LLC FOR THE ZERO EMISSION CERTIFICATE PROGRAM -
SALEM UNIT 2

DOCKET NO. ER20080558

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