STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

I/M/O Application of PSEG Nuclear, LLC And Exelon Generation Company, LLC For the Zero Emission Certificate Program Salem Unit 1 I/M/O Application of PSEG Nuclear, LLC And Exelon Generation Company, LLC For the Zero Emission Certificate Program Salem 2 I/M/O Application of PSEG Nuclear, LLC For the Zero Emission Certificate Program Hope Creek	BPU Docket Nos. ER20080557, ER20080558 and ER20080559

POST-HEARING BRIEF OF THE NEW JERSEY LARGE ENERGY USERS COALITION

> "Let the jury consider their verdict," the King said for about the twentieth time that day.
>
> "No, no!" said the Queen. "Sentence first—verdict afterwards."
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> "Stuff and nonsense!" said Alice loudly. "The idea of having the sentence first."
>
> Lewis Carroll, *Alice's Adventures in Wonderland*
> Trial of the Knave of Hearts, Chapter XII

PRELIMINARY STATEMENT

The New Jersey Large Energy Users Coalition ("NJLEUC") appreciates the opportunity to submit this post-hearing brief in the Board's ZEC II proceeding, in which applicants PSEG Nuclear, LLC ("PSEG") and Exelon Generation Company, LLC ("Exelon"), (sometimes collectively referred to as "the companies") seek Board approval of their applications for an award of ZEC subsidies for the second three year eligibility period. NJLEUC opposes awarding the subsidy or, in the alternative, urges the Board to exercise its authority under the ZEC Act, N.J.S.A. 48:3-87.5 (j)(3)(b), to reduce the per kilowatt hour charge to a just and reasonable rate that is supported by the record.

Background: "They won't get the subsidy if they don't need it."

The passage of the ZEC Act, N.J.S.A. 48:3-87.5, occurred following an acrimonious multi-year, multi-session Legislative battle. Opponents of the proposed nuclear subsidy bills voiced considerable concerns regarding the process by which applications for subsidies would be considered, including the rights of parties to intervene and meaningfully participate in the Board's proceeding, and the bill's creation of a playing field that was decidedly tilted in favor of applicants, rendering the Board's approval of the subsidies a foregone conclusion. The bill sponsors repeatedly assured concerned stakeholders, including NJLEUC, that the Board would have full authority to make its own independent determination whether the companies' ZEC applications fully satisfied each of the qualification criteria set forth in the ZEC Act, and that ratepayers would be well represented in the Board's ZEC proceedings.

This statement by Senator Sweeney at the January 25, 2018 hearing of the Senate Energy and Environment Committee was typical: "This (the ZEC bill) creates one thing—a process of review where PSEG will show their books to the BPU and BPU has the authority and ability to

make a determination at that point. There is no guarantee here." Similarly, at the bill signing ceremony, Governor Murphy, responding to widespread criticisms that the ZEC Act unduly favored the nuclear plant owners, would exclude ratepayers from meaningful participation in the Board's ZEC proceedings, and assured that the subsidies would be awarded, stated:

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

Thereafter, the Board's ZEC I proceeding marked the first time in its sixteen year existence that NJLEUC was not only denied intervenor status, but also access to the confidential information regarding the financial condition of the nuclear plants. The Board's determination that NJLEUC was not an "essential" party—a standard unknown to administrative law--relegated the group to the sidelines, limited to filing post-hearing comments that were based solely upon information available to the general public. Rate Counsel was the only ratepayer representative to be granted intervenor status and access to the confidential information, but only after Rate Counsel was repeatedly compelled to justify its role as the representative of ratepayers to the Legislature, a role that PSEG actively opposed.

In the ZEC I proceeding, experts retained by the Board and Rate Counsel, together with the PJM Independent Market Monitor ("IMM"), analyzed the companies' filings and, in particular, information regarding the financial condition of the nuclear plants. These experts, together with the Board's professional staff, unanimously determined that that each nuclear plant was financially viable and that the companies had failed to satisfy the ZEC Act's critical financial need criterion. Under the ZEC Act, the companies' failure to demonstrate financial need should have rendered the companies ineligible to receive the subsidy.

However, prior to the Board's decision, PSEG announced that its Board of Directors had authorized the closure of all three nuclear plants unless each plant was awarded ZECs. The latter condition violated the ZEC Act, which requires that each plant be separately analyzed and ranked for ZEC eligibility, and it precluded any attempt by the Board to determine whether and how the retirement of one or more plants deemed uneconomic could affect the financial viability of the remaining plants. N.J.S.A. 48:3-87.5 (f) and (g). Thus, the closure threat cannot be said to have been justified and made only because it was required by the ZEC Act. Rather, it was a calculated and improper threat designed to assure the outcome sought by PSEG through the regulatory equivalent of holding a gun to the Commissioners' heads.

PSEG's closure threat had its intended effect on the Board. The Commissioners' statements explaining their admittedly coerced affirmative votes clearly demonstrated that the threat to immediately close the plants had a decisive influence on each Commissioner's decision. Commissioner Gordon protested that "the Board is being directed to pay ransom and the hostages are the citizens of New Jersey." Commissioner Chivukula described the situation as "highway robbery…It's very clear…that they do not need the subsidy at this time." Commissioner Holden declined to "play the equivalent of a generation chicken game with our nuclear plants." Transcript of April 18, 2019 Agenda Meeting ("Tr."), (at pages 23 to 30).

Notwithstanding the Commissioners' clearly-expressed reluctance to award the subsidies, the Board nevertheless approved each application, despite the absence of record support for the awards. The Board's Order therefore represented an after-the-fact effort to justify an outcome that the Commissioners clearly did not support, a situation reminiscent of the "sentence first, verdict afterwards" approach advocated by the Queen in Alice in Wonderland. Thus, notwithstanding Senator Sweeney's and the Governor's earlier rejection of the widespread stakeholder concerns

that the companies "will get the subsidy even if they don't need it," the companies did in fact receive $900 million in subsidies despite the unanimous conclusion of the independent experts and Board staff that the companies had failed to satisfy the critical financial need eligibility criterion that is central to the ZEC Act. As discussed below, while the Board's Order was recently affirmed by the Appellate Division, NJLEUC asserts that the opinion was wrongly decided and is expected to be the subject of appellate review.

The Board's Authority to Reduce the ZEC Subsidy—Real or Illusory?

Highly relevant to the ZEC II proceeding were the Commissioners' further expressions of frustration over their inability to reduce the amount of the ZEC subsidy to more acceptable levels. Commissioner Solomon regretted that "the Legislature and Governor did not give us the authority to determine the amount of the subsidy." Commissioner Solomon further stated she believed that "some level of subsidy is warranted," but hoped that "the Legislature and Governor will consider ways to lessen the impacts on businesses and other ratepayers." (Tr. at 23-24). Similarly, Commissioner Gordon noted that "a majority of the Board would, if not all members, would support a significant subsidy to support (the plants') societal benefits" but that the "statute did not give us the freedom to even offer a subsidy we deemed appropriate—it was $4 a megawatt hour or nothing." (Tr. at 25-26). Commissioner Gordon also expressed concerns regarding the implications of the assessment of the full subsidy on "seniors and large energy users." (Tr. at 26).

By way of contrast, in the ZEC II proceeding, the Board has full authority under the ZEC Act to award a subsidy that is less than $0.004/kWh. The ZEC Act states:

> (3)(a) Notwithstanding the provisions of paragraph (1) of this subsection, and to ensure that the ZEC program remains affordable to New Jersey retail distribution customers, the board may, in its discretion, reduce the per kilowatt-hour charge imposed by paragraph (1) of this subsection starting in the second three year eligibility period and for each

> subsequent three year eligibility period thereafter, provided that the board determines that a reduced charge will nonetheless be sufficient to achieve the State's air quality and other environmental objectives by preventing the retirement of the nuclear power plants that meet the eligibility criteria established pursuant to subsections d. and e. of this section. N.J.S.A. 48:3-87.5 (j) (3) (a).

Although NJLEUC was again denied access to the confidential information regarding the nuclear plants in this proceeding, it appears evident from the public version of the Levitan Preliminary Reports and the reports and testimony of the independent experts that the plants are either profitable or are experiencing minimal, potentially short-term losses. In these circumstances, it would be appropriate for the Board to deny the applications for subsidies or, in the alternative, award a reduced subsidy tied to the plants' financial performance and a fair valuation of their clean generation attributes.

For example, if the reports demonstrate that the plants are losing $10 million annually, a $300 million dollar subsidy would obviously not be appropriate, even taking into the account the environmental benefits associated with the continued operation of the plants. In these circumstances the Board should fully avail itself of the flexibility afforded by the ZEC Act to award a reduced subsidy. This is precisely the flexibility the Legislature intended for all ZEC proceedings that follow the initial subsidy period, and codifies the flexibility the Commissioners wished they had in the ZEC I proceeding. What could go wrong?

"Hostage Taking" Part II: Will PSEG Undermine The Board's Authority To Reduce The Subsidy?

It is clear that PSEG is determined to deny the Board its authority to reduce the per kilowatt hour charge to a level supported by the record in this proceeding. Daniel Cregg, PSEG's Chief Financial Officer, delivered a blunt message in his written and oral testimony: *PSEG requires the full $10/MWh subsidy, and nothing less, or PSEG will cease operating the plants*. (Cregg Direct Testimony at p. 27). Mr. Cregg suggests that a $10/MWh subsidy would be a bargain for the State

because the company actually requires an $18/MWh subsidy to achieve the higher return it requires for its unregulated, merchant generation assets, a rate that exceeds the return obtained on the utility's assets in rate base. However, *Mr. Cregg was likewise clear that even if the Board were to award the full $10 subsidy demanded, PSEG will still not commit to keeping the plants open.*

Thus, PSEG unapologetically attempts to back the Board into the same uncomfortable corner as in the ZEC I proceeding. Once again, PSEG resorts to gun-to-the-head tactics, insisting on having it all, regardless of whether PSEG actually deserves the requested relief or whether the Board deems a reduced subsidy to be more appropriate. As in ZEC I, the company's heavy-handed demand is enforced by a closure threat.

It is by no means clear that the companies carried their burden of proving financial need in this proceeding, as the IMM and Rate Counsel's experts again concluded that the companies' presentations padded expenses and understated revenues and, after several appropriate adjustments, failed to sustain their burden of proving financial need. The public version of the Levitan Reports contain similar findings that suggest that the plants are projected to experience tolerable near term losses, a condition that could be obviated by regulatory and market changes that are now occurring. If in fact the projected losses are minimal, it would be singularly inappropriate for the Board to award the full $10 ZEC, even taking into account the environmental attributes associated with the plants' output.

Unfortunately, because the Board acquiesced to PSEG's ZEC I "hostage taking," it should surprise no one that PSEG has elected to employ the same tactic in ZEC II. Thus, we again are confronted with the same outcome that our leaders repeatedly assured us would not occur—e.g. that the companies could get the subsidy even if they don't deserve it.

In light of the renewed closure threat, the ZEC II hearing was dominated by questions about the Board having to "roll the dice" with the companies, with several witnesses asked what they would do "if you were in my position"? The questions evidenced a recognition that the Commissioners were again embroiled in the "high stakes game of chicken" they bemoaned in the ZEC I proceeding. These questions also suggest an apparent thought process that the only way for the Board to act responsibly as a regulator and in best interests of ratepayers would be to allow itself to again be taken hostage, capitulate to the closure threat and grant the full subsidy, despite the Board's ability to award a reduced subsidy, or no subsidy at all, in this proceeding.

PSEG again relies on an inappropriate closure threat in its continuing effort to negate the Board's statutory oversight role, seeking to reduce the Board to a mere rubber stamp for whatever the companies demand, while depriving ratepayers of the purported "benefits" of the ZEC Act that were so loudly trumpeted as important regulatory and consumer protection tools. Indeed, in a scenario reminiscent of Alice in Wonderland, PSEG would have the Board announce its positive "verdict" first and again justify, after-the-fact, a decision that neither the Board nor the record supports.

PSEG Is Making An Offer That The Board Can--And Should--Refuse

The regulatory capitulation that PSEG seeks does not serve the public interest. Quite to the contrary, in every respect the Godfather-like "bargain" proposed by PSEG serves only the selfish interests of the companies and their shareholders and disserves those of ratepayers. The Board well knows that ratepayer delinquency in the payment of utility bills now exceeds $800 million statewide, an extraordinary situation that required the Board to implement, and recently extend, a moratorium on terminations of utility service, particularly for the many households and businesses affected by the COVID pandemic. Requiring these ratepayers to foot another billion dollar wealth

transfer to these highly profitable companies would impose an obligation which for some large businesses would exceed $500,000 annually.

As further discussed below, PSEG's "offer" inexplicably and unjustifiably seeks to erase the deal the company struck years ago when the electric industry was restructured to a competitive model, a model that remains viable in all respects, unaffected by the passage of the ZEC Act. *As part of the deal struck in 1999, as affirmed by our Supreme Court and memorialized in the Electric Discount and Energy Competition Act, N.J.S.A. 48:3-49 et seq., PSEG agreed that ratepayers would no longer be obligated to financially support the companies' deregulated, competitive merchant generation plants.* In return, PSEG was granted the right to charge lucrative market-based rates for its generation and the payment by ratepayers of $3 billion in stranded costs, designed to compensate PSEG for the losses it projected its power plants would sustain in the newly-competitive energy markets. In all respects, ratepayers kept up their end of the bargain, including the payment of stranded costs, even after it became clear that the nuclear plants were highly profitable, and have earned the right to insist that PSEG likewise honor its commitments.

We acknowledge the recent decision of the Appellate Division affirming the Board's Order in the ZEC I proceeding. However, we respectfully urge that the opinion was wrongly decided and likely will be appealed. The Appellate Division held that the language of the ZEC Act was clear with regard to ratepayer responsibility for the market and operational risks associated with the nuclear plants, which the Court cited as justification for its otherwise inexplicable failure to take into account the diametrically contrary and equally clear language of EDECA (and the Board's Final Restructuring Order) which, as discussed at length below, completely absolved ratepayers from any further financial responsibility for PSEG's deregulated power plants.

Nothing in the ZEC Act purported to supersede or limit EDECA (a comprehensive, paradigm-shifting enactment that followed a concerted, five year industry restructuring initiative by the Board) in any respect and no such Legislative intent can be inferred in the circumstances. Thus viewed, EDECA and the ZEC Act are both valid Legislative enactments that completely contradict each other with regard to the treatment of continuing ratepayer responsibility for the nuclear plants. The rules of statutory construction are clear and require, at minimum, that the two statutes be read together and harmonized, to the extent such an outcome is possible. By completely ignoring EDECA and failing to even attempt to reconcile the two competing statutes, we respectfully suggest that the Appellate Division committed reversible error.

No other change of circumstances has occurred to undermine the arrangement between ratepayers and PSEG set forth in EDECA and the Board's Final Restructuring Order, other than PSEG's current unwillingness to live up to its end of the bargain. To now reinstate the obligation of ratepayers to financially support the companies' deregulated merchant plants under a Frankenstein-like version of re-regulation would represent a major disservice to ratepayers. It is certainly an eventuality that no one involved in the restructuring effort would have foreseen, including PSEG.

A Lose/Lose Proposition for Ratepayers

The regulatory structure advocated by the companies is a lose/lose proposition for ratepayers that the Board should reject. The companies would require ratepayers to *guarantee* the profitability of the nuclear plants, including providing a generous return on equity that exceeds the return provided on regulated utility assets. The companies would hold ratepayers responsible for all downside risks associated with the continuing operation of the nuclear plants without any ability to reduce this obligation during the three year ZEC eligibility period. Even worse, the companies

would deny ratepayers any "upside" opportunity to participate in the profitability of the plants should the plants' financial performance exceed the companies' current, conservative projections. Under the PSEG approach, all additional revenues would be pocketed by the companies. Who would agree to such an obvious "heads I win, tails you lose" arrangement in an arm's length negotiation?

It is also fair to assume that the companies will at some point insist that ratepayers assume full financial responsibility for all significant capital improvements the companies deem necessary to keep these aging plants operational. The fact that this arrangement could become significantly more onerous for ratepayers over time should be an important consideration for the Board if it assumes that the nuclear plants will remain in operation through 2050, when they will be 70 years old, and without question the oldest nuclear plants in the country.

Further, we again note that even if the companies are given everything they demand from the Board, they provide no assurance that the plants will remain open if certain events occur or market conditions change. These factors include circumstances in which a plant requires capital expenditures in excess of $40 million (clearly evidencing that the companies have no intention to incur these costs themselves), or new taxes or laws are enacted that threaten to reduce the plants' profitability below the companies' desired levels. See, N.J.S.A. 48:3-87.5 (k). We note that Exelon closed Oyster Creek rather than incur the costs associated with a new cooling tower. Thus, it is entirely likely that the companies would seek to require ratepayers to foot these potentially onerous bill or face yet another closure threat. At some point—and we believe we have reached that point—the Board must stand up for itself and the ratepayers it protects and tell the companies enough is enough.

If the Board truly seeks to advance and protect the interests of ratepayers, we respectfully suggest that capitulating to PSEG is not the way to do so. To the extent we are representative of ratepayers generally, the members of NJLEUC would reject PSEG's "deal" out of hand. We recognize it for what it is--an entirely one-sided proposition calculated to further enhance the profits of the companies and their shareholders, who clearly profited from the last ZEC award through appreciated stock prices and increased dividends. There is simply nothing here for ratepayers, other than another unnecessary and baseless wealth transfer to two highly profitable companies—a subsidy that is obviously unavailable to the State's other competitive businesses, many of which would be far more sympathetic candidates for a bailout.

Regulation Versus Closure Threats

It remains an open question whether the companies would actually make good on their threat to close the nuclear plants. Obviously, no one can read their minds. It wasn't that long ago that the companies rejected out of hand a suggestion that the nuclear plants be divested as a market power mitigation measure to secure approval of the companies' proposed merger. Times have obviously changed.

Now, PSEG's closure threat is based on 2020 market conditions that reflected historically low energy prices. There is good reason to believe that market conditions will improve going forward, based on market changes now being implemented and increased post-COVID demand. As a practical matter, at this point the nuclear plants have been paid for multiple times over during their forty year life span, making the companies' plaintive cries for a generous "return" on these investments ring hollow.

These are the trends and realities that will guide PSEG's ultimate decision, together with the fact that the company is simultaneously divesting its fossil plants. Does the company truly

want to completely exit the generation function and limit itself to a distribution-only utility with side interests in solar and offshore wind? Without a generation affiliate, how many billions of dollars would the utility (and ratepayers) have to invest in infrastructure and other programs each year to generate the additional revenues the companies "need" to remain attractive to Wall Street? Only PSEG can answer these questions. However, we note the obvious: any decision of PSEG's Board of Directors can be easily reversed when the rubber hits the road.

From the Board's perspective, if the PSEG threat/Board acquiescence pattern becomes the norm, the Board should entertain no doubt that as night follows day, similar closure threats will accompany all of PSEG's future ZEC applications. PSEG will assume that the Board will acquiesce every time, regardless of the merits of the ZEC applications, the opinions of the experts or findings of the Board's professional staff. The question for the Board is whether the Board and ratepayers can long tolerate this pattern.

Acceptance of this scenario would render the ZEC processes meaningless, including the determinations whether the companies have carried their statutory burden of proof, as the threat will always trump the merits of a given proceeding. If this is to be the pattern, the question must be asked--why should anyone bother to retain experts, pursue discovery and conduct hearings if the same preordained outcome repeats itself over and over, in Groundhog Day-like fashion, with all applications for full subsidies granted, regardless of their merit, under the duress of closure threats? Many parents learn the harsh lesson that acquiescence to a child's temper tantrums only insures that more temper tantrums will occur in the future. Regrettably, there is a clear analogy to be drawn here.

As a practical matter, it should also be kept in mind that a closure decision is not PSEG's alone to make. Should PSEG actually make good on its threat, PJM has the authority to order the

plants' continued operation if they are needed for reliability purposes. The company cannot simply leave the State and PJM high and dry at its whim. Therefore, the "rolling the dice" concern is overblown. PJM, not PSEG, is the ultimate arbiter of whether the plants can responsibly cease operation. If the plants are required to keep the lights on, PJM will direct PSEG to continue to operate them until they are no longer needed. If the plants are not needed for reliability purposes and they receive retirement signals from the markets, they should be permitted to close. As noted above, the economics associated with aging plants will only further deteriorate and the obsolete plants would likely soak up significant capital that would be better invested in new, state-of-the-art renewable technologies. Even in this scenario, however, the nuclear plants would continue to operate for an extended period of time as they are being decommissioned.

Is there an element of risk in this approach? Yes, but the only apparent alternative, other than the Board exercising its statutory authority to reduce the ZEC, would be to simply surrender to the companies, a situation that would catapult the concept of regulatory capture to new and dangerous levels. Needless to say, regulatory capitulation in response to attempted "hostage takings" and "hold-ups" cannot be said to serve the interests of the Board, the State or ratepayers. Nor will capitulation in these circumstances necessarily accomplish anything. Even if the Board approves a full ZEC subsidy in this proceeding, the companies provide no commitment that the plants will continue to operate. The Board will still be rolling the dice, as PSEG will always reserve to itself the ultimate decision regarding the plants' fate.

While PSEG may not like it, if the Board finds some subsidy warranted, it could fashion a middle ground consistent with the findings of the experts in this proceeding. The Board should not hesitate to pursue the reduced subsidy alternative, and take full advantage of the authority that was denied it in the ZEC I proceeding. This should be the chosen alternative to truly protect the interests

of ratepayers, and to give credence to the Governor's assurance that the "companies will not get a subsidy if they don't need it."

In sum, it is ironic that the "PS" in PSEG stands for "public service." In two separate ZEC proceedings, PSEG's behavior demonstrates beyond any question that for all of its professed support of the State's Energy Master Plan and carbon reduction goals, it's still all about PSEG, greed and money. For PSEG, the State's environmental goals and concerns serve as little more than leverage to use against the Board to obtain the company's preferred level of return on investment on its aging nuclear plants, the public interest be damned. The time has come for the Board to exercise the discretion it hoped for in the ZEC I proceeding and to set a ZEC subsidy at a level that is based not on what PSEG's shareholder-driven self-interest "wants to have," but rather on what objective economic analyses demonstrate it truly "needs to have," if anything, to support the continued operation of its nuclear plants, assuming of course it is found that the companies' needs are consistent with the best interests of the public at large.

POINT I

THE ZEC ACT DID NOT SUPERSEDE OR LIMIT THE ELECTRIC DISCOUNT AND ENERGY COMPETITION ACT AND THE BOARD'S FINAL RESTRUCTURING ORDER

Much of the disagreement between the independent experts and PSEG in this proceeding relates to the appropriate treatment to be afforded the costs and risks associated with the continuing operation of the nuclear plants. Whether the costs and risks asserted by the companies may be considered "true costs" and how to properly value these costs were the predominant issues debated.

The Levitan Preliminary Reports for each of the nuclear plants reached the same conclusion regarding PSEG's purported operational costs as was the case in 2019—e.g. that "operational risk is not a true cost" and that PSEG's historical cost data indicates that the plants have not incurred true out-of-pocket operational risk costs for the decade 2010 through 2020. Levitan concluded: "Consistent with our 2019 Report, we view the cost of operational risk as a prudent generation planning and asset management parameter but not as a cost actually incurred. Since it is not a true out-of-pocket cost, the cost of operational risk may not be avoided by ceasing operations." (See, e.g., *Hope Creek January 19, 2021 Preliminary Report*, at pp.21-22).

Rate Counsel expert witness Andrea Crane was blunt in her assessment of the validity of PSEG's alleged costs and risks:

> The ZECs statute permits PSEG to consider risks in assessing its financial situation. *PSEG does not propose an adjustment to account for risk. PSEG instead seeks a guarantee from customers*.
>
> …Thus, a significant portion of the Company's overall claim for subsidies relates not to objective and verifiable cost estimates, but to speculative risks. While the Legislature provided that these risks should be considered when evaluating whether or not a subsidy was required, they did not ensure recovery of these speculative costs from ratepayers.

> …The Operational and Market Risks included in the Companies' analysis do not reflect an actual cost to the nuclear operators. Instead, these components are cost "cushions" designed to protect nuclear operators from potential additional costs or lower revenues if the Companies' forecasts turn out to be incorrect. Ratepayers should not be put in a position of having to guarantee owners of these deregulated facilities against either market uncertainty or operational risks, especially when the nuclear operators themselves control much of the risk relating to operations.
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> …[T]he Operational Risk adjustment is one-sided and places an unreasonable burden on New Jersey ratepayers…*The subsidies provided for in the ZEC legislation were not intended to be a guarantee for the owners of these unregulated merchant plants that their costs would be reimbursed by ratepayers in all cases…Similarly, with regard to Market Risks, ratepayers should not be the guarantors of last resort for all possible contingent risks related to operating revenues…*Similar to its treatment of Operational Risk, PSEG only assumed that Market Risk would increase its costs. There is no recognition that conditions in the energy market during the second eligibility period may actually result in higher than anticipated revenues for the generating units.

(Direct Testimony of Andrea C. Crane, at pages 17-18) (emphasis supplied).

Dr. Joseph Bowring, PJM's Independent Market Monitor, pointedly challenged the companies' alleged costs and risks:

> The PSEG request incorrectly defines risk. *PSEG requests guarantees rather than payment for risk.* Risk describes the probability distribution of possible market results. There is a probability that revenues could be higher or lower. There is a probability that costs could be higher or lower.
>
> In addition, sophisticated companies like PSEG routinely manage risk…It is reasonable to assign risk management for the nuclear units to PSEG rather than to customers. That is how markets work. That is how a reasonable regulatory framework works.
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> …PSEG wants New Jersey customers to pay it as if only the worst possible outcomes in this distribution [of possible outcomes] could occur. The IMM's analysis concludes that the risk adjustment that should be included in a subsidy is zero. In fact, given ongoing developments in the PJM energy market and the fact that energy market prices in 2020 were at all-time lows and are expected to increase, the correct value of risk to include in the subsidy

> evaluation is negative. That is, the value of risk should reduce rather than increase any estimated need for a subsidy.
>
> *PSEG's and Exelon's risk adders do not constitute a cost of risk. The requested risk adders are a request for a one way guarantee that PSEG will be held harmless if the worst outcomes occur*…PSEG has the capability to manage the risks of price fluctuations and does manage that risk. There is no reason for customers to provide further guarantees that if PSEG risk management is not effective, customers will make up any shortfalls, and if PSEG risk management is effective, customers will pay as if it were not and PSEG will receive a windfall.

Analysis of NJ Zero Emissions Certificate (ZEC) Applications, *Report of the Independent Market Monitor for PJM,* January 29, 2021 (at pages 19-22) (emphasis supplied).

These experts make a compelling case that the costs and risks asserted by the companies under the ZEC Act have little, if any, merit. Rather, they take the form of inappropriate one-way ratepayer guarantees that would cushion the companies against all costs and risks, real or imagined, that are clearly the companies' responsibilities and within the companies' control. NJLEUC was denied access to the confidential versions of these reports and testimony and therefore must rely on Rate Counsel, the IMM and Board staff to address the financial merits of the companies' claims.

However, we have a more fundamental concern about including the companies' cost and risk analysis in the ZEC eligibility calculus and as a basis for awarding the subsidy: the restructuring of the electric industry completely absolved ratepayers of responsibility for these and all other costs associated with deregulated, competitive merchant generation facilities.

It is understandable that the companies seek to avail themselves of the more favorable language of the ZEC Act as a basis for the authorization of ratepayer subsidies to support the continuing operation of the nuclear plants. The ZEC Act, which is believed by many to have been authored by PSEG, contains language that purports to permit the companies to incorporate into their financial presentations costs that include operation and maintenance expenses, overhead

costs, fuel expenses and operational and market risks associated with the continuing operation of the nuclear plants. This is seemingly permitted under the ZEC Act despite the fact that the plants' unregulated status under EDECA remains unaffected by the ZEC Act. N.J.S.A. 48:3-87.5 (a). Of course, these are precisely the types of costs from which ratepayers were specifically relieved of all responsibility by the Board's Final Restructuring Order, as affirmed by our Supreme Court, and EDECA.

As noted above, the Appellate Division recently upheld the Board's ZEC I Order, relying solely on its interpretation of the language of the ZEC Act to support its decision. Astonishingly, the Appellate Division completely ignored EDEDA and the Board's concerted five year restructuring efforts that preceded EDECA and, we submit, that in so doing the Court committed reversible error. *We again underscore that nothing in the ZEC Act purports to supersede or limit EDECA or the Board's Final Restructuring Order in any manner, and both statutes remain good law and relevant precedents.*

Thus, there are now two acts of the Legislature that adopt directly contradictory approaches to ratepayer financial responsibility for the companies' deregulated power plants. Under EDECA and the Board's Final Restructuring Order, in return for receiving $3 billion in stranded costs and the right to charge lucrative market-based rates, PSEG agreed to completely absolve ratepayers from any future obligation to financially support its power plants, including the nuclear plants. By way of contrast, under PSEG interpretation of the ZEC Act, ratepayers can be required to not only provide billions of dollars in continuing financial support to the nuclear plants, but to also become guarantors of the plants' profitability, as defined by PSEG, and to hold the companies harmless against all of the plants' market and operational risks.

Clearly both scenarios cannot stand. In completely failing to address this obvious conflict and to even attempt to reconcile the two conflicting statutes, the Appellate Division committed reversible error. Clearly, the Board's eight year-long (including the three year post-EDECA transition period) concerted effort to transform and transition the electric and gas industries from a vertically integrated utility model to a competitive model cannot be so readily dismissed. Nor can EDECA, the comprehensive legislation that codified the Board's restructuring efforts, be superseded or limited, by implication or inference, by a narrow bill that merely created a new subsidy for a finite number of beneficiaries.

It has consistently been held by our courts that "statutes that deal with the same subject matter should be read *in pari materia* (side by side) and construed together as a unitary and harmonious whole." St. Peter's University Hospital v. Lacy, 185 N.J. 1, 14-15 (2005); Bergen County Utilities Authority v. Donavan, 226 N.J. 432, 444 (2016). "When statutes deal with the same subject, they should be read in pari materia and construed so that, to the extent possible, each can be given its full effect." Walcott v. Allstate New Jersey Insurance Company, 376 N.J. Super 384, 391 (App. Div. 2005).

In this regard, our Supreme Court has recognized that "the Legislature is presumed to be familiar with its own enactments, with judicial declarations relating to them, and to have passed or preserved cognate laws with the intention that they be construed to serve a useful and consistent purpose. And the courts have the duty of reconciling them so as to give effect to both expressions of the lawmakers' will." State v. Federanko, 26 N.J. 119, 129-30 (1958). Therefore, in determining legislative intent, a court will "consider not only the particular statute in question, but also the entire legislative scheme of which it is a part." Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123, 129 (1987). "Every effort should be made to harmonize the law relating to the same subject

matter. In re Adoption of N.J.A.C. 7:26B, 128 N.J. 442,469 (1992) (Garibaldi, J., concurring in part and dissenting in part)(quoting Superior Air Products Co. V. NL Industries, Inc., 216 N.J. Super 46, 63-64 (App. Div. 1987), appeal dismissed, 126 N.J. 308 (1991).

It should be evident from these precedents that the Appellate Division's failure to harmonize, let alone address, EDECA with the ZEC Act constitutes reversible error and should not guide the Board's analysis in the ZEC II proceeding. Simply because the language of the ZEC Act appeared clear to the Appellate Division did not provide it with license to virtually ignore the facially contradictory provisions of EDECA or take into account the clear Legislative purpose to memorialize the regulatory bargain that was struck by the Board, PSEG and ratepayers as the culmination of the prolonged restructuring effort. That bargain centered around the agreement by PSEG to absolve ratepayers of any future obligation to provide financial support to PSEG's deregulated, merchant power plants. PSEG's agreement, which it now conveniently ignores as well, flies directly in the face of its current effort to establish ratepayers as the guarantors of the profitability of these plants and to hold the companies harmless against all market and operational risks. *A more complete perversion of the restructuring arrangement that PSEG was instrumental in crafting is difficult to imagine*.

An overview of the Board's restructuring efforts and the relief that the restructuring provided to ratepayers follows.

Background: The Restructuring of the State's Electric and Natural Gas Industries

The issues relating to the propriety of awarding ZECs to the companies' nuclear plants arise as a corollary to the restructuring of the State's electric and gas industries two decades ago. The restructuring was the Board's and Legislature's response to the State's high energy costs, which at the time were 50% higher than the national average. Therefore, the primary goal of

restructuring was to reduce utility generation costs, and ultimately the cost of electricity to retail customers, by tapping into the then-developing competitive markets.

The first step taken by the Board in the restructuring process was the "unbundling" of utility rates. In the vertically integrated utility model, utilities provided bundled services at a single delivered cost to customers. To facilitate the transition to a competition, the costs associated with each of these services—generation, transmission, distribution and customer account services—were functionalized and unbundled to enable the generation and customer account service functions, the services that were not considered to be natural monopolies, to be opened to competition. *The unbundling of costs was intended to, among other things, avoid the creation of subsidies in rates and cross-subsidization between a utility's regulated and non-regulated functions*. See, In re Public Service Electric and Gas Company's Rate Unbundling, Stranded Costs and Restructuring Filings, 330 N.J. Super 65, 85 (App. Div. 2000); aff'd 167 N.J. 377 (2001) ("In re PSE&G").

For purposes of this proceeding, it is important to underscore that the generation-related costs that were removed from utility rates—and therefore from ratepayer responsibility—as part of the rate unbundling included the following:

- All generation-related capital and operation and maintenance costs;
- All related allocated overheads;
- Fuel costs; and
- Costs associated with long-term power purchase arrangements.

See, Restructuring the Electric Power Industry in New Jersey—BPU Findings and Recommendations, BPU Docket No. EX94120585Y, at 148 (April 30, 1997). See also, N.J.S.A. 48:3-52.

The Board's Final Order in In re PSE&G, dated August 24, 1999, included a finding that PSE&G's generation facilities, including the nuclear plants, were to be transferred to an unregulated affiliate, and that "*customers will no longer be exposed to operational risks associated with these facilities.*" (emphasis supplied). The Board further explained the risks and rewards that would accrue to the unregulated generation affiliate with the transfer of the nuclear facilities:

> With respect to the transfer of the nuclear generation assets…we noted above the benefits associated with the transfer of not only operational risk and responsibility to (an unregulated affiliate), attendant with the (affiliate's) opportunity to earn non-regulated returns associated with the sale of power and related services from the nuclear units.

The transition of the generation function to competition therefore meant that all costs and risks associated with utility generating plants that were previously assumed by utility ratepayers would be segregated, and the responsibility for payment of these costs transferred to an unregulated affiliate and its shareholders. PSEG specifically acknowledged this arrangement in the Stipulation that PSEG prepared to settle its restructuring case, which included *PSEG's acknowledgment that "the amount of the consideration being received by Public Service is extremely reasonable given the fact that under the Stipulation the electric utility's customers are insulated from any liabilities associated with the transferred generation facilities."* (emphasis supplied).

The transition also marked the end of the Board's economic regulation of the power generation function, terminating the Board's historic and extensive ratemaking and cost of service regulation of power production. Thus, in the new paradigm, the generation function would no longer be regulated by the Board or supported by ratepayers through regulated, cost of service-based rates, but would instead be transitioned to competition in the deregulated power markets, with utility generators granted the significant authority to charge lucrative, uncapped market-based

rates, with all cost responsibility and risks of operation shifted to shareholders. See, e.g., EDECA Section 8, N.J.S.A. 48:3-56.

In the restructuring proceedings, PSEG and other utilities had expressed concern that the market-based rates established by the competitive markets would be lower than the production costs that were embedded in the utilities' regulated rates, thereby potentially exposing the utilities to a situation in which they would be unable to fully recover their embedded costs through the competitive markets. These so-called "stranded costs" represented the amount by which the embedded costs of utility generation service incurred by the utility as part of the "regulatory compact" to serve the general public exceeded the competitive market price that could be obtained for the service. Stated differently, stranded costs represented the generation plant costs that the companies were at risk of losing when the supply market opened to competition. In re PSE&G, 330 N.J. Super at 90, See also, N.J.S.A. 48:3-61 (a).

To address utility concerns regarding the recovery of these costs, the Board convened a separate stranded cost proceeding in which PSEG and others presented the testimony of numerous witnesses and produced voluminous financial information, including detailed projections regarding the future profitability of the deregulated power plants, including the nuclear plants, in the competitive markets. PSEG's presentation, which included confidential information that was provided to all intervenors that executed a confidentiality agreement, suggested that the generating plants would incur substantial losses going forward in the competitive markets and requested commensurate relief from the Board. In re PSEG, 330 N.J. Super at 87-92.

As a result of the stranded cost proceeding, and based in large measure on PSEG's financial presentation, the Board authorized PSEG to collect approximately $3 billion in stranded costs, which was recoverable through a non-by passable and irrevocable market transition charge that

was designed to compensate PSEG for the embedded production costs projected to be above market and not otherwise recoverable in market-based rates. PSEG thereafter securitized the stranded cost award and recovered it through an irrevocable transition bond charge that was paid by PSEG ratepayers for fifteen years. In re PSE&G, 330 N.J. Super at 123-134. N.J.S.A. 48:3-62 (a).

PSEG's market projections and warnings about the uncertain future of its nuclear plants in the competitive markets proved to be substantially off the mark. It soon became evident that PSEG had significantly undervalued the nuclear plants, and their forecasted losses never materialized. In fact, the nuclear plants earned windfall profits throughout much of the stranded cost recovery period. The PSEG generation fleet, and in particular its low operating cost nuclear units, benefited from generous PJM market clearing prices that were established by the bids of high priced natural gas plants, whose operating costs significantly exceeded those of the nuclear plants. In fact, PSEG Power, which includes PSEG Nuclear, for many years drove the profits of the Public Service Enterprise Group.

Despite the profitability of the nuclear plants, ratepayers remained obligated to pay the $3 billion in stranded costs because EDECA made the payment of stranded costs irrevocable. N.J.S.A. 48:3-62. Throughout the fifteen year stranded cost recovery period, it was common for NJLEUC members to pay market transition charges as high as $100,000 *per month*. This means that certain companies paid as much as $18 million each to PSEG, a wealth transfer for which they received nothing in return. At no point did PSEG offer to refund to ratepayers any portion of the windfalls associated with the recovery of the non-existent stranded costs.

With the advent of fracking, the cost of natural gas declined substantially. Lower cost natural gas had the corresponding effect of reducing the market clearing prices in PJM as natural

gas-fired generating units bid into the PJM auction at lower levels than they had historically, thereby reducing the profitability of the nuclear plants. Not content with the reduced profits it was then receiving on the nuclear plants, PSEG commenced a multi-year Legislative and administrative effort to secure the State's approval to subsidize the nuclear plants. The bill that eventually emerged, the ZEC Act, is tilted decidedly in favor of the companies over the interests of the Board and ratepayers.

The ZEC Act

Preliminarily, we again underscore that nothing in the ZEC Act purports to supersede or limit EDECA in any manner. However, the ZEC Act contains language that suggests the companies may incorporate costs in their ZEC eligibility presentations that include operation and maintenance expenses, overhead costs, fuel expenses and operational and market risk associated with the continuing operation of the nuclear plants, although the plants' unregulated status remained unaffected by the ZEC Act. N.J.S.A. 48:3-87.5 (a). The ZEC Act was silent regarding the restructuring of the electric industry and PSEG's agreement to relieve ratepayers of all further responsibility for the generation-related expenses that are central to the ZEC Act.

The ZEC Act created a new irrevocable subsidy, payable by all New Jersey ratepayers, which would enable the nuclear plants to recoup their costs and offset potential future losses through the ratepayer-funded ZECs. At the same time, the ZEC Act left undisturbed the nuclear plants' EDECA right to charge market-based rates that are not subject to the rate caps formerly imposed by cost-of-service-based regulation under the Public Utility Law. N.J.S.A. 48: 2-21. Absent from the ZEC Act is any provision that would enable ratepayers to share the nuclear plants' upside economic potential should the plants remain profitable, or to avoid payment of all or a portion of the ZECs should the plants' projected losses not materialize (as occurred with PSEG's

stranded costs projections). N.J.S.A. 48:3-87.5. Through payment of the ZECs, the ZEC Act compels ratepayers to again assume the market and business risks associated with these deregulated plants and to again be exposed to the potential payment of windfall profits to PSEG, all without providing any tangible benefits to ratepayers in return.

Specifically, the ZEC Act directs applicants for ZECs to provide financial information to the Board regarding the nuclear power plants that include:

> …certified cost projections over the next three energy years, including operation and maintenance expenses, fuel expenses, including spent fuel expenses, non-fuel capital expenses, fully allocated overhead costs, the cost of operational risks and market risks that would be avoided by ceasing operations…For purposes of this section, "operational risks" shall include, but need not be limited to, the risk that operating costs will be higher than anticipated because of new regulatory mandates or equipment failures and the risk that per megawatt-hour costs will be higher than anticipated because of a lower than expected capacity factor, and "market risks" shall include, but need not be limited to, the risk of a forced outage and the associated costs arising from contractual obligations, and the risk that output from the nuclear power plant may not be able to be sold at projected levels. N.J.S.A. 48:3-87.5 (a).

It is apparent on its face that because the ZEC Act would re-impose ratepayer responsibility for the costs and risks associated with deregulated power plants, the ZEC Act is singularly inconsistent with EDECA and the Board's Final Restructuring Order. Worse still, as noted by the IMM and Rate Counsel expert Andrea Crane, the ZEC Act establishes ratepayers as guarantors of the costs and revenues of the nuclear plants, with ratepayers holding the plants harmless from the worst outcomes the companies' project. *This arrangement expands the ratepayer support obligation that existed when the plants were regulated*, as the Board had the authority to disallow costs as imprudent in appropriate circumstances. Here, there is no such protection afforded to ratepayers, who would be required to "cushion" the companies against all possible market and

operational risks and their ramifications, the companies' risk management practices notwithstanding.

While this remains an issue for the appellate courts, as a further matter of statutory construction, if it is the Legislative intent to supersede or limit a prior enactment, it does so explicitly, or by the inclusion of language such as "notwithstanding any laws, orders, or rules to the contrary" to evidence that the new law departs in some respect from the prior law and that the prior law is now being limited or avoided in this respect. No such language is included in the ZEC Act. It would be particularly important to include such language here because EDECA is a comprehensive law that completely altered the electric industry paradigm and marked a fundamental shift in the State's energy policies. In contrast, the ZEC Act merely created a subsidy for a limited class of eligible recipients. It would therefore be unreasonable to conclude that an enactment like the ZEC Act could supersede EDECA by inference or implication.

If EDECA and the ZEC Act are read *in pari materia*, their common, harmonized meaning should be that the Board can adopt a subsidy based on the demonstrated value of the nuclear plants' environmental or carbon attributes, but cannot include ratepayer responsibility for the costs and risks associated with the plants' continuing operation as a foundation for the determination. There can be no question that ratepayer responsibility for these costs and risks is specifically barred by EDECA and the Board's Restructuring Order.

PSEG witness Daniel Cregg testified that under the ZEC Act, ratepayers compensate the plants for their environmental attributes and not for their costs and risks. Leaving aside the proper valuation of the plants' environmental attributes by the experts and Board, the fact remains that under the PSEG approach, the plants' costs and risks provide a necessary foundation for an award

of subsidies to be made. President Fiordaliso underscored this connection in explaining his vote to approve the ZEC I subsidies:

> Based on the specific language of the legislation, however, I believe that the intent of this legislation was for the Board, as the ultimate decision-makers, to consider operational risks and market risks in its evaluation of these applications. And that it is squarely within the Board's authority to determine the weight that should be given to these factors, namely risks.
>
> We're defining the ZEC Act to include operational risks, i.e. operational costs or operating costs higher than anticipated and market risks, i.e. market energy and capacity price volatility. (Tr. at 6-17).

Thus, the approach proposed by PSEG and adopted by President Fiordaliso establishes a back-door avenue for the inclusion of these costs in the subsidy calculation. It is evident from the expert reports and testimony that without consideration of these costs, the plants would not be eligible to receive ZECs. If these costs were to be eliminated from consideration, the calculation would be a very different one, properly limited to a true valuation of the plants' environmental attributes or the appropriate social cost of carbon, as should be the case.

This approach would enable the Board to approve a more targeted subsidy that is actually tied to the value of the plants' environmental attributes to the State, a result that could be consistent both with the ZEC Act and EDECA. Conversely, an interpretation of the ZEC Act that would have the effect of reinstating ratepayer responsibility for the costs and risks associated with the deregulated nuclear plants, directly or indirectly, would be singularly inconsistent with the language of EDECA, and the Legislative intent in enacting EDECA, and cannot stand. The Board should not permit analysis of the plants' market and operations-related costs and risks to provide the basis for an award of ZECs.

POINT II

THE BOARD SHOULD DENY THE SUBSIDY OR EXERCISE THE FLEXIBILITY AFFORDED IT BY THE ZEC ACT TO REDUCE THE SUBSIDY AS APPROPRIATE IN THE CIRCUMSTANCES

A very different ratemaking scenario is presented in the ZEC II proceeding that was absent in ZEC I—the Board now has the unquestioned authority and discretion to reduce the $0.004 per kilowatt-hour subsidy set forth in the ZEC Act. Therefore, the frustrations expressed by the Commissioners in the prior proceeding regarding their inability to authorize a lower, more appropriate rate are now a thing of the past. However, PSEG, recognizing the possibility that a reduced subsidy could be awarded, again seeks to coerce—and hold hostage—the Board and ratepayers through renewed threats to close the three nuclear plants. PSEG now threatens to close the plants unless the Board awards the full subsidy, and not a penny less, without regard to whether the record supports a full award. PSEG's actions should be recognized for what they are--a transparent attempt to again intimidate the Board into compromising its ratemaking and regulatory authority, and sacrificing the interests of ratepayers.

Based on the public versions of the reports and testimony of the independent experts regarding the plants' current and projected financial condition, it appears that either no subsidy, or a significantly reduced subsidy, would be appropriate in this proceeding. Therefore, NJLEUC urges the Board not to succumb to the PSEG pressure campaign, and to exercise its broad and unquestionable statutory and constitutional authority to establish a just and reasonable subsidy rate. There should be no question that the interests of ratepayers will only be advanced if the Board refuses to rubber stamp the "plugged" subsidy rate included in the ZEC Act, now sought to be enforced and perpetuated by PSEG.

BACKGROUND

It is known that PSEG's CEO, Ralph Izzo, provided Senator Bob Smith, a primary sponsor of the ZEC Act, with the amount of the subsidy that was included in the ZEC Act, an amount that was designed to provide the companies with the approximately $300 million in annual subsidies they sought. The subsidy rate, $0.004 per kilowatt-hour of consumption is said to "reflect the emission avoidance benefits" associated with the continued operation of the nuclear plants. N.J.S.A. 48:3-85 (j) (1) and N.J.S.A. 48:3-87.4. The ZEC Act did not attempt to quantify the so-called "emission avoidance benefits" or to demonstrate how the rate was designed to capture these benefits. Nor did the ZEC Act provide any indication how the rate was derived or why it is just and reasonable. Nor was any hearing or formal review conducted by the Legislature or Board to establish the propriety of the rate.

Rather, the ZEC rate was determined by the prospective beneficiary of the rate and advanced in a manner intended to avoid Board involvement in setting the rate. This "process" is the antithesis of the traditional, century-old ratemaking process, which was designed to protect ratepayers and result in the establishment of just and reasonable rates. N.J.S.A. 48:2-21. It is therefore fair to describe the ZEC rate as a "plugged" number, established by an interested party, outside of the ratemaking process and without benefit of any formal analysis or record support by either the Legislature or Board.

As noted, in the ZEC I proceeding, several Commissioners made quite clear their displeasure with awarding any subsidy, let alone the full $10 per megawatt-hour subsidy (the statewide equivalent of the $0.004/kWh rate) provided in the ZEC Act, based on the record presented. That record included the unanimous agreement of the independent experts that the companies had not carried their burden to demonstrate financial need. However, the

Commissioners felt constrained by the language of the ZEC Act, which purported to remove their discretion to reduce the subsidy during the first ZEC eligibility period. The Commissioners' decision to award the full subsidy amount in the ZEC I proceeding has been affirmed by the Appellate Division.

Now, however, the plain language of the ZEC Act makes clear that in this second ZEC eligibility period, and all eligibility periods thereafter, the Board has full authority to reduce the per kilowatt-hour charge. To do so, the ZEC Act provides that the Board must determine that the "reduced charge will nonetheless be sufficient to achieve the State's air quality and other environmental objectives by preventing the retirement of the nuclear plants that meet the eligibility criteria established pursuant to subsections d. and e. of this section." N.J.S.A. 48:3-87.5 (j) (3).

Thus, in this ZEC II proceeding, there is no question that the Board now has full authority to award less than the $0.004 per kilowatt-hour ($10 per megawatt-hour) subsidy. The Board may now set a ZEC subsidy at the level it determines appropriate in light of the State's air quality requirements and to assist in preventing the retirement of the plants.

In this scenario, if the Board establishes what it considers to be a just and reasonable ZEC II rate and PSEG objects to the Board's determination as "not enough" and renews its threat to shutter the plants, the Board will have met its obligations under the ZEC Act by having extended a subsidy it deems adequate to compensate the companies in light of the record developed in the proceeding. If PSEG disagrees, the Board's reaction should be "so be it," rather than "how much more do we have to give you to make you happy?"

Although the Board clearly has the authority to decide the subsidy issue that it lacked in the ZEC I proceeding, PSEG seeks to deprive the Board of its discretion through renewed threats to close all three plants unless the Board knuckles under and awards the full subsidy amount. For

PSEG, it's all or nothing—anything less than an award of the full subsidy will purportedly result in the closure of the plants. Thus, once again, the Board finds itself the target of a regulatory hostage taking, again occurring in circumstances in which it is far from clear that the companies proved their entitlement to a subsidy, let alone another $300 million per year for an additional three years.

We leave it to the independent experts granted access to the confidential information regarding the plants' financial performance to address whether, or to what extent, one or more of the plants are incurring actual losses, as opposed to hypothetical ones. However, the public versions of the expert reports and testimony strongly suggest that the plants remain profitable or, at worst, according to the Levitan Preliminary Report, may be incurring minor, possibly transitory losses. Thus, it appears clear that if any award is to be made (the IMM and the Rate Counsel and P3 witnesses testified that none is appropriate), it should be carefully considered and reduced to a level that is deemed necessary and appropriate in the circumstances.

If, for example, the companies demonstrate, using appropriate metrics, that they lost $10 million in 2020 (when rates were at historic lows and have since increased), it should follow that the award of a three year, $300 million annual subsidy would vastly overshoot what is just and reasonable in the circumstances. As noted above, ratepayers have already provided windfall profits to PSEG in the form of stranded costs based on PSEG loss projections that proved to be wildly inaccurate. The Board should learn from history and avoid making the same mistake again. This lesson would be well applied now, when ratepayers can least afford an unnecessary bailout of these profitable companies, which pay increased dividends to their shareholders each year, now apparently funded in part by the ZEC subsidy.

The Board cannot again abdicate its ratemaking authority to PSEG and be kowtowed into endorsing the "plugged" subsidy that PSEG inserted into the ZEC Act. The Legislature abdicated its ratemaking authority by failing to conduct an appropriate hearing into whether the PSEG rate was just and reasonable. In the ZEC I proceeding, the Board adopted the statutory ZEC rate, also without having conducted the hearing necessary to satisfy this bedrock regulatory requirement.

However, while the Appellate Division affirmed the Board's ZEC I Order in this regard*, there is no question that an entirely different issue is presented in this proceeding. Here, the Board has the express authority, not only under Public Utility Law but also the unambiguous language of the ZEC Act, to reduce the amount of the subsidy to assure that it represents a just and reasonable rate in the circumstances presented.*

Our Courts have long recognized the fundamental ratemaking requirement that "the usual proofs of rate base and reasonable rate of return [establish] the justness and reasonableness of the rates" to be charged to the public. In re Intrastate Industrial Sand Rates, 66 N.J. 12, 19 (1974) ("Industrial Sand"). Regardless of whether a base rate or subsidy is at issue, utility ratepayers have the right to pay utility rates that are not excessive and that "the public is not to be laden with unreasonable or extortionate rates in order that dividends be provided for the utility's stockholders." Industrial Sand, 66 N.J. at 22; In re Redi Flow Corp., 76 N.J. 21, 39 (1978).

The Board has been delegated the full authority under the Public Utility Law to address the potential injustice to ratepayers posed by the wrongful imposition of an unjust and unreasonable rate. N.J.S.A. 48:2-21. A long succession of appellate decisions have consistently acknowledged the Board's broad authority over all utility rates, a power delegated by the Legislature that is firmly rooted in our Constitution. See, e.g. Elizabethtown Water Company, 205 N.J. Super 528 (App. Div

1985), aff'd as modified, 107 N.J. 440 (1985); Bergen County v. Board of Public Utility Commissioners, 137 N.J. Super 448 (App. Div. 1975).

The classic formulation of this authority is set forth in Industrial Sand as follows:

> The law has thus developed, no doubt, because the system of rate regulation and the fixing of rates thereunder are related to constitutional principles which no legislative or judicial body may overlook. For if the rate for the service supplied be unreasonably low it is confiscatory of the utility's right of property, and if unjustly or unreasonably high…it cannot be permitted to inflict extortionate and arbitrary charges upon the public. And this is so even where the rate or limitation on the rate is established by the Legislature itself. Industrial Sand, 66 N.J. at 23-24 (citations omitted).

Industrial Sand further addressed the Legislature's delegation to the Board of expansive ratemaking authority to approve just and reasonable rates:

> …(R)ulemaking is a legislative and not a judicial function, and the Board of Public Utility Commissioners, to which the Legislature has delegated its rate making powers, is vested with broad discretion in the exercise of that authority…For the delegation of the legislative function to be valid under our Constitution it is essential that adequate standards be prescribed by the Legislature and adhered to by its agent, in this instance the Board…The statutory standard prescribing the ratemaking powers of the Board is to be found in R.S. 48:2-21 (b) (1), which provides that the Board may "fix just and reasonable individual rates whenever the Board shall determine any rate to be unjust, unreasonable, insufficient or unjustly discriminatory or preferential. Industrial Sand, 66 N.J. at 21; See also, In re PSE&G, 167 N.J. at 384-385.

Given the constitutional dimension to the Board's ratemaking authority, there should be no question that the Board has the authority, and the obligation, to ensure that the ZEC II subsidy is just and reasonable. Nothing in the ZEC Act, which was enacted for the limited purpose of providing potential financial relief to the State's nuclear plants, should dictate a different result given the Board's overarching constitutional obligation to reject unjust and unreasonable rates. Particularly where, as here, the rate was established by an interested party, without any hearing or determination regarding the propriety of the rate, the Board has an obligation to conduct a proper

review of the subsidy rate and, if determined to be unjust, unreasonable or excessive vis-à-vis a properly calculated "emissions avoidance value" of the nuclear plants, the Board would be well within its delegated authority to reject the statutory ZEC rate as unjust and unreasonable and to reduce it accordingly.

It does not appear that the public reports and testimony of the independent experts support the notion that the statutory ZEC rate accurately reflects the social cost of carbon in New Jersey. In fact, the experts appear to have determined that the companies overstate the value of the emissions savings that would occur if the plants remain operational, and that the actual emissions value of the social cost of carbon is far less than what the companies propose to recover through the ZEC subsidy.

It is noteworthy that in the original version of the ZEC bill in the 2016-2017 Legislative Session (S4000), the subsidies were entitled "Nuclear Diversity Certificates," which purportedly represented the "environmental and fuel diversity attributes of one megawatt hour of electricity" generated by a nuclear plant. After S4000 failed, the bill was reintroduced in the 2018-2019 Legislative Session and featured nuclear subsidies, now known as ZECs, which were purported to represent the "emissions avoidance benefits" of keeping the plants open. N.J.S.A. 48:3-87.5 (j)(1). Even though the two bills purported to represent two very different things that presumably had different values, the $0.004/kWh subsidy rate curiously remained the same, a fact that casts further doubt on the justness and reasonableness of the rate established by PSEG.

As noted above, the independent experts again agree, as they did in the ZEC I proceeding, that certain of the costs included in the companies' applications were padded or not "true" costs that were actually incurred by the companies, but instead represented a metric relevant only for generation planning purposes. The experts again rejected the companies' claims for spent fuel

costs and a portion of their claimed labor and non-labor-related costs. Further, the experts concluded that the companies' projected operational and market risks did not distinguish between avoidable and non-avoidable costs and were not true costs that were actually incurred and therefore would not be avoided by ceasing operations.

Further, the Board should not adopt nuclear-related "costs" that are not recognized by the experts as true costs, for to do so would violate the longstanding principle that a utility may pass through to ratepayers only those costs and expenses that are actually incurred, as opposed to costs that are hypothetical, fictitious or inflated, in order for the rate to be just and reasonable. Lambertville Water Company v. New Jersey Board of Public Utility Commissioners, 153 N.J. Super 24 (App. Div. 1977, rev'd in part on other grounds, 79 N.J. 449 (1979). We also reiterate that EDECA and the Board's Final Restructuring Order preclude ratepayers from being required to assume the costs and risks associated with the nuclear plants' continuing operation.

The Board should not ignore these significant ratemaking concerns or accept the companies' applications at face value, without fully taking into account the conclusions of the experts in this proceeding and relevant law. The Board must determine, based on the record presented, whether a subsidy is appropriate in the circumstances presented and, if so, what a just and reasonable subsidy would be based on a full examination of the plant's "emissions avoidance" value. This is too important a decision to be based upon conjecture or capitulation to PSEG threats.

It was evident from the Commissioners' statements in the ZEC I proceeding that they did not find the statutory ZEC rate to be just and reasonable. As Commissioner Gordon stated, "the statute did not give us the freedom to even offer a subsidy we deemed appropriate. It was $4 a megawatt hour or nothing." Commissioner Gordon viewed this to be an excessive amount, and he expressed his concerns regarding the "implications for seniors living on fixed incomes" and his

"particular concern about the impact on large energy users in the manufacturing sector, as well as hospitals, universities, and other public institutions. I believe this energy tax will lead to job losses, plant closings, and will make New Jersey even less competitive than it is now." (Tr. at 25, 26).

Commissioner Chivukula referred to the subsidy as "highway robbery" and noted that it would place an "undue burden" on ratepayers: "…this type of thing, to hurt the people directly, hurt the businesses. As it is, businesses are moving out, with whatever the taxes that are there. And this is an undue burden on ratepayers of the State of New Jersey." Commissioner Solomon echoed the belief that "the Legislature and the Governor did not give us the authority to determine the amount of the subsidy," while expressing concern for ratepayers and her further belief "that some level of subsidy is warranted." (Tr. at 23-24).

It is clear that the intervening COVID pandemic has only increased the burden on the ratepayers for whom the Commissioners expressed concern. The Commissioner's statements evidenced their understanding that the capital businesses spend on energy subsidies is the same capital that would otherwise be devoted to employee salaries, job creation, facility upgrades and expansions, purchases of raw materials and payment of State and local taxes. The New Jersey business community has already shed an untold number of jobs and product lines, as well as numerous businesses themselves, due to the high cost of energy compared to other states. Providing yet another undeserved financial windfall to PSEG will only exacerbate these outcomes. The impact on senior citizens on fixed incomes and LMI communities will be no less severe.

Fortunately, in the ZEC II proceeding the Commissioners have the authority they previously lacked to downwardly adjust the subsidy to a level that would avoid further instances of "highway robbery" and undue burdens placed on ratepayers. NJLEUC urges the Board not to reward PSEG's "all or nothing" closure threat by relinquishing its authority to reduce the subsidy

in the ZEC II proceeding—the authority the Commissioners lamented they lacked in the ZEC I proceeding. The Board's exercise of this authority will make possible the only outcomes that would truly advance the interests of ratepayers—e.g. denial of the subsidy or, in the alternative, authorization of a reduced subsidy rate found to be just and reasonable based on the record developed in the proceeding.

This proceeding marks the first opportunity for the Board to redress the wrongs of permitting PSEG to dictate the subsidy rate that was included in the ZEC Act and coercing the Board to award the subsidy in the ZEC I proceeding even though the record did not justify the result. Now, that the Board has the authority to address the rate issue, the Board should not permit the proceeding to again be hijacked by PSEG closure threats, which would result in the State again being held hostage and ratepayers paying "highway robbery" rates. The Board's authority to reduce the subsidy should be exercised in a manner that properly balances the interests of all parties and vindicates the Board's role as regulator.

In sum, the Board's broad ratemaking authority could easily be rendered meaningless and illusory if the Board again allows itself to succumb to PSEG's continued bullying. We strongly urge the Board to hold its ground to protect the interests of ratepayers and the State and to avoid a situation in which the Board becomes captured by the companies it regulates. If the Board fails to do so, it will assure that "all or nothing" closure threats will haunt all future ZEC proceedings and become the deciding factor in each. The Board must avoid this eventuality at all costs.

POINT III

THE DENIAL OF ACCESS TO APPLICANTS' CONFIDENTIAL MATERIALS IN THIS PROCEEDING DENIED NJLEUC'S DUE PROCESS RIGHTS

By three separate Orders dated September 29, 2020, the Board granted NJLEUC's intervention motion, but denied NJLEUC's companion motion for access to the companies' confidential materials in this proceeding. The Board found that "due process considerations do not require that NJLEUC be afforded access to the information deemed confidential by the applicants." (See, e.g. Salem I Order at p. 11)

The confidentiality provision set forth in Section 3 of the ZEC Act limits access to confidential information regarding the nuclear plants to only those parties deemed "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).

NJLEUC's significant financial and unique business interests in, an expertise regarding the subject matter of the Board's contested proceedings, and acknowledged assistance to the Board in determining contested issues have, throughout the group's sixteen year existence, consistently been found to satisfy the New Jersey Administrative Code standard for intervention and to be eligible to obtain access to confidential information in literally every proceeding in which NJLEUC intervened. These proceedings included the proposed merger of PSEG and Exelon, in which precisely the same kinds of financial information regarding the companies and the performance of the nuclear plants was provided to all intervenors that executed a non-disclosure agreement.

For purposes of the ZEC Act, NJLEUC members are not "competitors" of the companies so that disclosure to them would not "harm competition" with the meaning of Section 3(a). NJLEUC at all times was willing to execute an appropriate non-disclosure agreement, as it has consistently done in past proceedings. The Board has for decades authorized the disclosure of confidential information in accordance with this confidentiality procedure. See, I/M/O Request for Solid Waste Utility Customer Lists, 106, N.J. 508, 522-524 (1987).

The denial of NJLEUC's motion was erroneous, particularly in light of its members' potential multi-million dollar annual exposure to the payment of ZECs, and the decision relegated NJLEUC to "bystander" status in the proceeding. Having been denied access to the financial information regarding the nuclear plants, NJLEUC was deprived of an opportunity to meaningfully address the financial issues that are the primary focus of this proceeding.

NJLEUC was also denied the opportunity to participate in meetings or discussions of the parties in which confidential information was discussed, and was not privy to the most important information produced in discovery and contained in the various independent expert reports. A cursory review of the heavily redacted "public" versions of the confidential documents in the record, in which entire paragraphs and pages are blacked out, underscores NJLEUC's difficulty in attempting to address the important financial issues in the proceeding. Without this critical information, NJLEUC's opportunity to participate and comment in this proceeding has been reduced to a hollow exercise that falls far short of the meaningful participation that had been assured by the Legislature and Governor. NJLEUC was an essential party to this proceeding and should have been afforded access to the confidential information.

The denial of access to the confidential documents violated NJLEUC's due process rights. Due process required that NJLEUC members, the parties that will unquestionably be the most

affected financially by the outcome of this proceeding, should have been afforded a meaningful opportunity to speak for themselves to avoid being deprived of their property interest in millions of dollars of corporate capital that could potentially be diverted from their New Jersey operations to the payment of subsidies to the companies. See, Matthews v. Eldridge, 424 U.S. 319, 332, 96 S. Ct. 893, 901, 47 L. Ed. 2d 18 (1976); see, also, Greenberg v. Kimmelman, 99 N.J. 552, 568 (1985) (The Fourteenth Amendment of the United States Constitution provides that no state shall deprive any person of life, liberty or property without due process of law. Article I, paragraph 1 of the New Jersey Constitution protects similar interests).

NJLEUC's members' interest in protecting the tens of millions of dollars potentially at issue constitutes a property right that is of constitutional dimension and, therefore, entitled to due process protection. These protections required that NJLEUC be afforded access to the confidential information so that its intervention would be meaningful. The denial of access to the critical information regarding the financial performance of the nuclear plants effectively denied NJLEUC the right to be heard "at a meaningful time and in a meaningful manner," a basic tenet of due process. Matthews v. Eldridge, 424 U.S. at 333. Although NJLEUC participated to the extent possible in the hearings in this matter, this was merely a superficial exercise because NJLEUC lacked the confidential information that would have made its participation substantive and meaningful, enabling it to "contribute to the Board's understanding of issues," as the Board has repeatedly acknowledged NJLEUC has consistently done in past proceedings. Unlike past proceedings, NJLEUC did not conduct cross-examination during the ZEC II hearing, which focused largely on financial issues, including a separate hearing regarding confidential information from which NJLEUC was excluded.

It was evident from the Governor's signing statement for the ZEC Act that it was not his intention to deny ratepayers a meaningful role in the Board's ZEC proceedings, and that it was his understanding that "the ratepayer will be represented" and that stated concerns by NJLEUC and others to the contrary were "not true."

The participation of Rate Counsel in this proceeding did not preclude the intervention with full rights of other ratepayer representatives in the proceeding. In this regard, the intervention rule provides:

> In cases where one of the parties is a State agency authorized by law to represent the public interest in the case, no movant shall be denied intervention solely because the movant's interest may be represented in part by said State agency. N.J.A.C. 1:1-16.3 (b).

The ZEC proceeding is not so unique as to justify departure from the traditional rules regarding intervention and access to confidential information. Indeed, the denial of intervenor status and access to confidential documents in this proceeding stands in stark contrast to the treatment afforded business groups and other diverse stakeholders in In re PSE&G and the PSEG/Exelon merger proceeding, in which precisely the same types of financial information and projections were a primary focus.

The restructuring proceeding required the Board to engage in a similar financial analysis regarding the financial condition and projected profitability of PSEG's generation fleet, including the nuclear plants, in an effort to value PSEG's alleged stranded costs. In support of its application for stranded costs, PSEG produced considerable confidential financial and market information regarding the financial condition and profitability of the company's generation facilities, including forecasted annual expenditures for fuel, operation and maintenance expenses, capital additions, taxes, administrative and general expenses and other ancillary costs, as well as forecasts that projected future prices in the competitive energy and capacity markets.

This information was made fully available to the Board, Rate Counsel, and a diverse group of intervenors which included PSEG's customers and competitors that executed confidentiality agreements. The Appellate Division observed that "(t)he proceedings were marked by full and vigorous participation, by thirty intensely interested intervenors or all stripes, reflecting the full range of both public and special interests." In re PSE&G, 330 N.J. Super at 122. The intervenors included the New Jersey Business Users and New Jersey Industrial Customers Group, the predecessors of NJLEUC, which were permitted to conduct comprehensive financial discovery of PSEG and to present testimony regarding the financial issues. The parties were not required to prove that they were "essential" to the proceeding to achieve party status or to gain access to precisely the same type of confidential information that was considered in the ZEC proceeding.

It should be recognized that the "essential party" standard, set forth in the ZEC Act is unknown in administrative law practice and procedure, either as a standard for intervention or for access to confidential information. One searches in vain for any precedent, rule or administrative code provision that purports to establish the essential party standard or the elements a party would be required to establish to prove itself "essential" to an administrative proceeding. Thus, any determination made under this "standard" is, by definition, arbitrary and capricious given the absence of any known criteria to guide the determination.

NJLEUC entertains little doubt that the "essential party" standard was included in the ZEC Act by PSEG as part of its effort to limit the opportunity of opponents like NJLEUC and Rate Counsel to meaningfully oppose the companies' subsidy applications. However, the requirements of due process cannot be so easily circumvented. If there was one overriding principle that was truly "essential" to this proceeding, it is that the due process rights of NJLEUC members and other parties that are significantly affected by the Board's actions must be honored, and the parties

afforded a right to be heard in a meaningful way, with full access to all relevant financial information.

NJLEUC's members have an extraordinary financial stake in the outcome of this proceeding, one that could impact the continuing viability of their New Jersey operations. In addition, NJLEUC members are sophisticated in energy matters, and unlike the other public-interest parties in the proceeding, have a superior understanding of the business and market economics that affect corporate investments and decisions to invest capital in or abandon facilities, knowledge that is directly relevant to the issues to be decided in this proceeding.

It bears repeating that the decision to potentially provide additional billions of dollars in subsidies to two successful companies will cause an inevitable ripple effect across the State's economy and business community and will significantly increase the cost of energy and the cost of doing business in New Jersey. The business community should have been afforded a meaningful opportunity to defend against this outcome.

In light of the foregoing, NJLEUC should have been permitted to intervene in the ZEC proceeding with all the rights of a party, including full access to the confidential information regarding the nuclear plants which is central to the determination to be made in this proceeding. The Board's decision to deny NJLEUC access to the confidential information under the amorphous "essential party" standard was regrettable and denied NJLEUC's due process rights in this proceeding.

Conclusion

NJLEUC urges the Board to deny the companies' ZEC II applications or, in the alternative, to craft a reduced ZEC rate found to be just and reasonable based upon the record developed in

this proceeding. NJLEUC appreciates the opportunity to provide this post-hearing brief and will remain active regarding ZEC-related issues.

Respectfully submitted,

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