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July 5, 2023

Via Electronic Mail

Sherri L. Golden, Secretary
Board of Public Utilities
44 South Clinton Avenue, 1th Floor
P.O. Box 350
Trenton, NJ 08625-0350
board.secretary@bpu.nj.gov

**Re: I/M/O the Implementation of L. 2018, C. 16 Regarding the Establishment of
a Zero Emission Certificate Program for Eligible Nuclear Power Plant
BPU Dkt. No. EO18080899**

**Application for Zero Emissions Certificates of Hope Creek
Nuclear Power Plant
BPU Dkt. No. EO18121337**

**Application for Zero Emissions Certificates of Salem 1 Nuclear
Power Plant
BPU Dkt. No. EO18121338**

**Application for Zero Emissions Certificates of Salem 2 Nuclear
Power Plant
BPU Dkt. No. EO18121339**

Dear Secretary Golden:

Please accept for filing these comments being submitted on behalf of the New Jersey Division of Rate Counsel in accordance with the Notice issued by the Board of Public Utilities ("Board") in this matter on June 22, 2023. In accordance with the Notice, these comments are being filed electronically at board.secretary@bpu.nj.gov.

Please acknowledge receipt of these comments.

INTRODUCTION

In the above-referenced Notice, the Board's Staff seeks comments regarding its revenue review of the nuclear power plants selected to receive Zero Emissions Certificates ("ZECs") pursuant to L. 2018, c.16, N.J.S.A. 48:3-87.3 to -87.7 (the "ZEC Law") during the first eligibility period provided in the ZEC Law, April 18, 2019 through May 21, 2022. In the Notice, Staff refers to the period from April 18 through the end of Energy Year 2019, May 31, 2019, as the "Stub Period," and the subsequent three Energy Years, from June 1, 2019 through May 31, 2022, as the "Initial Eligibility Period." Staff's request for comments purports to be in compliance with N.J.S.A. 48:3-87.5(e)(4) and N.J.S.A. 48:3-87.5(i)(3), which require the Board to make an annual determination to assure that selected nuclear plant does not receive double payment for its fuel diversity, resilience, air quality or other environmental attributes, and with the provisions in the Board's May 20, 2020 Order in above referenced dockets (the "May 2020 Order") that specified the procedure for conducting such reviews, which was to include the filing of financial data with the Board, the development by Staff of preliminary findings, and an opportunity for public comment on the preliminary findings.

Based on the Notice, it appears that Staff is purporting to comply with the statute and the May 2020 Order by providing a two-week period to comment on the following paragraph which purports to state the entirety of Staff's "Preliminary Findings" based on its review of the documentation from the entire first eligibility period:

Staff thoroughly reviewed and analyzed the Selected Nuclear Plants' certified data and documentation submitted pursuant to the Act, and the May 2020 Order. Staff finds no evidence of double-payment, direct or indirect payments, or credits related to the resilience, air quality, or other environmental attributes associated with electricity generated or sold by Salem 1, Salem 2, or Hope

Creek during the Stub Period or the Initial Eligibility Period. Accordingly, Board Staff does not recommend any reduction to the payment obligation to the nuclear plant owners during the Stub Period or Initial Eligibility Period.

[Notice at p. 3 (citations omitted).]

Apparently, this will be the only opportunity for input before the Board considers Staff's recommendation. Inexplicably, the parties to these dockets did not receive the materials submitted by the nuclear unit owners, or even notice that materials had been filed with the Board.

The process contemplated in the Notice is in blatant violation of both the statute and the Board's own Order, and a violation of the due process rights of Rate Counsel and the other parties to these proceedings. The Board should take steps to remedy this deficient process, as detailed below.

RATE COUNSEL COMMENTS

Under the ZEC Law, nuclear plants selected to receive ZECs are required to:

certify annually that the nuclear power plant does not receive any direct or indirect payment or credit under a law, rule, regulation, order, tariff, or other action of this State or any other state, or a federal law, rule, regulation, order, tariff, or other action, or a regional compact, despite its reasonable best efforts to obtain any such payment or credit, for its fuel diversity, resilience, air quality or other environmental attributes that will eliminate the need for the nuclear power plant to retire, except for any payment or credit received under the provisions of this act;

[N.J.S.A. 48:3-87.5(e)(4).]

The Board is charged with conducting reviews on an annual basis, to assure that, if such payment or credits are received, ratepayers will receive the benefit:

To ensure that a selected nuclear power plant shall not receive double-payment for its fuel diversity, resilience, air quality, or other environmental attributes, the board shall annually determine the dollar amount received by the selected nuclear power plant in an energy year pursuant to a law, rule, regulation, order, tariff, or other action of this State or any other state, or a federal law, rule, regulation, order, tariff, or other action, or a regional compact referenced in paragraph (4) of subsection e. of this section.

[N.J.S.A. 48:3-87.5(i)(3).]

If the Board determines that a double payment has been received, it is directed to reduce the amount of ZECs required to be purchased from the selected nuclear plant by an amount equal in value to the dollar amount determined by the Board. Id. Further, if the Board determines that a selected nuclear plant is receiving revenues for fuel diversity, resilience, air quality, or other environmental attributes, it must “immediately reduce the number of ZECs on a prospective basis consistent with the level of such revenues.” Id.

In the May 2020 Order, the Board established the procedure to be followed for the statutorily mandated review. On or before June 30 of each year, the selected nuclear units would be required to submit “all financial documents pertaining to the payments, credits revenues received by the units for generation in the prior energy year,” and to provide updates and supplements to their applications, including the items specified in a list contained in the Order. See May 2020 Order at 12. Staff was directed to review the documentation and determine what payment, credits and revenues “qualify as the ‘dollar amount received’ for ‘fuel diversity, resilience, air quality, or other environmental attributes,’ in accordance with N.J.S.A. 48:3-87.5(i)(3).” Id. Staff was directed to present its preliminary findings for public comment by December of the same year, and present its final findings to the Board for consideration by the

following February. Id. The Board explained that this schedule was “designed to work in parallel with the eligibility review that occurs every three years.” Id.

The May 2020 Order contemplated an annual process in which financial documentation would be filed with the Board, the documentation would be reviewed by Staff, and members of the public would have a meaningful opportunity to comment on Staff’s preliminary findings, which Staff and the Board would consider in making the annual determination mandated by the ZEC Law. This Board-ordered process has not been followed. While the Notice states that the Public Service Enterprise Group (“PSEG”) has submitted confidential documents on an annual basis, it is not clear whether these materials were formally filed with the Board—despite being an Intervenor in these proceedings and having been authorized to receive confidential information, Rate Counsel was never provided access to the materials submitted by PSEG, or even notice that the materials had been filed. Based on the Notice, there will be no opportunity for Rate Counsel or others to review these materials. Staff has failed to comply with the Board’s directive to present preliminary findings in the December following each of Energy Years. Thus, the results of the annual review were not available when the Board conducted the eligibility review for the second ZEC eligibility period in 2020 and 2021.

Compounding these deficiencies is the wholly inadequate “preliminary findings” that have been presented for public comment. As noted, Staff has presented only a short paragraph purporting to contain its “preliminary findings.” This paragraph, which is quoted in its entirety above, contains no actual findings, only a conclusory statement that Staff has reviewed the documentation received from the nuclear plants and has found no evidence of any double payment. Notice at p. 3. The Notice describes the types of materials reviewed by Staff, but none

of these have been made available to Rate Counsel or, apparently, the other parties to these dockets or the general public. In short, Staff has provided a virtually meaningless opportunity for comment, that surely was not the intent of the May 20 Order.

The process contemplated by the Notice will not provide an adequate foundation for the determination the Board is required to make. Indeed, based on the available record, it unclear there is any foundation for the Board's determination. An agency's decision must be based on substantial evidence in the record, and this must be apparent from the agency's decision. As the New Jersey Supreme Court has explained, "[t]he administrative agency must set forth basic findings of fact supported by the evidence and supporting the ultimate conclusions and final determination so that the parties and any reviewing tribunal will know the basis on which the final decision was reached." Riverside Gen. Hosp. v. New Jersey Hosp. Rate Setting Comm'n, 98 N.J. 458, 468 (1985) (citations omitted). The "preliminary findings" contained in the Notice, if adopted by the Board, would not meet this standard.

Further, the opportunity for comment provided in the Notice does not comport with due process. Under the ZEC law, ratepayers are entitled to refunds of any double payments found in the annual review required under N.J.S.A. 48:3-87.5(i)(3). Although the Board has latitude in choosing the appropriate process for administrative proceedings, "an agency's discretionary choice of the procedural mode of action, are valid only when there is compliance with the provisions of the [APA] . . . and due process requirements." In re Basic Generation Service, 205 N.J. 339, 347 (2011). Moreover, "the fundamentals of fair and adequate procedure constituting due process must be observed" See In re Howard Sav. Bank, 143 N.J. Super. 1, 6-7 (App. Div. 1976) (citing Application of Plainfield-Union Water Co., 11 N.J. 382 (1953)). This

includes an opportunity to assess “the evidential worth of assertions of fact or opinion.” Application of Plainfield, *supra*, 11 N.J. at 392-93. The process provided by the Notice provides no opportunity for Rate Counsel, and other interested parties, to assert their interests. Not only have interested parties been deprived of the opportunity to review the unit owners’ submissions, they have not received any details that would contribute to an understanding of Staff’ analysis of those submissions.

These deficiencies should be remedied. Staff should be directed to make the unit owners’ complete submissions available to the two Intervenors that were granted access to confidential information, Rate Counsel and the PJM Independent Market Monitor. Any non-confidential portions of the submissions should be made publicly available. Further, Staff should be directed to prepare detailed reports of its preliminary findings for public comment. A minimum of sixty (60) days should be allowed for comments.

In addition, the Board should take steps to comply with the statute and the May 2020 Order for the current ZEC eligibility period, which covers energy years 2023, 2024, and 2025. The revenue review for energy year 2023 should be completed in February of 2024. The Board should immediately release the unit owners’ submissions for that energy year 2023, when they are filed and direct Staff to prepare and present its preliminary findings for that energy year for

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public comment by December of 2023. Staff should also be directed to adhere to the timeline specified in the May 2020 Order for subsequent energy years.

Respectfully submitted,

Brian O. Lipman, Esq.

Director, Division of Rate Counsel

By: */s/ Sarah H. Steindel*

Sarah H. Steindel, Esq.

Assistant Deputy Rate Counsel

c: Service List

**In the Matter of the Implementation of L.
2018, c. 16 Regarding the Establishment of a
Zero Emission Certificate Program for
Eligible Nuclear Plants, Application of PSEG
Nuclear, LLC and Exelon Generation
Company, LLC for the Zero Emission
Certificate (ZEC) II Program
Docket Nos. EO18121337, EO18121338,
EO18121339
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