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September 29, 2020

Client/Matter No. 21561/2

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

**Re: I/M/O the Application of PSEG Nuclear, LLC and Exelon
Generation Co., LLC for the Zero Emission Credit Program--
Salem I and II and Hope Creek Nuclear Stations
Docket Nos. ER20080557, ER 200805558, and ER20080559**

Dear Secretary Camacho-Welch:

This letter memorandum is written in further support of the motions of the New Jersey Large Energy Users Coalition to (i) intervene in the above proceedings and (ii) obtain access to confidential information regarding the nuclear plants, and in response to the opposition to the motions filed by PSEG and Exelon. The companies argue that both of NJLEUC's motions should be denied because NJLEUC failed to demonstrate that it is an "essential" party to the proceeding.

The companies erroneously conflate the standard for intervention in contested administrative proceedings, as set forth in N.J.A.C. 1:1-16 et seq., with the so-called "essential party standard" that was included in Section 3 of the ZEC Law, N.J.S.A. 48:3-87.5, to limit access to confidential information regarding the nuclear plants. Clearly, the right to intervene and the right to access to confidential information are two completely separate issues. Nothing in the ZEC Law purported to address the standard for intervention in proceedings convened under the ZEC Law. Nor did it purport to amend the longstanding Administrative Code provision that has provided the basis for NJLEUC being granted intervenor status in literally every contested proceeding in which the group sought party status over the past fifteen years. Because there has never been a question regarding NJLEUC's eligibility for full party status in the Board's contested proceedings, and because the operative intervention standard remains the same, there should be no issue regarding NJLEUC's eligibility to intervene in this proceeding. Accordingly, NJLEUC urges the Board to grant the intervention motion.

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With regarding to the separate issue regarding the confidentiality of certain nuclear plant information, the ZEC Law introduced, for the first time, the so-called “essential party” standard as the “standard” to be satisfied to obtain access to this information. The extent to which PSEG authored the ZEC Law is not known, although it is known that PSEG provided the amount of the ZEC subsidy that has been imposed on ratepayers. It can be fairly assumed that the essential party provision was included as part of PSEG’s continuing effort to limit the scope of inquiry regarding the companies’ eligibility for ZEC subsidies by excluding as many parties as possible from the ZEC proceedings, including the company’s brazen attempt to exclude Rate Counsel.

The Board should not countenance this type of regulatory overreach, particularly in light of the fact that similar confidential information has been freely shared in past proceedings, such as the electric industry restructuring proceedings and the PSEG/Exelon merger proceeding using non-disclosure agreements similar to the one NJLEUC has executed in these proceedings. This is particularly so because NJLEUC’s members are not “competitors” of the companies, the clear focus of Section 3 of the ZEC Law. It also bears noting that under the ZEC Law, the Board’s authority is broader in the ZEC II proceedings than in ZEC I, including the right to adjust the amount of the ZEC subsidy. It therefore follows that the Board has broader latitude in these proceedings to determine the parties that will accorded full rights as parties.

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

As noted in our moving papers, NJLEUC has a constitutionally-recognized right to participate meaningfully in this proceeding, in which its members’ significant financial and property rights will be very much affected. Due process requires that NJLEUC be afforded full access to all relevant nuclear information and this right cannot be circumvented with the ease suggested by PSEG. Indeed, if there is one overriding principle that is truly “essential” to this proceeding, it is that the due process rights of NJLEUC’s members must be honored. NJLEUC’s members have an extraordinary financial stake in the outcome of the proceeding, and therefore must be afforded a right to be heard in a meaningful way, with full access to all relevant financial information. *See, Matthews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 901 and 46 L.Ed. 2d 18 (1976) and *Greenberg v. Kimmelman*, 99 N.J. 552, 568 (1985). In a word, if the exposure to payment of many millions of dollars in unjustified subsidies and the layers of economic harm that

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would flow from these payments do not satisfy the “essential party standard”, the standard has no meaning.

For the foregoing reasons, NJLEUC respectfully submits that its motions for intervention and access to confidential information should be granted.

Respectfully yours,



STEVEN S. GOLDENBERG

SSG/rad

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