SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION
Docket No. A-003939-18

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 for Zero Emission Certificates of Salem 1 Nuclear Power Plant Application for Zero Emission Certificates of Salem 2 Nuclear Power Plant Application for Zero Emission Certificates of Hope Creek Nuclear Power Plant	)	APPELLATE DIVISION **Docket No. A-003939-18** Civil Action On Appeal from the Order of the New Jersey Board of Public Utilities in: Docket Nos. EO18080899, EO18121338,EO18121339, EO18121337

REPLY BRIEF OF APPELLANT NEW JERSEY DIVISION OF RATE COUNSEL

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PRELIMINARY STATEMENT

There is a clear theme running through the briefs filed by the Respondents in this case. That is, that this Court should not conduct a probing review of the ratepayer subsidies granted to PSEG Nuclear and Exelon Generation (the "applicants")via the Order below. Through a variety of arguments including appeals to administrative agency deference, suggestions that the wrong Order is being appealed, and convoluted arguments limiting the statutes setting forth the Board of Public Utilities' ("Board" or "BPU") powers over rates and Rate Counsel's jurisdiction, Respondents attempt to construct a wall around the Board's Order to preclude a full review by this Court. Shockingly, this includes an argument that if the Legislature sets a rate in a statute it is perfectly fine for that rate to be unjust and unreasonable, and that even if it is, this Court has no authority to review it.

Lost in their arguments is the fact that the Board's Order forces all New Jersey electric utility customers to pay approximately $900 million over the next three years to private unregulated corporations to enhance their profits. Respondents appear to concede that their nuclear plants are not losing money, but they claim they are not making enough money for their Boards of Directors to keep them open without subsidies. Those that have reviewed the confidential information submitted by the

applicants – including BPU Staff, a consultant hired by the BPU (Levitan), the Independent Monitor of the PJM Markets ("PJM IMM"), and Rate Counsel's consultants, all concluded that given their risks, costs and revenues, a rational economic actor would continue to operate the three units. In rejecting all of those analyses, the Board simply adopted the applicants' financial information without explaining what information caused it to reach a different result. The Board also relied on a series of "externalities," not included in the eligibility criteria that are specifically listed in the statute.

There is no doubt that the statute at issue here was the result of a highly political process. A review of the transcript of the Board's decision shows that the administrative process was also politically charged. If this Court sanctions Respondents' attempts to foreclose a genuine review of the Order below, the citizens of this state – who have no choice but to pay this charge if they use electricity – will be deprived of the type of unbiased, non-politicized review promised by the due process protections of the federal and state Constitutions.

Once the obstacles constructed by the Respondents to a fair review of the Board's Order are stripped away, it becomes clear that the Board's Order does not pass muster. Even if the Board disagreed with the analyses of Staff, Levitan, the PJM IMM and Rate Counsel, the Board failed to explain how it reached a

different result based on the statutory eligibility criteria and the record before it. While the Board may have been legitimately concerned that the plants would follow through with their threat to shut down without the subsidy, the Board had an obligation to apply not only general policy goals, but the specific financial criteria established in the statute.

Moreover, it is hard to imagine this Court agreeing that a non-bypassable rate established by the Legislature is allowed to be unjust and unreasonable. While there is little in the record to justify the rate, the argument that the rate set in the statute is virtually unappealable is both illogical and inconsistent with prior decisions in both the New Jersey and the federal courts. Ratepayers deserve due process and respectfully ask that the obstacles to such process put forth by Respondents be rejected. Because the Order below failed to analyze compliance with the financial eligibility criteria in the statute and failed to ensure the reasonableness of the statutory rate, it is arbitrary and capricious and should be overturned.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Rate Counsel relies on the Statement of Facts and Procedural History set forth in its initial brief.

ARGUMENT

POINT I

THE RECORD BELOW DOES NOT SUPPORT A FINDING THAT THE APPLICANTS QUALIFIED FOR ZECS

Under N.J.S.A. 48:3-87.5(e)(3), an applicant for ZECs must demonstrate that a nuclear plant is at risk of closure because it "is projected to not fully cover its costs and risks ...." The parties to this action as well as the Board's consultant (Levitan) and Staff, have raised substantial questions concerning the reasonableness and credibility of the applicants' projected costs and revenues, as well as their purported quantification of the "costs" of risks. (RCb18-19, RCb27-36)[1] Yet, in the Order below, the Board ignored the issues raised by the parties and simply adopted the applicants' bottom line.

[1] The briefs and appendices previously filed in this appeal in this matter will be referred to as follows:

"RCb" refers to Appellant Rate Counsel's initial brief.

"Aa" and "Aca" refers to the Rate Counsel's public and confidential appendices.

"EDCb" refers to the brief filed on behalf of Respondents Public Service Electric and Gas Company, Jersey Central Power & Light Company and Atlantic City Electric Company.

"PSEGb" refers to the public version of the brief filed on behalf of Respondent PSEG Nuclear

"PSEGa" and "PSEGca" refer to PSEG Nuclear's public and confidential appendices

"EXb" and "EXcb" refer to the public and confidential versions of Exelon's brief.

"EXa" and "EXca" refer to Exelon's public and confidential appendices.

The Board did not address in its Order the substantial factual challenges to the applicants' presentations on both risks and other costs. Instead, the Board appeared to rely solely on the applicants' positions and on "externalities" that are not part of the statutory criteria for awarding ZECs. (RCb36-37)

Now, on appeal, the Board attempts to defend its decision by re-defining what it did. The Board characterizes its decision as turning on a single issue of law, that is, the Board's interpretation of the ZEC Act as "requir[ing] a financial analysis that included operational and market risks, not just avoidable costs." (BPUb27). The Board asserts that it rejected the entire "methodology" followed by Levitan and Staff, oddly referred to in the Board's brief as "Rate Counsel's preferred methods," because it was based on "[S]taff's view that a unit's avoidable costs was the proper focus of the evaluation of a unit's financial viability." (BPUb27, BPUb28) According to the Board's brief this was the sole issue "at the crux of [the Board's] decision" and the only issue that needed to be discussed in the Board's Order. (BPUb37-38, BPUb41) This same argument is echoed in the briefs filed by respondents PSEG and Exelon. (PSEGb8-9, PSEG15-16, PSEGb36; EXb1-2, EXb24-31).

The Board's argument makes no sense. The issue is not whether "costs and risks" should be considered. All parties appear to agree that they should. The issue is how they are

considered and how they are quantified. While the Order presented an analysis of whether the Board was obligated to consider the "costs of risks," it contained no actual analysis of the costs of risks, or any other costs. Indeed, neither the Board's Order nor the Commissioners' discussion of this matter at the April 18, 2019 meeting gives any indication of how the Board, if it intended to reject the analyses of Staff, Levitan, Rate Counsel, the PJM Market Monitor and others, quantified those "costs of risks" to find the applicants eligible. (Aa611-614, Aa729-58).

The fact is, "avoidable costs" is not simply Rate Counsel's or Staff's or Levitan's or the PJM IMM's preferred methodology, it is a well-recognized economic analysis to determine if an asset is receiving sufficient revenue from a market to continue operating. In fact, the Board itself has advocated for the use of this analysis in proceedings before the Federal Energy Regulatory Commission ("FERC"). As Staff observed in its memoranda to the Board:

> In other proceedings, the Board has supported a net avoidable cost rate (net "ACR") as an appropriate measure of a generator's competitive offer into the markets. Underlying that approach is the concept that if a· generating unit is covering its avoidable costs through revenues, it is more profitable for the unit to operate than to shut down, i.e., it is economically competitive. Similarly, in this proceeding, the PJM Independent Market·Monitor's [sic]("IMM") contends that if a unit is covering its avoidable costs, the

> unit is covering its costs and should not qualify for a subsidy.
>
> (Aa628, Aa645, Aa662).

As explained in the PJM IMM's comments to the Board, "an asset is receiving a retirement signal from the market if the asset is not covering and is not expected to cover its avoidable costs on an annual basis." (Aa153) In fact, the avoidable cost rate, net of energy and ancillary service revenues, was recently adopted by the FERC as the default offer price that would be used for existing generation resources bidding into the PJM capacity market. In other words, FERC viewed the net avoidable cost rate as the proper measure of the revenues needed to incentivize existing generation resources to offer capacity in a given year, rather than withdraw from the market. Calpine Corp. et al. v. PJM Interconnection, LLC, FERC Dkt. Nos. EL16-49-000 & EL18-178-000, 169 FERC ¶ 61,239, 2019 FERC LEXIS 1876 at *123-*124 (2019). See also, Advanced Energy Mgmt. All. v. FERC, 860 F. 3d 656, 667 (D.C. Circuit 2017)("A resource's avoidable costs are the operational costs the resource would not incur in the following year if it did not have a capacity commitment.")[2]

[2] The ZEC Act itself recognizes avoidable costs as a relevant factor in determining what a plant owner would look at to decide whether to continue in operation. As the Board recognizes in its brief, the financial information ZEC applicants were required to submit included "the cost of operational risks and market risks that would be avoided by ceasing operations...." N.J.S.A. 48:3-87.5(a)(emphasis supplied). (BPUb4-5, BPUb12,

Costs can be avoidable or they can be fixed and unavoidable. The reason PJM, FERC, the PJM IMM and others look at "avoidable costs" as a measure of a unit's likelihood of shutting down is because a unit that is recovering more than its avoidable costs in a market has an economic incentive to continue operating. In other words, if a unit is not recovering its avoidable costs, the market is providing less revenue than the costs the unit would avoid by shutting down; but if a unit is recovering more than its avoidable costs, the market is providing sufficient revenue for the unit to continue to operate at a profit. However, none of this has to do with whether or not risks, as well as costs, are being considered. It is not an "alternative methodology" that replaces a review of risks, but a well-accepted means of looking at market signals and costs.

Avoided costs also are not a vestige of historical ratemaking principles that have been superseded by the ZEC Act. (BPUb13, BPUb22) A focus on costs that would be avoided by shutting down bears no resemblance to rate base/rate of return ratemaking and is fully in accord with the ZEC Act's directive to the Board to determine whether the nuclear units' financial condition puts them at risk of retirement.

BPUb23, BPUb29). Thus, avoidable costs were clearly seen by the bill's drafters as a relevant factor in determining eligibility.

As noted in Rate Counsel's initial brief, Board Staff and Levitan did consider market and operational risks. They simply questioned the applicants' claimed valuations of those risks. By its very nature a "risk" is something that may or may not happen. All markets come with risks and they are extremely difficult to quantify as a "cost." With respect to the applicants' failure to adequately quantify the risks, the clearest discussion of why the "costs of risks" proposed by the applicants were discounted by Staff and Levitan appears in the comments of the PJM Independent Market Monitor, an independent entity charged with reviewing internal market conditions and promoting competitive and non-discriminatory markets at PJM. The PJM IMM explained:

> PSEG does not incorporate the probability of costs being lower than expected. [**BEGIN PSEG CONFIDENTIAL]** [redacted] **[END PSEG CONFIDENTIAL].** PSEG does not explain why they do not incorporate the probability of revenues being higher than expected.**[BEGIN PSEG CONFIDENTIAL]** [redacted] **[END PSEG CONFIDENTIAL].** PSEG does not address the expected positive impact of the proposed PJM changes on energy market prices. PSEG does not address the fact that the structure of the subsidy would provide PSEG guaranteed increases in revenues over three years regardless of whether PSEG's costs go down and revenues go up. PSEG's and Exelon's risk adders do not constitute a cost of risk. The operational costs incurred by PSEG include the costs of maintaining the safety of the unit and minimizing the risks of operating the units. These costs are

> included in the costs of the unit evaluated in this report and are covered by revenues.

(Aca427-28, Aa169-70).

With respect to the Operational Risk adder the PJM IMM noted:

> **[BEGIN PSEG CONFIDENTIAL]** [redacted] **[END PSEG CONFIDENTIAL]**

(Aca429, Aa171).

The PJM IMM noted that PSEG attempted to "quantify" the operational risks by simply applying **[BEGIN PSEG CONFIDENTIAL]** [redacted] **[END PSEG CONFIDENTIAL]** across the board. However, the PJM IMM noted that **[BEGIN PSEG CONFIDENTIAL]** [redacted] **[END PSEG CONFIDENTIAL]**[3] (Aca429, Aa171)

Respondents cite to the New York ZEC law as including a 10% adder (BPUb33, PSEGb27 citing Aa542-42, EXb34), but the 10% adder in the New York ZEC Order relates to the calculation of

[3] "OATT" stands for PJM's Open Access Transmission Tariff, which does not relate any valuation of risks or costs of generating units.

the Alternative Compliance Payment to be paid by companies that do not purchase ZECs, not a calculation of risks. No operational risk "adder" was used to determine the value of New York's ZEC payments, which are based on an estimate of the social cost of carbon. Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard; Petition of Constellation Energy Nuclear Group LLC; R.E. Ginna Nuclear Power Plant, LLC; and Nine Mile Point Nuclear Station, LLC to Initiate a Proceeding to Establish the Facility Costs for the R.E. Ginna and Nine Mile Point Nuclear Power Plants, 2016 N.Y. PUC LEXIS 425, at *229-30(Aug. 1, 2016). Moreover, the references in the briefs of Exelon and the Board are to comments submitted to the Board by PSEG, which cites comments filed with the New York Commission by Constellation Energy Nuclear Group, LLC, not the Order issued by the New York Commission. (BPUb27, EXb34, Aa543)

The materials cited by PSEG and Exelon as providing evidentiary support for the operational risk "adder" confirm the PJM IMM's analysis. The discovery response cited by PSEG **[BEGIN PSEG CONFIDENTIAL]** [redacted] **[END PSEG CONFIDENTIAL]** (PSEGb27, PSEGca011-12) This response, and the comments submitted by PSEG to the Board which are also cited

in PSEG's brief, confirm that the percentage amount of the "adder" is not based on any particularized analysis of the risks that the units may face. (PSEGb27, PSEGca011-12, Aa542-43). The discovery responses cited and discussed at pages 32-33 of the Confidential version of Exelon's brief likewise do not contain any calculations supporting the 10% adder. Instead, Exelon appears to be arguing that **[BEGIN Exelon CONFIDENTIAL]** [redacted] **[END Exelon CONFIDENTIAL]** (EXca7-8,EXca12-13) This is not a reasonable analysis that can support the applicant's claimed cost of operational risk.

Similarly, with respect to Market risks, the PJM IMM explained that **[BEGIN PSEG CONFIDENTIAL]** [redacted] **[END PSEG CONFIDENTIAL]** (Aca430, Aa172).[4]

[4] Respondents take issue with Rate Counsel's suggestion that the possibility of applying for ZECs at a later time was a factor that should have reduced the applicants' claimed costs of risks. (BPUb36) The Board's argument that this observation was "irrelevant" because the Board was considering "current financial information" (BPUb36) makes no sense. The ZEC Act

Rate Counsel's consultant, Andrea Crane of the Columbia Group, echoed these concerns regarding the applicants' quantification of the "costs of risks." She stated:

> 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 be[sic] not be put in the 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.

(Aa460-61, Aca224-25)

With respect to operational risks, Ms. Crane found that the applicants' forecasts were "one-sided" and failed to take into account the fact that "while it is possible that costs could be higher than forecast, it is also possible that costs could be lower than forecast." (Aa461, Aca225). With respect to market risks, Ms. Crane noted that it was inequitable to simply accept the applicants' numbers given the significant revenues that they

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explicitly contemplates consideration of "projections," which, by definition, are estimates of what will occur in the future. N.J.S.A. 48:3-87.5(a).

had recovered to date and the fact that they consciously assumed those risks when they sought to extend their operating licenses. (Aa462. Aca226).

PSEG does not appear to dispute the analyses provided to the Board by the PJM IMM, Rate Counsel, Levitan and Staff. Indeed, the supplemental information provided in response to Staff's information request that is cited in PSEG's brief confirms that the claimed "costs" of market risks are not actual costs, but are only a one-sided analysis of "downside" scenarios. (PSEGb27, PSEGa121-22, PSEGa124-25) The materials cited in Exelon's brief are no more probative of any actual costs. Exelon's purported analysis of "market risks" is no more than a **[BEGIN Exelon CONFIDENTIAL]** [redacted] **[END Exelon CONFIDENTIAL].** (EXcb34-35, EXca8, EXca13)

There is therefore ample support in the record for the conclusions of Staff and Levitan that the operational and market risks claimed by the applicants – which constituted **[BEGIN PSEG CONFIDENTIAL]** [redacted] **[END PSEG CONFIDENTIAL]** of the applicants' claimed shortfall for Salem 1 and **[BEGIN PSEG CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** for Salem 2 and **[BEGIN PSEG CONFIDENTIAL]** [redacted] **[END PSEG CONFIDENTIAL]** for Hope Creek (Aca326-27, 342, 357-58)

were not "true costs" that should simply be adopted to determine whether the applicants met the financial criteria in the statute. Far from ignoring the cost of risks, Staff and Levitan conducted an actual analysis of the values proposed by the applicants for these risks and found them lacking.

Although the Board rejected Staff's and Levitan's conclusions that the risks could not be quantified as "costs," the Board itself made no attempt to quantify the risks. It simply stated that "had the Eligibility Team and [Levitan] considered the two risk factors as well as the other externalities, and had they reviewed the financial filings as submitted by the applicants, the plants would have been deemed eligible to receive subsidies, as a matter of fact." (Aa613) The Board did no further analysis. We do not know what in the applicants' financial filings the Board relied on to reach this conclusion, how any of the costs and risks contained in the applications were quantified by the Board, or why the Board viewed the applicants' quantification of costs and risks as more reasonable than all of the other parties'.

The Board argues (BPUb36-37)that the issues raised by Levitan, Staff, the PJM IMM, Rate Counsel and other intervenors were in fact considered by the Board, and this is reflected in the summaries of materials in the record that were presented in the Order. (Aa602-11) Summaries are not analysis. A "mere

cataloging of evidence followed by an ultimate conclusion of liability, without a reasoned explanation based on specific findings of basic facts, does not satisfy the requirements of the adjudicatory process because it does not enable [the court] to properly perform [its] review function ...." Blackwell v. Department of Corrections, 348 N.J. Super. 117, 122-23 (App. Div. 2002). When facts are disputed, the agency must explain "how it weighed the proofs" before it. St. Vincent's Hospital v. Finley, 154 N.J.Super. 24, 31 (App. Div. 1977). See also Smith v. E.T.L. Enterprises, 155 N.J. Super. 343, 348 (App. Div. 1978), quoting Benjamin Moore & Co v. Newark, 133 N.J. Super. 427, 428 (App. Div. 1975) (agency must both find facts and "set forth 'an analytical expression of the basis which, applied to the found facts, led to the holdings below'"). The Board did not do this.

Respondents attempt to justify the Board's consideration of non-financial "externalities" by citing language in N.J.S.A. 48:3-87.5(a) and N.J.S.A. 48:3-87.5(d).(BPUb4-5, BPUb22-23, BPUb30,BPUb24) However, the criteria for awarding ZECs are found in subsection (e) of N.J.S.A. 48:3-87.5, not subsections (a) or (d). Subsection (a) provides that the Board can require the applicants to submit "any other information, financial or otherwise" but makes it clear that such information is to be used in determining whether the applicant has "demonstrate[d]

that the nuclear power plant's fuel diversity, air quality, and other environmental attributes are at risk of loss because the nuclear power plant is projected to not fully cover its costs and risks ..." (emphasis supplied). N.J.S.A. 48:3-87.5(d) clarifies the Legislature's intent to deny ZECs to nuclear plants that do not meet the requirements and objectives of the ZEC Law. Neither provision purports to alter the ZEC Act's criteria to qualify for ZECs that are explicitly stated in N.J.S.A. 48:3-87.5(e).

As the Board argues at some length, it is the Board's analysis, not that of its Staff, that must ultimately withstand review. (BPUb19-21) Since the Board has expressly disavowed an intent to incorporate and adopt its Staff's analysis, its determination to award ZECs must stand or fall on the Board's own analysis. This is not a case where the Board has merely eliminated some details, such as in N.J. Bell Tel. Co. v. Dep't of Pub. Utils. 162 N.J. Super. 60, 75 (App. Div. 1978), and N.J. Dept. of Public Advocate v. BPU, 189 N.J. Super. 491, 505 (App. Div. 1983), or a case where the basis for the Board's factual determinations can be explained as an exercise of "[c]ommon sense," as in In re PSE&G's Rate Unbundling, 167 N.J. 377, 392 (2001), or a case in which "all specifics that may be missing can be inferred from the order" as in In re Board's Investigation & Review of Loc. Exch. Carrier Intrastate Exch.,

No. A-2074-09, 2012 N.J. Super. Unpub. LEXIS 1430 at *56 (App. Div. 2012). In the present appeal, the Board simply did not address factual disputes, choosing instead to explain that failure as the result of a legal determination that the Board did not need to make.[5]

The Respondents' briefs also present several alternative justifications for the Board's decision. All of these post hoc explanations should be rejected, as none of them are discussed in the Board's Order, much less cited as the basis for its decision. For example, Respondents dispute Levitan's recommended adjustment[6] for labor costs that would continue to be incurred after the plants' retirement, asserting that such costs would be covered by the plants' nuclear decommissioning trust funds. (BPUb33-34) In the absence of guidance from the Nuclear Regulatory Commission beyond the short definition of

[5] The Board argues that the lack of analysis in its Order should be excused because the record includes information that is claimed to be confidential.(BPUb40) The Board cannot seriously contend that it could not have presented any factual analysis without disclosing confidential information. The Order was issued in both "public" and "confidential" versions. (Aa599-715, Aca294-406) Any factual determination that could not be explained without reference to confidential information could have been included in the "confidential" version of the Order, making the Board's reasoning available at least to those parties entitled to receive the protected information, and to this Court.

[6] Although the Board's Brief refers to this as a "Rate Counsel" adjustment, it is clear from the page of Rate Counsel's brief cited by the Board that the 50% disallowance of labor costs was recommended by Levitan. (RCb31)

"decommissioning" cited in the Board's brief, it is by no means clear that all post-retirement labor costs at a nuclear plant site would qualify for reimbursement from the nuclear decommissioning trust fund. Further, Respondents fail to mention that Levitan used a 50% disallowance as a rough estimate due to the "absence of an adequate response from PSEG to the Rate Counsel Discovery Requests ...." (Aa685) The discovery responses cited in PSEG's brief do not make it clear that post-retirement labor costs will be reimbursed from the decommissioning trust fund. Those responses state only that the trust funds are adequately funded and accessible to PSEG, and do not attempt to quantify which costs are covered. (PSEGb38, PSEGa107, PSEGa118)[7]

Respondents also argue that "flow through" recovery of capital investments in the year they are incurred was part of

[7] At page 37, note 18 of its brief Exelon cites several decision of the United States Nuclear Regulatory Commission ("NRC")that have allowed nuclear plant operators to draw on nuclear decommissioning trust funds for purposes that are beyond those defined as "decommissioning" in the NRC.s regulations. The decisions cited by Exelon make it clear that these are not decommissioning costs, and that decommissioning trust funds may not be used for such costs without an exemption from the NRC. See, e.g., Pacific Gas & Electric Co; Diablo Canyon Nuclear Power Plant Units 1 and 2, 84 Fed. Reg. 48,995 at 48,956 (Sept. 17, 2019). Moreover, in at least one of these cases, involving the Pilgrim Nuclear Power Station in Massachusetts, the use of decommissioning funds for non-decommissioning purposes is being vigorously disputed by the State Attorney General. See materials posted on Massachusetts Attorney General's website, available at pilgrim-nuclear-power-station-license-transfer-application-proceeding.

the "accounting methodologies ... chosen by the Legislature" in the ZEC Act. (BPUb34-35) This argument is based on the ZEC Act's inclusion of information on "non-fuel capital expenses" as part of the cost information required to be submitted by ZEC applicants. (BPUb34). This language contemplates that capital expenditures will be considered, but does not purport to dictate "flow through" accounting for such expenditures. The reasonableness of this approach was a factual issue the Board was required to address, not an issue the Board could resolve as a matter of law.

In addition, Respondents assert that it was proper for the applicants to include the federal spent fuel disposal charge despite the fact that this charge is not being incurred. (BPUb35) Although it is true, as the Board argues, that someone will have to pay for spent fuel disposal, it is not at all clear that the cost will be paid by nuclear plant owners during the next three years. The Board's brief does not even consider the likelihood that the cost of spent fuel disposal will be socialized rather than charged to nuclear plant owners, or that it will take longer than three years to resolve the issues that led to the charge's suspension. (Aa591)

In sum, Respondents' arguments fail to rehabilitate the Board's decision. While the Board may have been free to reject the analyses of its Staff, its consultant, the PJM IMM and Rate

Counsel, it then should have applied an analysis consistent with the statutory eligibility criteria. It did not do so, opting instead to rely on a general statement adopting the applicants' financial filings on a wholesale basis, and relying on many other external factors that were not part of the eligibility criteria specified by the Legislature. The Board's Order is therefore arbitrary and capricious and should be overturned.

POINT II

THE BPU'S FAILURE TO ENSURE THAT THE ZEC RATE IS JUST AND REASONABLE IS ARBITRARY AND CAPRICIOUS AND CONTRARY TO LAW

Respondents argue that the $0.004 charge is both immutable and unappealable, and that when the Legislature sets a rate, that rate need not be just and reasonable. They maintain that when enacting the ZEC statute, the Legislature intended to establish a completely new regulatory system and that the other provisions of Title 48 were not intended to apply. However, Respondents' arguments are undermined by the Board's own actions, the language of the ZEC statute, and by consistent judicial rulings recognizing the constitutional underpinnings of ratemaking. Respondents' argument that the rates set in the ZEC Act need not be just and reasonable and may not be appealed should be rejected.

First, Respondents appear to argue that the ZEC charge is not a "rate" subject to the just and reasonable requirement set forth in N.J.S.A. 48:2-21 and N.J.S.A. 48:3-1. (BPUb44-45, PSEGb48-49, EXb46-47) N.J.S.A. 48:2-21 requires that the Board set "individual rates, joint rates, tolls, charges or schedules thereof" that are just and reasonable. N.J.S.A 48:3-1 provides further that no public utility may "[m]ake, impose or exact any unjust or unreasonable, unjustly discriminatory or unduly preferential individual or joint rate,... fare, charge or schedule for any product or service supplied or rendered by it within the state ...." As noted in Rate Counsel's initial brief, these provisions have been interpreted as defining what is a "rate" or "charge" from the perspective of the consumer. In re Redi-Flo Corp., 76 N.J. 21, 41 (1978)("Since a fuel adjustment clause would cause an increase in the consumer's out-of-pocket expenditure for fuel, it plainly falls within the statutory definition of a rate increase.") Since the ZEC charge is added to the customer bills and charged via the utility's tariff, it is clearly a rate or charge subject to these provisions.

While PSEG attempts to portray the utilities' tariffs as "paperwork" to be filed with the BPU to recover the ZEC charge (PSEGb10), that is not what a tariff is. As the New Jersey Supreme Court stated in Application of Saddle River, 71 N.J. 14,

29 (1976), "[a] tariff is a published schedule of rates, filed by a public utility, and thereafter, in the absence of successful challenge, applicable equally to all customers." Not only is a tariff not mere "paperwork," "[i]t is the law, and its provisions are binding on a customer whether he knows of them or not." Id. Thus, by including these charges in the utilities' tariffs the Board itself recognized that the ZEC charge is a binding rate for utility service under the law.[8]

While it is true that the applicants as generation owners are no longer "public utilities" pursuant to EDECA, Respondents' efforts to argue that the ZEC charge is therefore not subject to the just and reasonable requirement must be rejected. (BPUb22 n.5, PSEGb51-53, EXb46-48). These unregulated entities have come to the Legislature and the Board asking them to impose a

[8] Respondents' arguments that Rate Counsel cannot challenge the $0.004 rate because it did not appeal the November 19, 2018 Orders approving the Electric Distribution Companies' tariffs (PSEGb42-42, EXb42) must be rejected. Each of those Orders state specifically that "The tariff is not to be implemented unless and until the Board issues a final order authorizing the Company to implement the ZEC program." (EXa4, EXa9, EXa14, EXa19, EXa24). At the time those orders were issued it was not known whether the Board would award any applicants the ability to recover ZECS. Had Rate Counsel brought its challenge then, the matter would not have been ripe. It was only once the BPU issued its April 18, 2019 Order that the award of the ZEC and the imposition of the rate was certain. Recognizing this, the Board in the April 18 Order appealed herein, ordered the utilities "to submit final tariffs consistent with the Board's order, effective April 18, 2019." (Aa614) By then, the time to appeal the November Orders had passed. This argument appears therefore to simply be another means by which Respondents seek to preclude review of the Board's actions.

non-bypassable charge on customers' retail bills. Traditionally, utilities have been afforded that ability in exchange for their commitment to provide safe, adequate and proper service at just and reasonable rates subject to state regulation. Petition of South Jersey Gas Co., 226 N.J.Super 327 (App. Div. 1988). The applicants cannot seek the benefit of regulation and then disavow the obligations that go with it. Besides, as noted by the New Jersey Supreme Court in In re Redi-Flo, supra, 76 N.J. at 41, the question of what is a rate is to be viewed from the perspective of the customer. Customers have no choice but to pay these charges or risk losing an essential service. The ZEC charge must therefore be deemed a utility rate that is subject to review by this Court and the constitutional and statutory constraints imposed by the law.

Second, while repeatedly touting the need to adhere to the plain language of the statute, the Respondents' arguments that the just and reasonable requirement does not apply to the $0.004 charge are inconsistent with the plain language of the ZEC Act. Perhaps recognizing the radical departure from the regulatory structure established by EDECA, the Legislature in several places within the ZEC Act made clear that some provisions were "notwithstanding any law, rule or regulation to the contrary." See, e.g., N.J.S.A. 48:3-87.5(b), (d). However, that qualifying language does not appear in N.J.S.A. 48:3-87.5(j)(1) which

establishes the $0.004 rate and is not included in any general provision governing the Act as a whole. As noted in Rate Counsel's initial brief (RCb10-11, RCb47 & n. 13), statements from the Act's sponsors made clear that it was not intended to supplant the Board's overall powers or modify other provisions of Title 48. Had that been the intent, the Legislature could have included similar qualifying language in the provision establishing the ZEC rate. It did not do so, and thus the plain language of the Act demonstrates that Respondents' argument that the ZEC Act represents an entirely new regulatory scheme to which Title 48 does not apply, should be rejected.

Moreover, it is important to view Respondents' arguments that the ZEC Act is an "entirely different statute" not subject to other provisions of Title 48 in context. N.J.S.A. 48:2-21 appears in a portion of Title 48 that sets forth the "Powers" of the Board of Public Utilities. See N.J.S.A. 48:2-16. There is nothing in the statute to suggest that its provisions are inapplicable any time new statutes are passed adding new provisions to the Board's regulatory oversight. Indeed, many statutes have been passed since 1962 when N.J.S.A. 48:2-21 went into effect. EDECA itself was a "new statute" added to Title 48, as were many clean energy provisions added in recent years. See, e.g., N.J.S.A. 48:3-98.1. Yet none of those additional provisions have been interpreted by the Board as dispensing with

the "just and reasonable" standard for rates and charges. See, e.g., In re Petition of PSEG for Approval of a Second Extension of a Solar Generation Investment Program, 2016 NJ PUC LEXIS 283 at *26 (Nov. 30, 2016)(reviewing Stipulation in a matter brought under N.J.S.A. 48:3-98.1 to determine if it "will enable the Company to provide its customers in this State with safe, adequate and proper service at just and reasonable rates.")[9]

The telecommunications cases and statutes cited by Respondents do not change this. They simply relieve from BPU rate regulation telecommunications providers that demonstrate that there is sufficient competition for their services to allow the open market to ensure the reasonableness of their rates. That statutory scheme contains specific provisions relieving those companies from rate regulation under N.J.S.A. 48:2-21, and requiring them to demonstrate as a prerequisite that their plan for alternative regulation will continue to "produce just and reasonable rates." N.J.S.A. 48:2-21.18, -21.19. This fact was specifically acknowledged by the Appellate Division in the cases cited by Respondents.[10] Application of New Jersey Bell Telephone

[9] PSEG cites the allowed rate reductions in EDECA as an example of a valid Legislative exercise of authority to set rates. (PSEGb43-44) However, those rates were also subject to the just and reasonable standard. N.J.S.A. 48:3-52(e).

[10] Respondents appear to suggest that Rate Counsel is arguing that the ZEC rate must be reviewed via a rate base/rate of return analysis. (PSEGb50-51) Rate Counsel has never suggested

Co., 291 N.J. Super 77, 90 (App. Div 1996). No such provisions appear in the ZEC Act, and no reading of those statutory provisions supports an argument that when a "new" statutory scheme is imposed the constitutional requirement that rates be just and reasonable is abandoned.

Even if the ZEC statute is viewed as a "new" statutory scheme, N.J.S.A. 48:2-21 and 3-1 continue to be valid statutes that must be harmonized with any additional provisions governing rates charged to customers. They do not simply disappear when a new statute is passed, especially when that new statute contains no provision indicating that they have been repealed. Respondents' arguments in this regard are nonsensical and are not consistent with laws governing statutory construction or interpretation. American Fire and Cas. Co. v. New Jersey Div. of Taxation, 189 N.J. 65, 81 (2006)(reviewing court "has 'an affirmative duty' when construing two statutory provisions relating to the same subject matter to 'reconcile them, so as to give effect to both expressions of the lawmakers' will.'") (quoting St. Peter's Univ. Hosp. v. Lacy, 185 N.J. 1 (2005)); State v. Lewis, 185 N.J. 363, 369 (2005) ("a court should strive to avoid statutory interpretations that 'lead to absurd or unreasonable results.'")(quoting State v. Gill, 47 N.J. 441,

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that, only that the rate must be reviewed to determine whether it is just and reasonable.

444(1966)). Even if one statute is more specific than the other, the goal is still to harmonize them to preserve the intent of both enactments. County of Camden v. S. Jersey Port Corp., 312 N.J. Super. 387, 398 (App. Div. 1998) ("Statutes relating to the same subject matter or subject, although one may be specific and the other general, are to be construed as one in order to give effect to both.")(citing City of Clifton v. Passaic Cty. Bd. of Taxation, 28 N.J. 411, 421(1958)).

Third, Rate Counsel maintains that the Legislature could not simply dispense with the just and reasonable requirement due to its underpinnings in the Constitution. Respondents appear not to understand the Constitutional aspects of ratemaking and/or the arguments being made by Rate Counsel.[11] It is well-established that ratemaking implicates the Fifth and Fourteenth

[11] Respondents are correct that Rate Counsel is not bringing a facial challenge to the statute. See, Somers Assoc., Inc. v. Gloucester Twp., 241 N.J. Super. 323, 337 (App. Div. 1990)("A confiscatory impact may be either facial or 'as applied.'" (citation omitted)). Since the rate was set before any applications were filed, it would not have been possible to determine whether the $0.004 rate was just and reasonable until the "emissions avoidance benefits" of individual applicants were known. However, Rate Counsel is most definitely arguing that once the applications were submitted and eligibility was determined, which triggered the collection of the ZEC, the Board had a duty to review the reasonableness of the rate. Its failure to do so and its approval of a rate that is unjust and unreasonable, Rate Counsel contends, is a violation of due process under the Fifth Amendment to the Constitution as applied to the states in the Fourteenth Amendment, and under Article I of the New Jersey Constitution. Although respondents acknowledge this area of law (BPUb50-52, PSEGb49-53, EXb50-52) they dismiss Rate Counsel's invocation of it.

Amendments to the U.S. Constitution and property rights secured under Article I, section 1 of the New Jersey Constitution. FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 585-86 (1942) (interpreting the "just and reasonable" requirement for rates under the Natural Gas Act, and finding that "the Congressional standard prescribed by this statute coincides with that of the Constitution ...."); Great Northern Ry. Co. v. Washington, 300 U.S. 154, 160 (1936) ("If the exaction be so unreasonable and disproportionate to the service as to impugn the good faith of the law it cannot stand either under the commerce clause or the Fourteenth Amendment.") In re Valley Road Sewerage Co., 285 N.J. Super. 202, 209 (App. Div. 1995) (noting that "[t]he term 'reasonable' is hardly more precise than its antonym, 'confiscatory;'" but that "to pass constitutional muster" the rate must be sufficient to provide sufficient financial security and return to the Company and take into account the interests of consumers).

Thus, if a rate is set too low, it is confiscatory to the utility. If rates are set too high, it is ratepayers whose property is being taken. In re Industrial Sand Rates, 66 N.J. 12, 24 (1974). And, as clearly stated in both Industrial Sand, 66 N.J. at 24, and State v. Trenton, 97 N.J.L. 241, 247 (E&A 1922), this principle applies whether the rate is set by the Legislature itself or by the administrative agency to which the

Legislature has delegated its power. Moreover, it is the Courts that must review the Legislative and administrative record to ensure that rates are reasonable and consistent with due process. These principles were explained clearly by the U.S. Supreme Court in St. Joseph Stock Yards v. United States, 298 U.S. 38 (1936):

> [T]he Constitution fixes limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation. When the legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. The legislature cannot preclude that scrutiny and determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation. Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards.
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> Id. at 51-52.

The situation here is almost exactly what the Supreme Court was concerned about in St. Joseph Stockyards. The ZEC statute was passed through a highly political process. The BPU Commissioners clearly felt constrained by the outcome of that process and did not review the reasonableness of the rate. If this Court were to accept Respondents' arguments that the rate cannot now be reviewed by this Court, there will have been no review whatsoever regarding whether the amount of this charge – which will collect approximately $900 million from ratepayers over the first three years – reasonably reflects the "emissions avoidance benefits" of keeping these plants open.[12] The constitutional rights of ratepayers not to pay unreasonable, confiscatory rates will be unprotected and undermined.[13]

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[12] As noted in Rate Counsel's initial brief, there is nothing in the statute that explains how the $0.004 charge was derived. The only indication we have of its source, is from a newspaper account that quotes one of the bill's sponsors as saying it came from the applicant, PSEG. (RCb51 n. 14)

[13] The Court need not address the spurious claim raised by PSEG and the BPU that Rate Counsel lacks the ability to challenge a statute that deprives ratepayers of their constitutional right to due process. (PSEG 53 n.22). The argument appears to be yet another attempt to foreclose review of the Company's subsidy. However, this appeal is a challenge to a BPU Order, and thus PSEG's gratuitous argument is not before the Court. Notwithstanding this, Rate Counsel notes that N.J.S.A. 52:27EE-48 authorizes Rate Counsel to represent the "public interest," which is defined in N.J.S.A. 52:27EE-12 as "an interest or right arising from the Constitution, decisions of court, common law or other laws…." PSEG's suggestion that judicial review of legislation as applied by an executive-branch agency is a prohibited "third bite at the apple" (PSEGb54) also does not

The argument set forth in the briefs of the Board and PSEG (BPUb48, PSEGb52-52) that Industrial Sand is inapplicable based on that Court's reliance on Municipal Gas Co. v. Public Service Com. 225 N.Y. 89 (1919)appear to be based on an incomplete or faulty reading of that New York case. Respondents appear to be relying on a prior Court of Appeals decision involving the same parties. People ex rel. Municipal Gas Co. v. Public Service Comm., 224 N.Y. 156 (1918). See, 225 N.Y. at 94 (cited at BPUb 48 and PSEGb52). Had respondents read further into the decision actually cited by the Court in Industrial Sand, they would have seen that it very much supports Rate Counsel's position. Responding to the argument that the rate set in the statute could not be changed, Judge Cardozo wrote for the Court:

> We do not view so narrowly the great immunities of the Constitution, or our own power to enforce them. A statute prescribing rates is one of continuing operation. It is an attempt by the legislature to predict for future years the charges that will yield a fair return. The prediction must square with the facts, or be cast aside as worthless .... Into every statute of this kind, we are to read, therefore, an implied condition. The condition is that the rates shall remain in force at such times and at such only as their enforcement will not work denial of the right to a fair return.
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> 225 N.Y. at 96.

The Court of Appeals thus concluded that where a party alleges that a rate is unreasonable and confiscatory, "[i]t has the

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merit serious consideration. See Marbury v. Madison, 5 U.S. 137 (1803).

right, now also grown historic, to invoke, when constitutional immunities are threatened, the judgment of the courts." Id. at 97.

Finally, only PSEG attempts to argue explicitly that the $0.004 ZEC rate is just and reasonable. The company relies upon the fact that there are other provisions in the Act that may serve to protect ratepayers from unreasonable exactions in the future. (PSEGb57) The Company also relies on a disputed (Aa588) report prepared for the Company by the Brattle Group that estimates a "net benefit" from the ZECs, and a new analysis that compares the cost of ZECs to the cost of other clean energy programs.[14] (PSEG 57-60). Exelon cites to a Legislative finding that generally discusses the "social cost of carbon" as an element of "emissions avoidance benefits," and asserts that the costs of the ZECs will be lower. (EXb 53). That statutory language was written before any ZECs were awarded or any applications submitted, and thus could not have been based on an actual analysis of the costs of the ZECs as compared to the social cost of carbon.

[14] Several of the state's Electric Distribution Companies, led by PSEG's affiliate, PSE&G, argue that the ZEC Act creates a "net economic benefit" for consumers (EDCb 5-6). In support of this argument, which only PSEG and Exelon advanced below, they cite to the Brattle Report which, as noted by Rate Counsel before the Board, was an incomplete analysis that its own authors warned should not be used to assess the net benefits of the ZECs. (Aa 588). The Board did not discuss or adopt this analysis.

Moreover, while all parties acknowledge that the pertinent analysis for this Court to review is the Board's, the Board never analyzed or even mentioned any of these arguments in its decision. These post hoc rationalizations for the Board's decision by the entity that benefitted from that decision are insufficient. Had the Board intended to rely on these factors it would have said so. However, the Board did absolutely no analysis of the reasonableness of the rate and PSEG's analysis in its brief cannot make up for that failure.

In sum, the essence of Respondents' arguments regarding the $0.004 rate is that when the Legislature establishes a rate it may be unjust and unreasonable and it may not be reviewed by the Court. Although they acknowledge that unjust and unreasonable rates implicate the constitutional rights of ratepayers, they do not explain how their position comports with substantial contrary precedent. This Court cannot and should not issue a decision that says unjust and unreasonable rates are permissible or that the Legislature may insulate the rates it sets by statute from the constitutional principles established by both the United States and New Jersey Supreme Courts. The Board's complete failure to review the ZEC rate despite an extensive contested record regarding the emissions avoidance benefits and financial condition of the applicants is arbitrary and capricious and should be overturned.

CONCLUSION

For the foregoing reasons, Rate Counsel respectfully requests that the Board's April 18, 2019 Order be overturned.

Respectfully submitted,

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DIVISION OF RATE COUNSEL

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