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September 25, 2020

**In the Matter of the Application of PSEG Nuclear, LLC and Exelon  
Generation Company, LLC For The Zero Emission  
Certificate Program – Salem Unit 1  
Docket No. ER20080557**

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

**In the Matter of the Application of PSEG Nuclear, LLC For The Zero  
Emission Certificate Program – Hope Creek  
Docket No. ER20080559**

**VIA ELECTRONIC DELIVERY**

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

Dear Secretary Camacho-Welch:

Enclosed is PSEG Nuclear, LLC's Brief in Opposition to the Motion to Intervene of PJM Power Providers Group ("P3") in the above-captioned proceedings. By copy of this letter, copies of the brief are being forwarded on this date via electronic mail to all persons whose names appear on the attached Service List.

Consistent with the Order issued by the Board in connection with In the Matter of the New Jersey Board of Public Utilities' Response to the COVID-19 Pandemic for a Temporary Waiver of Requirements for Certain Non-Essential Obligations, BPU Docket No. EO20030254, Order dated March 19, 2020, this document is being electronically filed. No paper copies will follow.

Thank you for your anticipated courtesies.

Sincerely,

A handwritten signature in black ink that reads "Grace H. Park". The signature is written in a cursive style and is followed by a long horizontal line.

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

In the Matter of the Application of PSEG Nuclear,            )  
LLC and Exelon Generation Company, LLC                    )  
for the Zero Emission Certificate                                )  
Program—Salem Unit 1                                                )       Docket No. ER20080557

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

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

**PSEG NUCLEAR, LLC’S AND EXELON  
GENERATION COMPANY, LLC’S BRIEF IN  
OPPOSITION TO THE MOTION TO INTERVENE  
OF THE PJM POWER PROVIDERS GROUP**

On September 21, 2020, the PJM Power Providers Group (“P3”) filed a motion to intervene (“Motion”) in the above-referenced dockets involving the applications of Hope Creek, Salem 1, and Salem 2 for the Zero Emission Certificate (“ZEC”) program. PSEG Nuclear, LLC (“PSEG”) and Exelon Generation Company, LLC (“Exelon Generation”) oppose this intervention for several reasons.<sup>1</sup> First, although P3 acknowledges the Board of Public Utilities’ (“BPU”) November 19, 2018 Order denying P3’s motion in the first ZEC application round seeking intervenor status and access to confidential documents, P3 does not (and cannot) explain why its Motion this time should yield a different result. This is especially true given that P3 filed an emergency motion with the

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<sup>1</sup> PSEG’s opposition applies to the Hope Creek, Salem 1, and Salem 2 nuclear plants. Exelon Generation’s opposition is limited to the Salem 1 and Salem 2 nuclear plants.

Appellate Division to appeal the BPU's decision, the BPU opposed the appeal, and the Appellate Division ultimately affirmed the BPU's decision.

Second, P3 has not demonstrated that it is an "essential" participant entitled to review confidential financial information that will be submitted by applicants to the BPU. In the BPU's prior November 19, 2018 Order, it determined that competition could be harmed if P3 is given access to information that the applicants must provide as part of the ZEC Act process. The entities that P3 represents are direct competitors with the applicants – predominantly natural gas-fired, fossil fuel generation plant owners who would undoubtedly benefit from the retirement of the applicants' nuclear plants. Hence, providing confidential information to the P3 entities that have interests outside of the ZEC application process is a significant concern and should not be permitted.<sup>2</sup>

Third, P3 is not entitled to intervene because the "nature and extent" of P3's interests – expressly limited to promoting competition in the wholesale energy market – has nothing to do with this proceeding. Permitting P3 to participate as an intervenor would enable the introduction of a range of irrelevant and speculative issues that are outside the statutorily-defined scope of this proceeding and would interfere with the timely resolution of issues actually before the BPU.

Notwithstanding the forgoing, should the presiding Commissioner consider allowing P3 to be involved in the case, that involvement should be as a participant rather than as an intervenor.

## **FACTS**

On May 23, 2018, Governor Murphy signed legislation into law that created a "Zero Emission Certificate" or "ZEC" program to provide support payments for at-risk nuclear power

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<sup>2</sup> This concern is exacerbated by the fact that members of P3 could participate as potential bidders in the sale of non-nuclear generating assets, a process that PSEG announced on July 31, 2020.

plants that serve New Jersey (the “ZEC Act”).<sup>3</sup> In the ZEC Act, the Legislature found that “[n]uclear power generation is a critical component of the State’s clean energy portfolio” and that “nuclear power is an important component of a diverse energy portfolio.” N.J.S.A. 48:3-87.3(a)(7). The ZEC Act requires applicants to submit an array of sensitive financial information, which the applicant can designate as confidential, to determine if the applicant qualifies for ZECs. *Id.* at 48:3-87.5(a). The above-referenced dockets were established by the BPU for this purpose. On September 21, 2020, P3 filed a motion to intervene seeking (1) intervenor status with full rights as a party, and (2) access to all information designated as confidential by applicants for ZECs.

## **ARGUMENT**

### **A. P3’s Motion To Intervene Should Be Denied For The Same Reasons The BPU Denied P3’s Motion To Intervene In The First ZEC Application Round**

On October 23, 2018, during the first ZEC application round, P3 filed a motion to intervene (“Previous Intervention Motion”). In the Previous Intervention Motion, P3 argued that its interest in ensuring competition in the wholesale energy market required it be granted intervenor status with full rights of a party and access to confidential information. *See* P3 Motion to Intervene, BPU Docket No. EO18080899, at 5-6 (Oct. 23, 2018). On November 19, 2018, the BPU denied P3’s Previous Intervention Motion. The BPU ruled that P3 had “not made a showing that its interest in this matter warrants granting its motion to intervene, given the statutory scheme with its numerous opportunities for public participation through public comments and public hearings, the explicit provision at N.J.S.A. 48:3-87.5(a) concerning confidential documents, and the need for prompt and expeditious administrative proceedings.” Order on Motions to Intervene or Participate and for Admission Pro Hac Vice, BPU Docket No. EO18080899, at 11 (Nov. 19, 2018). The BPU also

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<sup>3</sup> The ZEC Act was codified at N.J.S.A. 48:3-87.3 *et seq.*

ruled that the “disclosure of information deemed confidential could harm competition, given that P3 members are power providers.” *Id.* As a result, the BPU denied P3 intervenor status and denied P3 access to confidential documents. *Id.*

After the BPU denied P3’s Previous Intervention Motion, P3 filed an emergency appeal with the Appellate Division. On December 6, 2018, the BPU filed a brief opposing P3’s request, arguing that P3 failed to demonstrate “that the Board’s decision on its motion was incorrect” and that “P3 has no statutory right to intervenor status.”<sup>4</sup> The very next day the Appellate Division affirmed the BPU’s decision.<sup>5</sup>

In the instant Motion, P3 again moves to intervene with full rights of a party and access to confidential documents. Once again, P3 argues that its interest in promoting competition in the wholesale energy market require it be granted full rights of a party with access to confidential information. Motion at 6-10. Although P3 cites what it views as positive findings in the BPU’s November 19, 2018 Order, P3 ignores the BPU’s ultimate ruling denying it intervenor status. As to the portion of the BPU’s decision on access to confidential documents, P3 asserts in passing that the November 19, 2018 Order was erroneous, but does not explain why.

P3 fails to explain why the applicable legal standards – which remain unchanged – warrant a different outcome this time. The reason for this intentional omission is because the reasoning in the BPU’s November 19, 2018 Order applies with equal force now, and this reasoning is reinforced by the arguments the BPU successfully made in opposition to P3’s emergency appeal of that Order. The Previous Intervention Motion was legally insufficient, and the instant Motion suffers the same fatal flaw. The rationale underlying the BPU’s November 19, 2018 Order remains controlling and

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<sup>4</sup> Br. of BPU Opposing PJM Power Providers Group’s Notice of Motion for Emergent Relief, Docket No. AM-000161-18, at 1-2 (App. Div. Dec. 6, 2018).

<sup>5</sup> Order on Emergent Motion, Docket No. AM-000161-18 (App. Div. Dec. 7, 2018).

warrants denial of P3's Motion.

**B. P3 Has Not Demonstrated That Its Participation Is “Essential” To This Proceeding And Therefore Is Not Entitled To Confidential Information**

P3 argues that it should be entitled to receive confidential information submitted by ZEC applicants in this proceeding. Motion at 6. However, under the ZEC Act, confidential information supplied by an applicant for the purpose of demonstrating eligibility is only available to entities that have been “deem[ed] essential [by the Board and the Attorney General] to aid the board in making the determinations required” in this proceeding. N.J.S.A. 48:3-87.5(a). The “essential” requirement exists because the ZEC Act requires applicants to submit an array of sensitive financial information that can be designated as confidential, and only those entities necessary in aiding the BPU's review of an application should be granted access to this confidential information. *Id.*

Even if P3 were granted status as an intervenor (which, as shown below, it should not be), P3 still would not be “essential” as required by the ZEC Act to be permitted access to confidential submittals. First, P3 never alleges in its Motion that it is “essential to aid the board in making the determinations” required for establishing eligibility under the ZEC Act. N.J.S.A. 48:3-87.5(a). Although P3 quotes the requirement in the ZEC Act that a party seeking access to confidential documents be “essential,” Motion at 9, P3 does not argue that it meets this standard. Instead, P3 states that it has executed the requisite nondisclosure agreement (“NDA”). Clearly, the mere signing of an NDA is not a substitute for satisfying the statutory requirement. Because P3 fails even to allege – let alone support an allegation – that it is essential to aid the BPU in making the financial determinations required under the ZEC Act, it cannot be granted access to confidential financial information submitted by ZEC applicants.

Second, even if dismissal of P3's request for access to confidential financial information under the ZEC Act were not barred by its failure to plead the necessary elements to establish an

entitlement, it still would not be eligible. To demonstrate that it is “essential” for the determinations required under the ZEC Act, P3 would need to show that those determinations could not reasonably be made without its involvement because its participation is “basic and necessary” and “of the utmost importance.”<sup>6</sup> P3 has not (and cannot) make that showing. This is especially true given P3’s admission that its “members are independent electric power suppliers located in the PJM market who are competitors of these nuclear plants.” Motion at 2. As the BPU ruled in its November 19, 2018 Order, providing P3 access to confidential information from ZEC applicants – information that the applicants must provide as a part of the ZEC process – could harm competition. Order on Motions to Intervene or Participate and for Admission Pro Hac Vice, BPU Docket No. EO18080899, at 11 (Nov. 19, 2018). Considering the entities that P3 represents – direct competitors of these nuclear plants that would benefit from these nuclear plants’ retirement – this concern was warranted during the first eligibility application process and continues to be a significant concern during this process as well.<sup>7</sup>

The BPU has the inherent capabilities to make the financial determinations required under the ZEC Act with its own personnel. In addition, the BPU is expressly permitted by the ZEC Act to hire any necessary consultants as it did during the first application process and, through a \$250,000 fee for each applicant plant, i.e., \$750,000 in total, will have ample means to do so.

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<sup>6</sup> See *Air Master & Cooling, Inc. v. Selective Ins. Air Master & Cooling, Inc.*, 452 N.J. Super. 35, 53 (App. Div. 2017) (applying “standard dictionary definitions for ‘essential’” and citing BLACK’S LAW DICTIONARY 663 (10th ed. 2014), defining “essential” as “[o]f utmost importance” or “basic and necessary”); *Raush v. Raush*, 2017 WL 3722545 (App. Div. 2017) (“Essential terms are those that are ‘[o]f the utmost importance’ or are ‘basic and necessary’ to the parties’ agreement”, citing BLACK’S LAW DICTIONARY 663 (10th ed. 2014); cf. *Mars, Inc. v. JCM Am. Corp.*, 2006 WL 3373284 (D.N.J. 2006) (dismissing claims for summary judgement in patent case dependent on whether materials incorporated by reference were “essential” because movant failed to show that “without [the incorporated materials], one skilled in the art is not sufficiently ‘enabled’ to produce the invention”).

<sup>7</sup> As stated in footnote 2, this concern is exacerbated by the fact that members of P3 could participate as potential bidders in PSEG’s sale of non-nuclear generating assets.



### **C. P3 Has Not Demonstrated Its Entitlement To Become An Intervenor**

N.J.A.C. 1:1-16.1 provides that “[a]ny person or entity not initially a party . . . who will be substantially, specifically and directly affected by the outcome of a contested case, may on motion, seek leave to intervene.” N.J.A.C. 1:1-16.3 provides the following standards to consider in addressing a request for intervention:

- i. the nature and extent of the movant’s interest in the outcome of the case;
- ii. whether or not the movant’s interest is sufficiently different from that of any party so as to add measurably and constructively to the scope of the case;
- iii. the prospect of confusion or undue delay arising from the movant’s inclusion; and
- iv. other appropriate matters.

The relevant statutory factors warrant denial of P3’s request for intervenor status.

First, P3’s alleged interest is insufficient to demonstrate a cognizable interest that would justify granting it the rights of an intervenor. P3’s stated interest is that it wants to ensure fair competition in the wholesale energy market, Motion at 6-10, but P3 fails to demonstrate how it would be “directly affected by the outcome of a contested case.” N.J.A.C. 1:1-16. 1(a). As a trade association, P3 is not itself an owner of nuclear power plants, and the interests it seeks to promote for its members in this proceeding relate to potential impacts on wholesale markets in PJM. It does not claim that these interests it seeks to address as a trade organization relate to any intention of its members to participate in the ZEC program. As a result, P3 does not represent the interests of a direct competitor that could supply the environmental and fuel diversity interests the ZEC Act is designed to preserve. Nor does P3 even attempt to explain how the implementation of the ZEC program will affect the wholesale markets.

As the BPU stated in its August 12, 2020 Order, the purpose of this proceeding is to

“determine which, if any, nuclear power plants will be eligible to receive ZECs during the next three-year eligibility period.” Order Establishing the Application Process for the Second Eligibility Period and Approving Request for Quotation, BPU Docket No. EO18080899, at 4 (Aug. 12, 2020). Therefore, the purpose of this proceeding is to enable the BPU to make an administrative determination of whether the applicant nuclear plants are at risk of retiring and their contributions towards air quality, fuel diversity, and resilience for New Jersey. This proceeding has nothing to do with how a ZEC recipient may or may not affect competition in the PJM markets, which is P3’s sole interest.

The BPU’s denial of an intervention request by another trade association purporting to represent the interests of generators in promoting competition is instructive. *See In Matter of Petition of Pub. Serv. Elec. & Gas Co.*, 1995 WL 451010 (BPU 1995). In that matter, the Independent Energy Producers of New Jersey (“IEPNJ”) claimed an entitlement to intervene in a proceeding involving a rate reduction offered by Public Service Electric and Gas Company (“PSE&G”) to a large energy consumer. *Id.* at \*55-56. IEPNJ claimed that it was a competitor of PSE&G under the theory that the customer could have installed co-generation facilities in lieu of entering into the agreement for the reduced utility rates. *Id.* at \*56. IEPNJ eventually conceded that co-generation was not feasible for this customer, but continued to “contend[] that the policy issues raised by this matter will impact the interests of IEPNJ because the Board’s determination in this matter ‘will affect the present and future competitive nature of New Jersey’s energy market.’” *Id.* Ultimately, the BPU rejected IEPNJ’s arguments:

Based on the circumstances of this case, as they are known at this time, it does not appear that IEPNJ’s members will be ‘substantially, specifically or directly’ affected by the outcome of this case. To the contrary, IEPNJ offers only vague nonspecific arguments as to how its members might be affected by the outcome of the case.

*Id.* at \*57.

P3 is similarly situated because its interest bears no relation to the task before the BPU in this proceeding. P3 offers “only vague nonspecific arguments as to how its members might be affected by the outcome of the case.” *Id.*

Second, P3’s intervention would only cause undue delay and confusion. During consideration of the bills that became the ZEC Act, P3 testified before the New Jersey Legislature about its strong opposition to the ZEC Act:

P3 remains opposed to any legislative efforts that interfere with the competitive, regional, federally regulated wholesale markets by providing out of market support for selected resources. Senate Bill 877 and Assembly Bill 2850 (‘the ZEC Bills’) not only undermine the competitive market in New Jersey and the entire PJM region, they represent an ill-conceived giveaway that unnecessarily harms consumers.

Testimony of the PJM Power Providers Group (P3), New Jersey Senate Appropriations and Assembly Telecommunications and Utilities Committees (Feb. 22, 2018). It is clear from P3’s prior testimony that it is not interested in constructively assisting the BPU in implementing the process for determining the eligibility and ranking of nuclear units that apply for ZECs under the ZEC Act. P3 intends to pursue its own agenda that will be disruptive of the BPU’s ability to carry out the ZEC Act’s directives.

The ZEC Act sets forth mandatory deadlines for completion of the BPU’s deliberations. Applications will need to be filed by October 1, 2020, and the BPU will be required to make a decision regarding whether and to whom to award ZECs by April 30, 2021. The procedural schedule has numerous deadlines to be completed in a short timeframe, including: two weeks to respond to two separate rounds of discovery requests in October and November 2020, seven days to respond to final discovery requests in January 2021, and evidentiary hearings and briefing

occurring in February and March 2021. This means that the BPU will have a great deal to accomplish within a compressed time frame – including a period that encompasses the holiday season – to hire consultants, review and analyze application submittals, obtain additional information as needed, review and analyze additional information submittals, issue preliminary findings, hold a hearing, identify plants that meet the eligibility requirements, determine ranking criteria, rank eligible plants and prepare its order explaining its decision. Allowing P3 to intervene will inevitably slow down this process and could impose extraordinary burdens on the BPU in order to meet its statutory obligations in a timely manner. To the extent P3 wants to participate in the process, the procedure set out by the statute and the BPU affords P3 ample opportunities to participate without being an intervenor, including public hearings and comments.

### **CONCLUSION**

P3 has failed to justify its entitlement to confidential financial information as an “essential” party needed to assist the BPU, and also has failed to meet the basic standards for intervention in this proceeding. Its participation as an intervenor would simply create undue delay and interfere with the ability of the BPU to meet a strict statutory timeline without adding constructively to the resolution of the issues that need to be addressed. For the reasons the BPU articulated in previously denying P3’s motion to intervene in the first ZEC application round, the instant Motion should be denied. In the alternative, should the presiding Commissioner decide to authorize P3’s involvement in this case at all, such involvement should be limited to participant status.

Respectfully submitted,

A handwritten signature in black ink that reads "Grace H. Park" followed by a long horizontal flourish.

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**SERVICE LIST**

IN THE MATTER OF THE APPLICATION OF PSEG NUCLEAR, LLC FOR THE ZERO  
EMISSION CERTIFICATE PROGRAM – HOPE CREEK  
DOCKET NO. ER20080559

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