STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

Comments of the PJM Power Providers Group

to the Notice of Public Meeting in BPU Docket No. EO18080899

In The Matter Regarding The Implementation of L. 2018 c. 16 Regarding The Establishment of a Zero Emission Certificate Program For Nuclear Power Plants

"There has been a lot of discussion about -- that this is an automatic hand-out to the utility. That is not true. This Bill creates a process for the BPU to review the finances of the utility to make sure that it can function and stay operational … And with that, we drafted a Bill that doesn't guarantee anything but a review."[1]

Senator Stephen Sweeney, December 20, 2017

The BPU was given a tall task by the General Assembly. L. 2018, c. 16 ("Act") , passed by the General Assembly on April 12, 2018 and signed by the Governor on May 23, 2018, required the Board to invent a process to approve an unprecedented charge on New Jersey's electricity consumers without having the typical regulatory tools available to render a just and reasonable decision. The BPU was placed in a very tough spot and P3 appreciates that.

That said, P3 remains very troubled by the process employed by the Board in which the Board unnecessarily and shortsightedly limited the participation of several parties that were in a position to offer valuable commentary and insights to the Board. The Board missed a valuable

[1] https://www.njleg.state.nj.us/legislativepub/pubhear/senatu12202017.pdf - pages 2 and 3.

opportunity to benefit from the perspectives of multiple other parities which, in the end, created a less robust record upon which to base a decision. Moreover, the decision itself, to approve the ZEC award, appears to have been made in a black box based on criteria that appear to be ill-defined at best and absent at worse. The BPU had four independent experts, including the Commision's own expert, arrive at a conclusion that the ZEC payments were not appropriate, yet the Board, without any empirical justification or explanation to contradict these four experts, arrived at a decision to award the out of market payments. P3 believes the BPU can do better and must do better.

With the issuance of the Board of Public Utilities ("BPU" or the "Board") August 21, 2019 Notice ("Notice") and questions in the Notice posed regarding the "post-eligibility determination activities" of nuclear power plants awarded Zero Emission Certificates ("ZECs"), the Board has the opportunity to improve the process by which the eligible nuclear power plants are evaluated and provide a robust forum for all entities to provide comments to this evaluation.[2]

1. Background

As is well documented in this docket, the PJM Power Providers ("P3")[3] was extremely frustrated by the lack of transparency associated with the entire process leading up to the April 18, 2019 Board decision and the subsequent awarding of ZEC payments to profitable nuclear facilities. P3 was denied intervenor status, and P3 noted the inability to respond to information

[2] The PJM Power Providers ("P3") is currently a party to the Appeal of the April 18, 2019 BPU decision, and nothing contained herein, shall constitute a waiver of any issue regarding the P3 Appeal of the underlying April 18, 2019 decision.

[3] P3 is a non-profit organization dedicated to advancing federal, state and regional policies that promote properly designed and well-functioning electricity markets in the PJM Interconnection, L.L.C. ("PJM") region. Combined, P3 members own approximately 65,000 MWs of generation assets and produce enough power to supply over 50 million homes. The comments contained in this filing represent the position of P3 as an organization, but not necessarily the views of any particular member with respect to any issue.

deemed confidential that went to the question of whether the nuclear power units were truly in the financial distress they purported to be in. As a result, the ability of parties, like P3, whose members own generation and therefore understand the financial workings of power plant revenues, was limited to help develop a record. Moving forward, the Board must institute a more transparent process that New Jersey ratepayers and interested parties deserve.

In the Notice, the Board asks, among other things, "What information is important to the State?" and "What should be the timing and process be by which the Board reviews the revenues, makes its determination, and if applicable, reduces the number of ZECs to the plant?" Before the Board even gets to these questions, the Board needs to commit itself to an open and transparent process consistent with its legislative mandate. P3 understands that the ZEC approval is not a traditional rate case, but many of the questions posed to the Board bear a remarkable similarity to traditional rate case questions. The legislation essentially asks the Board to pass judgment on whether deregulated generation facilities are profitable – or whether their costs plus risks exceed their revenues. In a rate case, parties would be able to challenge every cost input on a granular basis in an open forum. No such forum existed in this proceeding and the public was basically shielded from this analysis while the subsidy seekers were in the convenient position of being able to tell the Board their costs and the Board was hamstrung in its review because it did not have the benefit of opposing views.

Even the Commissioners and Board Staff expressed concerns at and after the April 18, 2019 Board meeting, when the ZECs were ultimately awarded to the three PSEG nuclear plants.[4] As Commissioner Gordon stated the vote on the ZEC was "the most difficult" vote he had to cast in his public life, and further noted that "the statute did not give us the freedom to even offer a

[4] *How 2 BPU Commissioners Nearly Derailed PSEGs Nuclear Subsidy*, By Danielle Muoio, April 25, 2019, https://www.politico.com/states/new-jersey/tag/nuclear.

subsidy we deemed appropriate. It was $4 a megawatt hour or nothing."[5] Commissioner Gordon further stated that, "I would characterize the choices we face as genuinely awful."[6]

The Legislature gave the Board a complex challenge that basically boiled down to a single question – would the nuclear units in Salem County cease operations within three years absent a material financial change? Common sense, practical logical and publicly available information all led to the answer to this question as an unqualified "no." The BPU Staff agreed, and in its April 17, 2019 Report stated that the Staff had "determined that this application does *not* meet the standards necessary to receive ZECs."[7] Despite the Board procuring Levitan & Associates, Inc. ("LAI") to assist Board Staff in the review and evaluation of the applications for eligibility and to assist in the development of the ranking criteria, and subsequent actual ranking of any eligible units, and even though Staff found no need for the subsidy, the Board, with very little explanation, ignored the conclusions of Board Staff and Levitan & Associates, the PJM Independent Market Monitor, the Ratepayer Advocate and P3's independent expert and voted in favor of the subsidy.[8]

The Board was not instructed by the Legislature to award a subsidy - the Legislature could have easily ordered the BPU to do so if that was the intent. The BPU was directed to conduct a process to determine if applicants were eligible for ZECs.

Importantly, as P3 has previously stated, L. 2018, c. 16, (N.J.S.A. 48:3-87.3, et seq.), vests the Board with discretion to determine whether a nuclear facility has satisfied the objectives of the Act, and if it does not, the Board is under no obligation to certify such nuclear plant as

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[5] Transcript, In The Matter of BPU Board Agenda Item 9A, April 18, ("Transcript"), at p. 24 -25.
[6] Transcript p. at 25.
[7] April 17, 2019, Memorandum from Thomas Walker, Director of State Energy Services, with attachment Levitan Report, at p. 1.
[8] *Id.*

eligible, c. 16, Sec. 3(d) ("If the board determines, in its discretion, that no nuclear plant that applies pursuant to subsection c. of this section satisfies the objectives of this act, then the board shall be under no obligation to certify any nuclear power plant as an eligible nuclear power plant.") (emphasis supplied). Indeed, Governor Murphy who, during the signing ceremony for the ZEC Act, responded to criticisms that the law did not authorize sufficient oversight of the BPU proceedings, leaving ratepayers vulnerable and under-represented 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 sort of 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."[9]

Accordingly, again P3 stresses that the Board has the responsibility to ensure that the intent of the statute is met: that no financial award will be made where it was not supported by the substantial and credible evidence in the record, in order to protect the ratepayer and the competitive interests of P3 and its members. The BPU must carefully scrutinize and determine the costs of the ZEC awarded nuclear power plants. As Commissioner Solomon stated at the April 18, 2019 BPU Board meeting "The Legislature and Governor provided very specific criteria for determining whether a nuclear generator is entitled to ZECs. Specifically, it requires that PS show that their costs and risks exceed their revenues or that PS could not cover adjusted cost of capital and would cease operation within three years without material financial change. In the event that revenues are greater than PS's cost and risk, we do not have the authority under the legislation tool for ZECs."[10]

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[9] https://www.njtvonline.org/news/video/murphy-signs-nuclear-subsidy-and-renewable-energy-bills/

[10] Transcript at p. 20.

2. Improving The Review Process and Making it More Transparent: Answers to Specific Board Questions

Question 2 of the Notice asks what unit revenues (federal, RTO, local incentives, etc.) should the Board consider, and what should the timing and process be by which the Board reviews revenues, makes its determination, and if applicable, reduces the number of ZECs to the plant. It is appropriate for the Board to consider whether the plants are recovering their going-forward costs from the PJM wholesale market, including inflows and outflows from incremental investment, as well as the cost of buying back market obligations to effectuate a retirement.[11] As NRG Energy, Inc. explained, "[i]n performing the discounted cash-flow analysis, obviously, revenue and costs, including fuel and Operations & Maintenance ("O&M"), are the most important factors to consider. On the revenue side, the analysis determines the energy and capacity revenues that the applicant is expected to make on a go-forward basis. In New Jersey, the largest share of a nuclear facility's revenues are typically earned in the energy markets, with the PJM capacity markets also providing a major source of revenues. Revenue projects should include planned changes to the PJM capacity and energy markets."[12] The Board should also consider hedges and other forward sales that also affect the profitability of a nuclear facility.[13]

Regarding the Board question on timing and the process, P3 believes that the process should be longer and more transparent. As P3 noted in its November 13, 2018 letter to the Board in this matter, the Board, in order to protect truly confidential information, has the ability to require the execution of non-disclosure agreements which can be appropriately tailored to

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[11] In the Matter of the Implementation of L. 2018 c.16 Regarding The Establishment of a Zero Emission Certificate Program for Eligible Nuclear Power Plants, BPU Docket No. EO18080899, *Comments and Responses of NRG Energy, Inc.*, October 22, 2018, at p. 4.
[12] *Id*. at p. 4-5.
[13] *Id*. at p. 5.

deal with the specific parameters of this matter. Further, there are also other ways in which the Board could deal with potential access to confidential information, for instance, by limiting access to certain persons, or by closely scrutinizing and then narrowing PSE&G's assertions as to what constitutes confidential information. Outside consultants can also be utilized to review information. The Board does not need to unnecessarily limit its ability to receive input from all stakeholders in order to fully inform its decisions. The Board can and should address this issue as early in the process as possible to give parties clarity as to their role.

Additionally, the Board should begin an early process of scrutinizing the costs of maintaining and operating the plants receiving ZEC payments. The Board should determine if those costs are prudently incurred and allow for input from other parties on the question of prudency. The Board should be able to confidently tell New Jersey ratepayers that the plant operators are doing everything it can to keep their costs low since the law provides a perverse incentive to keep costs high in order to qualify for a subsidy. The BPU has an explicit duty to ensure that rates are just and reasonable – as part of that duty, the Board must ensure that costs of subsidized nuclear power plants are prudently incurred. The Board can and should establish a process, similar to a traditional rate case, for evaluating these costs.

The Board asks in Question 4 how the procedural schedule should be structured, and how much information should be due to the Board. P3 believes that the Board should ask for the information as soon as possible and then ask for a true up of information closer to the delivery year so that companies can provide real data versus projected data. The Board also asks in Question 5 which specific data should be used for the determination and should it be based on actual data or projections. Beyond the operation and maintenance costs of the plant, the assumptions regarding future energy and capacity prices and future assumptions about the price of natural gas should be available to be scrutinized and challenged. These projections are critical to understanding the future revenue streams of the plant and are by their nature subjective. Reasonable minds can disagree on these projections, and the Board should actively seek a wide variety of opinions so as to develop informed views.

Moreover, information regarding the return on investment that ZEC plants receive should also be disclosed and subject to challenge– as would be the case in any rate case before the Commission. P3 appreciates that the nuclear facilities are not regulated assets in the traditional sense, but the Board's evaluation must consider how much profit is appropriate as it considers the appropriate level of subsidy. As Commissioner Gordon stated at the April 18, 2019 Board hearing, the ZEC legislation was enacted "not because the three plants are losing money, but because they are not profitable enough."[14] In fact, New Jersey Large Energy Users Coalition contended that the ZEC payment would guarantee a rate of return that is more than double what the Board has authorized for regulated utilities.[15] Even PSEG CEO, Ralph Izzo, conceded in an editorial board meeting that an annual $300 million ZEC would provide an 18% return on investment.[16] If the people of New Jersey are being asked to provide such a healthy return, they deserve to know why and be part of an open and transparent discussion regarding whether that type of return is appropriate.

Additionally, the Board asks in Question 6 what information should the Board collect to form the basis for the study on the ZEC program to be issued on or before May 23, 2028. P3 believes that as much information as possible should form the basis of the study. Moreover,

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[14] Transcript at p. 27.

[15] In the Matter of the Implementation of L. 2018 c.16 Regarding The Establishment of a Zero Emission Certificate Program for Eligible Nuclear Power Plants, BPU Docket No. EO18080899, *Comments of the New Jersey Large Energy Users Coalition*, January 31, 2019, at p. 4.

[16] See, https://www.northjersey.com/story/news/watchdog/2018/02/21/nuclear-plants-profitable-should-n-j-electric-customers-asked-pay-more/336011002/.

an after the fact audit of how much profit the plants made while receiving a subsidy would be instructive. Ultimately, the ratepayers deserve to understand and see what ZECs have cost them and what these payments have meant to the nuclear plant's profitability. By 2028, New Jersey consumers will likely have spent over $2 billion on ZEC payments to profitable nuclear plants. The study should ultimately answer the question whether those payments were truly necessary.

Lastly, P3 believes that the Board should define and clarify who bears the burden of operational and market risks and what risks are appropriately borne by the company and what, if any, should be borne by consumers. As the Board noted, "It is clearly within in the Board's authority to determine the weight that should be given to these factors."[17] As President Fiordaliso commented at the April 18, 2019 meeting, "the eligibility team concluded that none of these three units met the financial threshold necessary to be awarded ZECs."[18] The Eligibility Team found that market and operational risks included by PSEG in the applications should be excluded from the financial viability of the nuclear units.[19] As the April 18, 2019 Order stated, Board Staff and LAI adopted the Board's more traditional view that certain items raised by the applicants – specifically, inclusion of operational risks and market risks should not be considered in the analysis of the need for ZECs. Staff relied on its own review, comments of Rate Counsel, the PJM Independent Market Monitor and other participants rejecting risk calculations.[20]

However, President Fiordaliso noted that he believed that "operational risks and market risks" should be evaluated in the applications, and that these risks are defined as "operational

[17] April 18, 2019 State of New Jersey Board of Public Utilities Order Determining the Eligibility of Hope Creek, Salem 1, and Salem 2 Nuclear Generators to Receive ZECs ("Order") at p. 14.
[18] Transcript at p. 16.
[19] Order at p. 10.
[20] Order at p. 13.

costs or operating costs higher than anticipated and market risks, i.e., market energy and capacity price volatility."[21] Further, in the Order the Board cited that the Act defines "operational risks" to include, but are not 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 lower than expected capacity factors, and that the Act defines "market risks" as including but not 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 sold at projected levels. [22]

Given that operational and market risk, not the financial position of the nuclear plants, was a determinative factor upon which the Board awarded the ZECs, it is important for the Board to analyze, define and quantify these risks, and assess who bears the burden of the risks. For example, if gas prices go up or down or a plant temporarily shuts down due to an act of God – do ratepayers or the nuclear plant owners bear the risk? There are many risks and factors to consider and determinations on who bears each risk. Due to the importance and expansiveness of this issue, perhaps the Board should commence a separate inquiry that comprehensively evaluates such risks and who bears the burden of each risk.

P3 reiterates the comments made by Paul Sotkiewicz. Ph.D., on behalf of P3 and in response to Board Staff regarding accounting for risk in PJM's markets and how generators bidding into the PJM Energy and Capacity Markets typically cover their operational and market risks, and whether these risks are built into pricing bids or assumed by the bidder. As Dr. Sotkiewicz stated, "In competitive electricity markets it is the responsibility of the generation owner to find the means to mitigate operational and market risks, and to enjoy the payoffs from

[21] Transcript at p. 17.
[22] Order at p. 14.

successfully managing this risk as well as any potential downside of not managing such risks."[23] As Dr. Sotkiewicz concluded, "Generation resources have many opportunities to manage their market and operational risk both outside of PJM's markets and within the framework of PJM's markets. Given this ability to manage risk, it would not be appropriate to allow PSEG nuclear resources to include in any ZEC payments risks for which they already have the ability to manage and for which they are best positioned to managed."[24] It is important to note that P3 members, who combined own over 65,000 MW of power, bear and manage these risks without the ability to shift that risk to captive ratepayers, and P3 whole-heartedly shares the view of Board staff that generators should have the obligation to manage these risks lest ratepayers be left with a "heads I lose, tails you win" scenario.

3. <u>Conclusion</u>

As a matter of public policy, ZECs are a political solution to poorly defined problems that create long term challenges for any regulatory policy. P3 and many other parties attempted without success to persuade the General Assembly not to put the Board in the position it has been put in. P3 wishes that the BPU was not given the unenviable task of dealing with the "messy details" that have proven to be very messy indeed.

In order to make the best of a bad situation, the Board must commit itself to a better process moving forward as only the subsidy recipients seem content that the process to date has been satisfactory. While the subsidy seekers will protest and raise smokescreens of confidentiality, the

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[23] In the Matter of the Implementation of L. 2018 c.16 Regarding The Establishment of a Zero Emission Certificate Program for Eligible Nuclear Power Plants, BPU Docket No. EO18080899, *Response of Paul M. Sotkiewicz, Ph.D., on Behalf of the PJM Power Providers Group In Regard to Staff Questions On Accounting For Risk*, March 8, 2019, ("Dr. Sotkiewicz, Testimony on Accounting for Risk") at P 8.
[24] Dr Sotkiewicz, Testimony on Accounting for Risk, at PP 25 and 26.

Board must find a way to appropriately provide more transparency consistent with the ideas presented above. The subsidy seekers are demanding rate payer money; however, the Board has a constitutional obligation to ensure just and reasonable rates. In conclusion, P3 respectfully requests that the Board and Board Staff consider its comments herein and institute a more open and transparent process with the goal of making sure that the subsidy seekers have properly and satisfactorily demonstrated to the Board and ratepayers that their requests for more subsidies are just, reasonable, and required under the law.

Respectfully submitted,

On behalf of the PJM Power Providers Group

/s/ Glen Thomas

Glen Thomas
GT Power Group
101 Lindenwood Drive, Suite 225
Malvern, PA 19355
gthomas@gtpowergroup.com
610-768-8080

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