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November 23, 2020

VIA ELECTRONIC MAIL

Honorable Aida Camacho-Welch, Secretary
NJ Board of Public Utilities
44 South Clinton Avenue, 9th Floor
P.O. Box 350
Trenton, NJ 08625-0350

**Re: In the Matter of the BPU Investigation of Resource Adequacy Alternatives--
Rate Counsel's Post-Work Session Comments
BPU Docket No.: EO20030203**

Dear Secretary Camacho-Welch:

Please accept for filing these comments being submitted on behalf of the New Jersey Division of Rate Counsel ("Rate Counsel") in accordance with the Notice of Work Session issued by the Board of Public Utilities ("Board") in this matter on October 28, 2020. In accordance with the Notice of Work Session, these comments are being filed electronically with the Board's Secretary at board.secretary@bpu.nj.gov.

Please acknowledge receipt of these comments.

INTRODUCTION

Rate Counsel appreciates the opportunity to submit these comments following Board's November 9, 2020 Work Session in this matter. As stated in the Notice, the Work Session was convened virtually via "webinar" in order to explore the Fixed Resource Requirement ("FRR") proposals that were submitted by PSEG and Exelon Generation Co., LLC ("Exelon") in their October 2, 2020 post-technical conference comments in this matter.

In their initial comments in this matter, PSEG and Exelon proposed an "Integrated FRR Procurement Approach" in which a single New Jersey electric distribution company zone, presumably Jersey Central Power & Light ("JCP&L"), would become an FRR entity.¹ In their October 2, 2020 post-technical conference comments, PSEG and Exelon suggested two alternative approaches that the proposed FRR entity could use to procure the capacity requirements for the JCP&L service territory with resources impacted by the Minimum Offer Price Rule ("MOPR").² At the December 9, 2020 Work Session, representatives of PSEG provided a 90-minute PowerPoint presentation, which was followed by an opportunity for participating stakeholders to submit written questions to the Board's Chief Counsel, who propounded some or all of the questions, in whole or part, to PSEG.

The current PSEG-Exelon proposal, like the original one, is not a detailed proposal. It suggests two general approaches for capacity procurement, but does not set forth a detailed FRR plan. For this reason, Rate Counsel's comment will focus on the fundamental concerns that remain under the current proposal.

¹ PSEG-Exelon Joint Initial Comments at 4 (May 20, 2020).

² PSEG Post-Technical Conference Comments at 2-3 (Oct. 2, 2020).

RATE COUNSEL COMMENTS

I. The Current Proposal, Like the Original One, Is Unlikely to be Allowed by PJM and FERC.

PSEG and Exelon continue to suggest forming an FRR Entity for the JCP&L service territory that would contract for all of the New Jersey resources subject to the MOPR, and then spread the costs across all New Jersey electric customers.³ As Rate Counsel noted in its prior comments, this approach is clearly an “end run” around the MOPR that, to the extent it impacts the PJM capacity market prices, may be disallowed by PJM Interconnection, LLC (“PJM”) or the Federal Energy Regulatory Commission (“FERC”).⁴

The FRR approach is being proposed because of the risk that capacity from some state-subsidized resources may not clear the PJM capacity auction due to mitigation required by the MOPR.⁵ The potential value of this approach is that it would allow certain resources, including offshore wind, to receive capacity payments that they would likely not receive if they were to bid into the PJM capacity auction.

During the November 9 Work Session, PSEG appeared to suggest that the proposed approach is “surgical” and would not be disruptive to the PJM capacity market.⁶ To the contrary, to the extent the FRR plan uses capacity that would not clear the PJM auction due to the application of MOPR, it will necessarily affect prices in the auction. These resources will offset generation that would otherwise be needed. Given the structure of the Base Residual

³ PSEG Post-Technical Conference Comments at 7-9 (Oct. 2, 2020), Work Session PowerPoint Presentation, Slide 13. The PowerPoint presentation and a recording of the work session are available on the Board’s website at: <https://www.state.nj.us/bpu/about/divisions/ferc/resourceadequacy.html>.

⁴ Rate Counsel Initial Comments at 9-13 (May 20, 2020); Rate Counsel Reply to PSEG Post-Technical Conference Comments at 2-3 (Oct. 22, 2020).

⁵ Work Session PowerPoint Presentation, Slides 4-5.

⁶ Work Session Recording at 1:35:19 to 1:36:41.

Auction (“BRA”), the offset resources would be the most costly, thus driving down the clearing price in the BRA.

This is because the FRR entity removes a quantity of load from RPM and contracts for a commensurate quantity of supply. If the FRR entity uses only supply that would otherwise have cleared in RPM, the quantity of load and supply removed from RPM is matched, and the impact on RPM prices should be minimal. However, if the FRR entity uses resources that would not have cleared in the BRA—which is the main purpose of proposing an FRR for New Jersey—it will remove a significantly smaller quantity of supply than load from RPM. This will result in less demand relative to the available supply in the BRA auction. Lowering demand in the BRA without a commensurate reduction in supply will lead to the highest-priced generation, which otherwise would have cleared, failing to clear – resulting in a lower clearing price.

This phenomenon has of course been recognized by PJM and FERC repeatedly in proceedings having to do with the MOPR rules. This is exactly the subsidized-resources price suppression effect that capacity sellers, PJM, and FERC have repeatedly taken action to prevent. It is probable that PJM would see the proposed FRR as an attempt to thwart the MOPR’s purpose of preventing price suppression, and PJM would consider changes to its MOPR and FRR rules to prevent such price suppression impacts. This is particularly the case because the proposed FRR would concentrate all of the New Jersey subsidized resources within the JCP&L zone, while spreading the associated costs to consumers across the State. It appears likely that PJM would view this as a mechanism to compensate subsidized resources outside of the PJM auction for the entire State, rather than a bona fide plan to meet the capacity needs of the JCP&L zone. Even if

PJM itself does not take action, the PJM generators have not hesitated to challenge actions they allege to be detrimental to the PJM markets.⁷

As Rate Counsel noted its Reply Comments in this matter, PJM has not hesitated to change its rules when it determines that the MOPR is threatened.⁸ Any impacted party could also file a petition under Section 206 of the Federal Power Act⁹ at FERC if it deems this scheme as contrary to the many Orders issued by FERC upholding the MOPR. There is a significant risk to New Jersey ratepayers from these potential reactions to the PSEG-Exelon FRR plan that must be taken into account when considering the wisdom of adopting such a plan.

Rate Counsel notes also that the United States Supreme Court's recent decision in Hughes v. Talen Energy Mktg.¹⁰ affirmed the authority of PJM and FERC to regulate price-setting for wholesale sales of electric capacity. As would be the case here, Hughes involved a state program that was permissible under an exemption to the PJM MOPR at the time it was enacted. The Court in Hughes affirmed PJM's and FERC's authority to modify the rules to disallow the Maryland program because of its "effect of disrupting the competitive price signals" in the PJM capacity auction.¹¹ If PJM were to respond to the PSEG-Exelon FRR plan by changing its rules, ratepayers would be faced with additional uncertainty and potentially additional costs.

⁷ See, Calpine Corp., et al. v. PJM Interconnection LLC, 163 F.E.R.C. ¶ 61,236 (2018).

⁸ See, NJBPU v. FERC, 744 F.3d 74 (3d Cir. 2014).

⁹ 16 U.S.C. § 824e.

¹⁰ Hughes v. Talen Energy Mktg., 578 U.S. ___, 136 S. Ct. 1288, 194 L. Ed. 2d 414 (2016)

¹¹ Hughes, supra, 136 S. Ct. at 1295-96, 194 L. Ed. 2d at 423-24.

II. The Proposal to Contract With Capacity Resources on a Year-By-Year Basis Would Expose Ratepayers to Potential Higher Capacity Prices.

A major concern with the current PSEG-Exelon proposal is that PJM requires the FRR option to be a minimum five-year commitment, but the proposal calls for contracting resources for the required FRR Plan on a year-by-year basis with one-year commitments.¹² This creates what economists call a “hold-up problem”: after the first year, some of the intended FRR resources might threaten to retire or otherwise decline to make capacity available to the FRR entity unless additional payments outside of the proposed FRR auction pricing approach are provided. As the FRR entity will be forced to replace capacity retirements from a limited number of sources, this scenario subjects that entity, and New Jersey’s ratepayers, to the exercise of market power by the remaining resources.¹³

The potential for major retirements, such as nuclear plants, exists whether or not the FRR is formed. However, within RPM, each year some resources retire, other new resources become available, and the RPM BRA clearing prices and quantities by zone adjust to and reflect these changes. In the past decade over 30,000 MW of coal plants have retired without a substantial impact on RPM BRA prices. Unlike the PJM capacity market as a whole, the proposed FRR is sized to accommodate a specific group of resources, amounting to approximately 4,500 MW.¹⁴ If a large quantity of the intended FRR resources is removed, such as due to retirement of a nuclear plant, the FRR entity would have to contract with other available resources, such as gas-fired resources, or more expensive generators that did not clear the BRA. This could thwart the

¹² Work Session PowerPoint Presentation, Slide 7.

¹³ PSEG conceded that BPU could not force generation to participate in the FRR and any attempt to do so would most likely be struck down on constitutional grounds. Work Session Recording at 1:54:41 to 1:56:05.

¹⁴ Work Session PowerPoint Presentation, Slides 12-13.

objective of using the FRR approach to meet the state's decarbonization goals and/or sharply raise the cost of the FRR approach, reducing or eliminating the intended benefits of the FRR plan.

In particular, the FRR approach proponents, whose affiliates own nuclear generation, clearly stated that participation in the FRR would be voluntary for all resources, and whether the nuclear plants would remain in operation and offer into the FRR would depend upon economics.¹⁵ As shown in PSEG's slide presentation, the nuclear resources controlled by PSEG and Exelon represent over two-thirds of the "illustrative capacity value" that would be provided by the intended FRR resources.¹⁶ Although multi-year agreements with the intended FRR resources could address this risk, the proponents recognize that multi-year agreements raise a number of complicating factors.¹⁷ Thus, the FRR proposal would allow large resources within the FRR to exercise market power. They could threaten to retire, and then the FRR entity, faced with a shortage of available resources, would either have to replace the retiring resource with one that does not meet the State's climate goals or pay a higher price to keep the resource from retiring. Given that PSEG and Exelon have threatened on multiple occasions to retire the nuclear plants that make up over two-thirds of the FRR capacity, the State cannot ignore the very real likelihood that this proposal would allow PSEG and Exelon to exercise market power to the detriment of ratepayers and the State. The Board should decline to follow this path.

¹⁵ Work Session Recording at 1:31:48 to 1:33:03

¹⁶ Work Session PowerPoint Presentation, Slide 23.

¹⁷ Work Session Recording at 2:16:30 to 2:17:38.

III. The Board Should Proceed Cautiously.

PSEG and Exelon continue to insist the Board must act quickly. However, given the significant level of uncertainty regarding almost every aspect of the PSEG-Exelon FRR proposal, the Board should decline the invitation to act in haste. As stated in its earlier comments throughout this proceeding, Rate Counsel urges the Board to fully consider the host of unknown issues raised by the FRR option and the most recent PSEG-Exelon proposal.¹⁸ There remain numerous threshold issues which require resolution before the Board should consider proceeding with an FRR approach.

First and foremost, and as Rate Counsel has explained in its comments filed in this matter on May 20, 2020 and October 22, 2020, the Board lacks the statutory authority to implement FRR without new legislation.¹⁹ Notably, JCP&L's post-technical conference comments express a belief that new legislation is likely required for New Jersey to exercise any FRR option. Without addressing this foundational issue, the Board risks any FRR plan being scuttled after extended litigation at the state and federal level. Any consideration of the FRR option must recognize this foundational issue.

Second, the Board should not move forward with the PSE&G-Exelon proposal without input from PJM and the Independent Market Monitor ("IMM"). As stated above and in Rate Counsel's reply comments, a significant risk exists that PJM and FERC will not agree with an end run around MOPR and, in response, will change the FRR and MOPR rules. Without

¹⁸ Rate Counsel Initial Comments at 1-3 (May 20, 2020); Rate Counsel Post-Technical Conference Comments at 2-3 (Oct. 2, 2020); Rate Counsel Reply to PSEG and Exelon Post-Technical Conference Comments at 5-7 (Oct. 22, 2020).

¹⁹ See, In re Centex Homes Petition for Extension of Service, 411 N.J. Super. 244, 257 (App. Div. 2009).

coordination at the regional and federal level (including with, among others, PJM and IMM), any proposal before the Board cannot be considered viable.

In addition, the recent national elections have added another level of uncertainty. A change in presidential administrations will likely result in a change in federal policy toward clean energy resources. Because the FRR option includes a five-year commitment, the Board should be cautious that it does not proceed down a course based on federal policy which could change within the first couple years of the FRR's implementation.

Coinciding with the significant uncertainty surrounding the federal regulatory policies affecting New Jersey is uncertainty with respect to the timing of Ørsted's 1,100 MW Ocean Wind project. In its Q3 Earnings Call on October 28, 2020, Ørsted's CEO Henrik Paulsen indicated that Ørsted anticipates completion of the project beyond 2024 due to delays with the Bureau of Ocean Energy Management's permitting process.²⁰ If the Ocean Wind project is delayed for a year, it would not be an available resource until the 2025/26 Energy Year. This development contradicts the argument for urgency to enter into an FRR by the 2024/25 Energy Year.

As has been expressed in Rate Counsel's previous comments, the FRR option is a complicated undertaking which should be only pursued in the most deliberate fashion. The uncertainty, which appears poised only to increase over the next several months due to the change in federal administration, necessitates careful consideration of the threshold issues before entertaining substantive review of hypothetical plans.

²⁰ Ørsted Q3 Report Transcription at 4 (Oct. 28, 2020) (available at <https://orstedcdn.azureedge.net/-/media/2020-q3/transcription-orsted-q3-2020.ashx?la=en&rev=6ba53d913bc144aa93b7fc0039a4cbe0&hash=DE07EECFD26E95E8972E1BFAFCAE663D>)

IV. The Board Should Not Give Undue Weight to PSEG's Work Session Presentation.

At the beginning of the virtual Work Session, Board Staff stated that the presentation and subsequent moderated Q&A were “[i]ntended to help build the evidentiary record, that Staff will rely on to make recommendations to the Board on the best path for New Jersey customers” and would be “made part of the official record in this proceeding.”²¹ Rate Counsel cautions the Board against giving undue weight to the Work Session presentation. The event did not include any procedural safeguards that would allow the Board to consider the presentation as competent evidence on which it should rely.

The event was noticed as a “Work Session” for parties to ask questions about PSEG’s and Exelon’s FRR proposals with the intent to “sufficiently [develop] PSEG’s and Exelon’s proposals so that NJBPU Staff and its consultant may model the financial and technical implications of the FRR proposals.”²² However, the Work Session only included an uninterrupted 90-minute presentation by PSEG and Exelon. Although attendees could pose questions, the questioners were anonymous. Moreover, the attendees were not disclosed, the questions were filtered through Staff and no opportunity was provided for others to speak or engage in an exchange with PSEG and Exelon. There was no opportunity to fully probe PSEG or to further flesh out PSEG’s position. Indeed, PSEG objected and did not answer lines of questions it deemed outside the scope of the discussion.²³ Participants had no recourse.

Although the Board has latitude in choosing the appropriate process for administrative proceedings, “an agency’s discretionary choice of the procedural mode of action, are valid only

²¹ Work Session Recording at 0:01:02 to 0:01:12.

²² Notice of Work Session on Investigation of Resource Adequacy Alternatives

²³ See Work Session Recording at 2:35:35 to 2:36:31 and 2:38:19 to 2:38:22. See also 1:39:27 to 1:40:07.

when there is compliance with the provisions of the [APA] . . . and due process requirements.”²⁴ Moreover, “the fundamentals of fair and adequate procedure constituting due process must be observed”²⁵ This includes an opportunity to assess “the evidential worth of assertions of fact or opinion.”²⁶

Based on the format of the Work Session, the Board should give the presentations only the weight they are due as advocacy by parties with a direct financial interest in the outcome. The presentations and subsequent anonymized questions do not constitute credible evidence on which a decision regarding the best path for New Jersey ratepayers should be based, given the limited degree to which interested parties were permitted to challenge and probe the proponents’ assertions. Similarly, any models of the financial and technical implications of the FRR proposals developed by Staff must also be subject to due process, before they may be properly considered by the Board.

²⁴ In re Basic Generation Service, 205 N.J. 339, 347 (2011).

²⁵ See In re Howard Sav. Bank, 143 N.J. Super. 1, 6-7 (App. Div. 1976) (citing Application of Plainfield-Union Water Co., 11 N.J. 382 (1953)).

²⁶ Application of Plainfield, supra, 11 N.J. at 392-93.

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CONCLUSION

For the reasons stated above and in the other comments previously submitted by Rate Counsel in this matter, the Board should reject the FRR Plan proposed by PSEG and Exelon.

Respectfully submitted,

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