

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

and

APPLICATION FOR ZERO EMISSION
CERTIFICATES OF SALEM 1 NUCLEAR
POWER PLANT

APPLICATION FOR ZERO EMISSION
CERTIFICATES OF SALEM 1 NUCLEAR
POWER PLANT

APPLICATION FOR ZERO EMISSION
CERTIFICATES OF HOPE CREEK NUCLEAR
POWER PLANT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO: A-3939-18-T1

On Appeal from Final Orders of
the Board of Public Utilities,
Docket Nos. E018080899,
E018121338, E018121339 and
E018121337

**BRIEF OF BEHALF OF RESPONDENT/INTERVENOR MONITORING
ANALYTICS, LLC**

CARLIN & WARD, P.C.
25B Vreeland Road, Suite 203
Florham Park, New Jersey 07932
Michael.ash@carlinward.com
(973) 377-3350
*Attorneys for
Respondent/Intervenor,
Monitoring Analytics, LLC*

Michael J. Ash, Esq.
Attorney ID #035042004
Of Counsel

Jeffrey W. Mayes, Esq.
Admitted *Pro Hac Vice*
Of Counsel and on the Brief

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

PROCEDURAL HISTORY AND STATEMENT OF FACTS 2

ARGUMENT 4

 A. Standard of Review..... 4

 B. The Core Issue on Appeal Is Whether the ZECs Order
 Properly Applied the Financial Criterion..... 8

 C. The ZECs Order Fails to Explain How the Plants
 Satisfy the Financial Criterion..... 11

 D. The ZECs Order Fails to Consider Record Evidence
 Affirmatively Showing the Plants' Failure to
 Satisfy the Financial Criterion..... 14

 E. The ZECs Order Improperly Considers Criteria Not
 in the ZECs Statute..... 19

CONCLUSION 24

TABLE OF JUDGEMENTS

FINAL DECISIONS

1. Order Determining the Eligibility of Hope Creek, Salem 1, and Salem 2 Nuclear Generators to Receive ZECs in the Matter of the Implementation of L. 2018, C. 16 Regarding the Establishment of a Zero Emission Certificate Program for Eligible Nuclear Plants and Application for Zero Emission Certificates of Salem 1, Salm 2 and Hope Creek Nuclear Power Plants, BPU Docket Nos EO18121338, EO18121339, EO 18121337, April 18, 2019 **[public and confidential versions]**..... Aa599, Aca294

2. Order Completing the ZEC Proceeding, 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 and Application for Zero Emission Certificates of Salem 1, Salem 2 and Hope Creek Nuclear Power Plants, BPU Docket Nos. EO18181338, EO18121339, EO 18121337, April 18, 2019..... Aa762

INTERMEDIATE ORDERS

3. Order Initiating the Zero Emission Certificate Program, Designating Commissioner, and Setting Manner of Service and Bar Date, I/M/O 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, August 29, 2018..... Aa001

4. Order Establishing the Program, Application, and Procedural Process, I/M/O 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, November 19, 2018..... Aa012

5. Order on Motions to Intervene or Participate and for Admission Pro Hac Vice, I/M/O Implementation of L. 2018, C. 16 Regarding the Establishment of a Zero Emission Certificate Program for Eligible Nuclear Power Plants, BPU Docket No. EO18080899, November 19, 2018..... Aa047

TABLE OF AUTHORITIES

Cases

613 Corp. v. State, Div. of State Lottery,
210 N.J. Super 485 (App. Div. 1986)..... 6, 10

Bayshore Sewer Co. v. Dept. of Env'tl. Prot.,
122 N.J. Super. 184 (Ch. Div. 1973)..... 5, 6

In re Adoption of Amend. to Northeast Water,
435 N.J. Super. 571 (App. Div. 2014)..... 5, 6

In re Musick,
143 N.J. 206 (1996)..... 5

In re Proposed Xanadu Redevelopment Project,
402 N.J. Super. 607 (App. Div.)..... 5

Matter of Vey,
124 N.J. 534 (1991)..... 4

*Mayflower Sec. Co. v. Bureau of Sec. in Div. of Consumer Affairs
of Dep't of Law & Public Safety*,
64 N.J. 85 (1973)..... 5

Petition of New Jersey American Water Company,
169 N.J. 181 (2001)..... 4

*Public Service Electric & Gas Co. v. New Jersey Dep't of
Environmental Protection*,
101 N.J. 95 (1985)..... 4

Riverside General Hosp. v. New Jersey Hosp. Rate Setting Com'n,
98 N.J. 458 (1985)..... 4

Statutes

N.J.S.A. 48:3-87.3..... 3, 8

N.J.S.A. 48:3-87..... 10

N.J.S.A. 48:3-87.5(j)..... 9

N.J.S.A. 48:3-87.5(e)(2)..... 16

N.J.S.A. 48:2-46..... 4

Other Authorities

P.L. 2018, c. 16..... 3

PRELIMINARY STATEMENT

Intervenor/Respondent Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor for PJM ("Market Monitor"), respectfully submits this brief in support of the appeal filed by the Appellant New Jersey Division of Rate Counsel in opposition to the April 18, 2019, decision by the New Jersey Board of Public Utilities ("BPU") to approve a subsidy to the owners of three nuclear power plants.

The ZECs Order is arbitrary and capricious because it fails to explain the basis in the record or in logic for accepting Applicants' flawed analysis of projected costs, revenues and risks. The ZECs Order fails to explain its rejection of criticism of such analysis by the Market Monitor Analysis and others and its rejection of the analysis by the Market Monitor and others. The ZECs Order improperly misrepresents and otherwise ignores the Market Monitor Analysis. The ZECs Order improperly considers factors other than the statutory specific criteria for eligibility to receive ZECs. The ZECs Order should be reversed.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

The Market Monitor adopts and relies on Appellant's Statement of Facts and Procedural History in its brief dated and filed September 18, 2019.¹

¹ "Applicants" means PSEG Nuclear, LLC (PSEG) and Exelon Generation Company, LLC (Exelon).

"BPU" or the "Board" refers to the New Jersey Board of Public Utilities, and, in particular, the Eligibility Team.

"Eligibility Team" means the team assembled to review all of the information provided in and submitted with or in support of the applications to receive ZECs, and composed of members of Board Staff, the NJDEP and LAI.

"Market Monitor Analysis" means the Analysis of ZEC Applications filed by the Independent Market Monitor for PJM on January 31, 2019.

"IMM" or Market Monitor" refers to Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor for PJM.

"LAI" refers to Levitan and Associates, Inc., retained by the Board to serve as a consultant to Staff (including the Eligibility Team). LAI submitted the New Jersey Zero Emissions Certificate Application Eligibility Report on April 8, 2019.

"NJDEP" refers to the New Jersey Department of Environmental Protection.

"PJM" refers to PJM Interconnection, L.L.C.

"Power Providers" refers to the PJM Power Providers Group.

"Rate Counsel" refers to the New Jersey Division of Rate Counsel

"Staff" refers to the Staff of the Board of Public Utilities.

"ZECs Order" means the order on appeal dated April 18, 2018, *I/M/O the Implementation of L. 2018, c.16 Regarding the Establishment of a Zero Emission Certificate Program for Eligible Nuclear Power 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*, BPU Docket Nos. E018121338, E018121339, & E018121337 (Aa599).

"ZECs Statute" or "Act" means the statute creating Zero Emissions Credits (ZECs), P.L. 2018, c. 16, N.J.S.A. 48:3-87.3 et seq.

"Zero Emissions Credits" or "ZECs" means subsidies paid under the ZECs Statute.

ARGUMENT

A. Standard of Review.

New Jersey law provides the Superior Court "jurisdiction to review any order of the board" and "to set aside such order in whole or in part when it clearly appears that there was no evidence before the board to support the same reasonably." N.J.S.A. 48:2-46; see *Petition of New Jersey American Water Company*, 169 N.J. 181, 188 (2001). The Court explains: "Though sometimes subsumed in the search for arbitrary or unreasonable agency action, the judicial role is restricted to three inquiries: (1) whether the agency action violates the enabling act's express or implied legislative policies; (2) whether there is substantial evidence in the record to support the findings upon which the agency based application of legislative policies; and (3) whether, in applying the legislative policies to the facts, the agency clearly erred by reaching a conclusion that could not reasonably have been made upon a showing of the relevant factors." *Public Service Electric & Gas Co. v. New Jersey Dep't of Environmental Protection*, 101 N.J. 95, 103 (1985).

When an agency is interpreting and applying a statute there must be "substantial evidence in the record to support the

findings upon which the agency based its application of legislative policies." *Id.* Orders must include sufficiently clear and complete explanation to permit review. See *Matter of Vey*, 124 N.J. 534, 544 (1991). The Court explained: "The application of this standard requires far more than a perfunctory review; it calls for careful and principled consideration of the agency record and findings." *Riverside General Hosp. v. New Jersey Hosp. Rate Setting Com'n*, 98 N.J. 458, 468 (1985), citing *Mayflower Sec. Co. v. Bureau of Sec. in Div. of Consumer Affairs of Dep't of Law & Public Safety*, 64 N.J. 85, 93 (1973). The 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." *Id.* Orders lacking clear and complete explanation should be remanded to the agency. *Id.* Review is limited to whether the findings made could reasonably have been reached on "sufficient" or "substantial" credible evidence present in the record, considering the proof as a whole. *In re Adoption of Amend. to Northeast Water*, 435 N.J. Super. 571, 583-84 (App. Div. 2014).

BPU orders must be based on credible evidence in the record, may not be arbitrary and capricious, and must be in accordance with applicable law. *In re Musick*, 143 N.J. 206, 216

(1996). The court has held that the term "arbitrary and capricious" in the law means having no rational basis. *In re Proposed Xanadu Redevelopment Project*, 402 N.J. Super. 607, 642 (App. Div.), *certif. denied* 197 N.J. 260 (2008) (quoting *Bayshore Sewer Co. v. Dept. of Env'tl. Prot.*, 122 N.J. Super. 184, 199 (Ch. Div. 1973), *aff'd* 131 N.J. Super. 37 (App. Div. 1974)). The court further explained, "In connection with administrative bodies, the term means 'willful and unreasoning action, without consideration and in disregard of circumstances.'" *Id.*

The court gives due regard to an agency's expertise, but only where an agency's expertise is a factor facilitating fact finding: "judicial allegiance to the actions of administrative agencies is neither unlimited nor blind," and that "it is only 'in situations where agency expertise is essential towards understanding the proper context of a dispute [that] a deferential standard of review is appropriate.'" See *In re Adoption of Amendments to Northeast, Upper Raritan, Sussex County*, 435 N.J. Super 571, 583(App. Div.), *certif. denied* 219 N.J. 627 (2014) ("[w]here an agency's expertise is a factor, a court defers to that expertise"). Where expertise is not a "pertinent factor" in how the agency reached its decision, "no special deference need be afforded on that basis." *613 Corp. v.*

State, Div. of State Lottery, 210 N.J. Super 485, 496 (App. Div. 1986).

The BPU acknowledges in the ZECs Order that the matter is outside the scope of the regulatory authority routinely exercised by the BPU.² Because the BPU had no special expertise with ZECs or administration of the ZECs Statute, a "method and application process" was established in the same proceeding. Aa601. The BPU has not asserted any special expertise in evaluating the projected financial condition of market participants, particularly when such evaluation involves risk analysis. Nor has it asserted any expertise concerning the protection of employment in New Jersey or in particular New Jersey localities. It was in response to the BPU's appreciation of its lack of expertise that the BPU properly took measures necessary to ensure the development of a complete record. Such measures included the solicitation and accommodation of analyses from multiple sources to evaluate the Applications under the key statutory criterion. By order issued November 19, 2018, the BPU granted the Market Monitor's motion to intervene, stating: "[T]he Board acknowledges that the IMM is in a unique position

² "The process and procedures outlined in the Act are a deviation from the usual process and procedures that the Board follows when the Board receives an application from the utilities it regulates... More specifically, the issues included in the Act that the Board does not typically consider are operational risks and market risks." Aa612.

to review the financial viability of nuclear power plants seeking ZECs based on its experience reviewing generators' costs in the PJM capacity markets as part of reviewing unit-specific competitive offers." Aa025; Aa601. The independent experts retained by the BPU and the independent experts permitted to brief the BPU determined that Applicants failed to meet such criterion. Aa602.

The ZECs Order is arbitrary and capricious, unexplained and unsupported by evidence, and fails the standards for proper decision making identified by the Court. The reasons relied upon ignore the purpose of the ZECs Statute, which is to pay ZECs only to nuclear plants that meet specified criteria. No substantial evidence in the record supports findings consistent with the statutory purpose. The Court should accord no deference to the BPU based on expertise. Accordingly, the ZECs Order should be set aside.

B. The Core Issue on Appeal Is Whether the ZECs Order Properly Applied the Financial Criterion.

On May 3, 2018, New Jersey enacted the ZECs Statute, N.J.S.A. 48:3-87.3, which provides subsidies to nuclear power plants whose owners establish eligibility under certain criteria. On April 18, 2019, the BPU issued the ZECs Order approving the application for three nuclear generating units

located in Salem County, New Jersey: Salem I, Salem II, and Hope Creek to receive Zero Emissions Certificates (ZECs).³ Aa559.

The ZECs Order determined that the subsidy should only be paid to a nuclear plant where the applicant had demonstrated its eligibility under the applicable criteria. Aa602. Applicants have the burden of proof. Aa605. The BPU also affirmed that no presumption exists that any plant would meet the criteria.⁴ If no plant could establish that it meets the criteria, then no plant would receive ZECs. Aa600. The BPU further determined that it was bound to apply the statute and its criteria as written.⁵ None of these essential findings are contested.

³ Salem I, Salem II and Hope Creek are referred to in the record variously as "plant," "unit" or "station." In this brief, the term "plant" is preferred.

⁴ "If the Board was to determine, in its discretion, that no nuclear power plant that applied satisfies the objectives of the Act, the Board shall be under no obligation to certify any nuclear power plans as an eligible nuclear power plant.", citing N.J.S.A. 48:3-87.5(j). Aa600.

⁵ "The Board believes that the intent of the legislation was for the Board to consider operational risks and market risks in its evaluation of these applications. Under section 3.e(3) of the Act, PSEG must demonstrate that each "... nuclear power plant is projected to not fully cover its costs and risks " The "risks" were defined in the Act to include "operational risks," i.e., operating costs higher than anticipated, and "market risks" i.e., market energy and capacity price volatility. The Board accepts the determination of the Act that these factors must be considered in determining eligibility for ZECs." Aa612.

Showing eligibility for ZECs requires meeting each of five criteria: "to be certified as eligible, a plant shall: 1) be licensed by the U.S. Nuclear Regulatory Commission ("NRC") through 2030; 2) demonstrate a significant and material contribution to New Jersey air quality (minimizing emissions); 3) demonstrate anticipated plant shutdown within three years due to its financial situation; 4) certify that the facility does not receive any subsidies from other entities or agencies; and 5) submit an application fee.". Four criteria are perfunctory. *Id.* Only one, the financial criterion, requires significant objective analytical expertise:

[An applicant must]... demonstrate to the satisfaction of the Board ... 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, or alternatively is projected to not cover its costs including its risk-adjusted cost of capital, and that the nuclear power plant will cease operations within three years unless the nuclear power plant experiences a material financial change ..."

N.J.S.A. 48:3-87-87.5(e)(3). No applicant submitted analysis or evidence concerning its risk-adjusted cost of capital. Applicants' and other analyses did refer to coverage of projected costs and risks. The only criterion asserted by Applicant is that the nuclear power plant is projected to not

cover its costs and risks. The core issue presented to the BPU is whether Applicants met the financial criterion.

The ZECs Order's finding on the financial criterion is conclusory, speculative and unfounded. The ZECs Order ignores the record. Applicants' analysis is discredited. The record supports a conclusion that projected revenues exceed projected costs plus risks and a zero or negative value for risk in calculations concerning the financial criterion. The ZECs Order is arbitrary and capricious and should be reversed.

C. The ZECs Order Fails to Explain How the Plants Satisfy the Financial Criterion.

The only explicit finding in the ZECs Order applying the financial criterion states:

Had the Eligibility Team and LAI 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.⁶

Aa613.

This key fact finding is unexplained and unsupported in the record. The ZECs Order does not review or make explicit and reasoned findings on projected costs. The ZECs Order does not

⁶ Aa613. There is no disagreement with the BPU's determination that the BPU is bound to apply the ZECs Statute by its terms. The issue on appeal is that the ZECs Order did not adhere to its determination and failed to apply the ZECs Statute by its terms.

review or make explicit and reasoned findings on projected revenues. The ZECs Order does not review or make explicit and reasoned findings on risks. There is no discussion related to fact finding. The reasons for accepting "the financial findings as submitted by the applicants ... as a matter of fact" is left wholly unexplained. The required "careful and principled consideration of the agency record and findings," by the Court, or even a cursory review, will reveal that the ZECs Order does not explain its findings, makes no explicit findings on any of the important factual matters, and misrepresents or ignores much of the record. There is no viable course other than to reverse the ZECs Order.

A proper review of the flawed analysis submitted by Applicants reveals the failure to demonstrate that any of the plants satisfy the financial criterion. Applicants failed to sustain their burden. Such failure should have been the basis for denial of the applications even without consideration of the independent analyses affirmatively showing that the financial criterion was unsatisfied.

Applicants' analysis overstated costs and understated revenues. The Market Monitor Analysis of the ZECs applications, Staff consultant LAI's analysis, Rate Counsel's analysis and Power Provider's analysis expose the flaws in Applicants' analysis and demonstrate that the plants are projected to

recover their costs when correctly defined costs, revenues and risks are considered. The ZECs Order does not explicitly accept or even review the Applicants' costs and revenues analysis, and never identifies the analysis or analyses implicitly accepted. Aa156-Aa160. The ZECs Order falsely asserts that the Eligibility Team and LAI did not consider "the two risk factors" and did not "review the financial filings as submitted by the applicants." Aa613. What the Market Monitor Analysis, Rate Counsel's analysis and Power Providers analysis considered and reviewed is not addressed in the ZECs Order. All of the analyses are in the record, and, contrary to the assertion relied upon in the ZECs Order, all of them explicitly do consider risk factors and review Applicants' financial filings. The ZECs Order fails to accurately represent, much less explain, the decision to reject analyses which demonstrate the flaws in Applicants' financial filings. Applicants purport to account for risk, but do not. Applicants' analysis improperly incorporates a guarantee instead of risk. Aa169-71. Such adjustments are outside of the scope of the financial criterion defined in the ZECs Statute and must be excluded.

The ZECs Order's failure to explain the factual basis for accepting Applicants' analysis concerning the financial criterion is arbitrary and capricious. The extensive discussion of matters not pertinent to the financial criterion and other

statutory criteria are off point and do not compensate for the failure to address the financial criterion. Aa611-3.

D. The ZECs Order Fails to Consider Record Evidence Affirmatively Showing the Plants' Failure to Satisfy the Financial Criterion.

On January 31, 2019, the Market Monitor provided its own independent analysis affirmatively showing that the plants' asserted benefits are not at risk of loss because they are projected to fully cover their costs and risks over the next three years: "[i]n summary, the IMM concludes that the Hope Creek 1, Salem 1 and Salem 2 units are expected to more than cover their avoidable costs over the next three years. As a result, none of the units meets the standard for a subsidy under the ZECs program. The nuclear power plants are expected to fully cover their costs and risks." Aa156.

The Market Monitor showed that the Applicant understated revenues and overstated costs projected over the next three years. Aa156. The Market Monitor explicitly analyzed the Applicants' proposed approach to quantifying the risks of the plants. The Applicants proposed to include a very significant fixed operations risk adder and a comparable fixed market risk adjustment to expected costs. The Market Monitor explained that the Applicant's proposed risk adder would "hold [them] harmless from reductions in revenues and increases in costs." Aa159. The Market Monitor explained that Applicants make no attempt to

account for the probabilities of costs being lower than expected or revenues being higher than expected, an essential element to any proper analysis of risk. Aa168-9.

Applicants simply ignored the probability that revenues would be higher than their own estimate. Applicants ignored the full distribution of expected revenues and requested an adder based on the probability that revenues will be lower than projected. Applicants fail to explain why this is an appropriate measure of risk; it is not. Applicants fail to explain why they do not use the mean expected revenues or a weighted average of the range of expected revenues. Applicants ask customers to hold them harmless through the guaranteed risk adder from low probability events that are within the control of Applicants including higher operational costs. Applicants examine the probability distribution of potential outcomes, pick only the very low probability negative events that result in risk adders and assert that this is the definition of risk; it is not.

Applicants assert that their need for a subsidy is higher than supported by actual costs and revenues. Applicants assert that ratepayers should hold them harmless from two types of risk by paying higher subsidies. Applicants request that ratepayers hold them harmless from reductions in revenues and increases in costs. But Applicants do not propose that the subsidy level be reduced based on the probability that revenues are higher and/or

costs are lower than forecast. In proposing risk adders, Applicants request that ratepayers not only cover their costs, but that ratepayers should pay a significant additional markup over actual revenues to protect Applicants from any possibility that costs are higher or revenues lower than Applicants actually expect.

The Applicants' operational risk adder is not based on any analysis. It is simply asserted. The Applicants' market risk adder is based on one tail of the distribution of expected prices and revenues.

Applicants effectively propose to include a guarantee of higher revenues through ZECs based on the unsupported risk adder. The ZECs Statute does not provide for a guarantee nor does it provide for a one-sided analysis of risk. Aa183. The ZECs Order confirms that the ZECs Statute does not provide for a guarantee. Aa606. Applicants' inclusion of values in their calculations representing a guarantee should be excluded. The Market Monitor Report demonstrated that the actual value for risk, when accounting for the full range of possible outcomes, is negative and not positive. In the interests of being conservative, the Market Monitor set the risk adder to zero.

Applicants' analysis does not comply with the standard included in the ZECs Statute. The ZECs Statute provided for an accounting of risk in evaluating whether the financial criterion

is satisfied. N.J.S.A. 48:3-87.5(e)(2). Approval of Applicants' guarantee instead of the required risk factor is inconsistent with the BPU's finding that it lacks discretion to depart from the statutory text.

The Market Monitor Analysis includes subsections specifically addressing the calculation of risks, including calculation of both an operational risk adder and a market risk adder. Aa171-2. The final costs include a zero value for risk, which is conservatively high. The record supports a negative value for risk, based on numerous pending market design proposals that, if adopted, would raise revenues. Id. Retiring the plants would risk the loss of the opportunity to receive increased revenues. The ZECs Order determines that risk must be included in the calculation, but ZECs did not find that the ZECs Statute requires a positive value that is not based in the facts and is contradicted by the facts. The Market Monitor analysis concludes that expected revenues exceed expected costs, and that continues to be the case after explicitly accounting for risk.

The Applicants fail, in their risk analysis, to recognize that the ZECs Statute provides that the Applicants may reapply for ZECs one year later if ZECs are not provided in response to the first application. The ZECs Order also ignores this missing element of the Applicants' risk analysis. The statutory process itself mitigates the risk asserted by Applicants, in addition to

the factors documented in the Market Monitor Analysis. In addition to the direct refutation of the Applicants' approach to risk, it is logically incorrect to provide for a risk adder to address risk that is within the power of the Applicants to address and within the power of the BPU to grant. If the plants' revenues exceed costs in the next year, there would likely be no reason to reapply for ZECs, but the option is available. If the Applicants believe that the results in the next year support it, the Applicants can reapply and the BPU could grant ZECs for the following three years, if justified.

Consistent with both the ZECs Statute and its interpretation in the ZECs Order, the Market Monitor Analysis provides record evidence that includes risk in the calculation of the plants' financial condition. The ZECs Order ignores the Market Monitor Analysis without direct explanation. It appears that the BPU may have conflated the Market Monitor Analysis with other record evidence, but the treatment of the Market Monitor Analysis is not explained. See ZECs Order at 13 ("Staff, relying on its own review, as well as the comments of Rate Counsel, the Independent Market Monitor, and other participants, rejected these risk calculations..."). Aa611. It is arbitrary and capricious to ignore record evidence, particularly when such evidence applies to the core issue of the case and is the only evidence to bear directly on the core issue.

The BPU performed no substantive analysis of risk despite the rich record before it. The BPU's conclusions related to risk should be rejected as unsupported by the record and unsupported by logic or any explanation. As a result, the ZECs Order is arbitrary and capricious, and it should be reversed.

E. The ZECs Order Improperly Considers Criteria Not in the ZECs Statute.

The ZECs Order is flawed for its improper consideration of eligibility criteria that are not part of the ZECs Statute. Adding additional criteria is illogical, and arbitrarily and capriciously changes the requirements of the statute. Adding nonstatutory criteria disadvantages an applicant. If an applicant fails one of the five statutory criteria, there is no point to the consideration of additional outside factors: the application fails. If an applicant meets the five statutory criteria, an applicant then should not be required to satisfy outside factors, one or more of which it may fail to satisfy.

The reliance on "outside factors" is unexplained. Aa613. It is apparently the product of confusion about separate and sequential processes: determining statutory eligibility and, if needed, determining rank order among eligible plants, based on identified ranking factors.

The BPU finding allowing consideration of "outside factors" occurs in the same sentence that determines that all factors

included in the ZECs Statute must be considered. The ZECs Order acknowledges the applicable eligibility criteria. Aa605. The ZECs Order rejects reliance on the analysis sponsored by Staff on the grounds that it does not apply the BPU's interpretation of the statutory criteria to require inclusion of risk in the financial calculations. Aa612-3. The ZECs Order correctly required application of the statutory criteria.

The ZECs Order is also deficient because it fails to acknowledge that the Market Monitor did include risk in its calculations and because it fails to recognize the evident flaws in the Applicants' approach to risk. By failing to acknowledge and correctly represent the Market Monitor Analysis, the ZECs Order necessarily fails to properly evaluate it. Aa611-2. Staff and its consultant also considered the risks, and the BPU's factual finding regarding Staff consultant's analysis is not correct. Aa691-3.

Despite the clear criteria in the ZECs Statute, the BPU relies on nonstatutory criteria in connection with its finding in the ZECs Order. The contradiction appears in the same key sentence:

Based on the specific language in the Act, ... the Board believes that the Legislature specifically intended that these considerations be accounted for in the Board's review of the ZECs applications and that the Board must consider these risks along with other outside factors, including

fuel diversity, resiliency, and the impact of nuclear power plant retirement on RGGI, New Jersey's economy, carbon, and the Global Warming Response Act. Had the Eligibility Team and LAI 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 BPU is correct in finding that it must administer the statute by its terms. The BPU acknowledged "its statutory obligation to review the record, analyze the application materials, and exercise its independent discretion to determine whether the applications satisfy the eligibility requirements specified." Aa606. But the BPU goes well beyond its obligation and its requirement when it relies on specific language in the Act that is explicitly not part of the criteria for receiving ZECs. The BPU is not required to, or permitted to, use specific language in the Act out of context and to modify the clearly defined eligibility criteria in the Act. The ZECs Order reads requirements into the ZECs Statute that are not there.

The ZECs Order suggests that the Commission is accepting Staff's proposal to include nonstatutory criteria in the eligibility analysis. Aa613. Staff made no such proposal. Staff's other factors are included in Staff consultant's separately developed and applied ranking analysis. Aa677-8;

Aa697-701. The ranking analysis criteria are not in the statutory text and would only apply after a determination is made on eligibility. The ranking analysis was irrelevant for and not material to the BPU's decision in the ZECs Order because there were not enough applications in the applicable cycle to require ranking them. Aa611.

It appears that the ZECs Order improperly confuses Staff's ranking criteria with eligibility criteria. On review, the mistake must be corrected to avoid current and future improper administration of the ZECs Statute and to protect the efficiency and clarity of the applications process.

The purpose of the ZECs Statute is to pay ZECs to nuclear plants that meet the eligibility criteria which require that plant owners can accurately demonstrate that the plant's asserted benefits are at risk of loss because the plant is projected to not fully cover its costs and risks, and to not pay ZECs to nuclear plants that cannot so demonstrate. Neither fuel diversity, resilience nor any other identified outside factor is relevant to whether nuclear plants need subsidies. In addition, the ZECs Order ignores evidence that the assertions about these outside factors are incorrect and unsupported by analysis. Aa177-8. The ZECs Statute does not include such outside factors in the statutory eligibility criteria to be applied by the BPU.

The BPU apparently and improperly took into consideration Applicants' statements that it would shut down the plants "if one or two units are denied ZECs." Aa605-6. The ZECs Order did not explicitly rely on concern that the plants would be shut down without subsidies, regardless of whether projected cost and risks were covered, but Commissioners expressed concerns at BPU agenda meetings that the Applicants would retire the plants without subsidies: "PSEG has made it quite clear that they will not continue to operate the nuclear facilities absent the subsidies." Aa739.

The ZECs Order commits this error in spite of its preliminary finding that the ZECs Statute does not guarantee subsidies, and its pledge to "exercise its independent discretion to determine whether the nuclear plants that have applied satisfy the objectives of the Act." Aa613. The discussion in the ZECs Order contradicts the preliminary finding, assumes contrary to the facts that the plants will retire without ZECs, accepts Applicants' threat to shut down all three plants if even one does not receive ZECs, emphasizes the economic effects of such potential retirements and ignores the facts about the financial condition of each individual plant. Aa612-3. Commissioner Chivukula's dissent emphasized these deficiencies. Aa616-9.

Applicants' statements, regardless of their truth and regardless of their actual intentions, are not relevant to the objective analysis required to satisfy the financial criterion. Whether Applicants would or could retire a nuclear plant that passes the financial criterion has not been established in the record of this proceeding. Applicants' decision to retire a nuclear plant operating in PJM is subject to federal regulatory requirements. The ZECs Order is deficient to whatever extent it improperly relied on speculative and unsubstantiated statements of intent by the owner in place of the objective eligibility criteria included in the ZECs Statute.

CONCLUSION

For these reasons, the BPU's decision should be reversed.

Respectfully Submitted,

CARLIN & WARD, P.C.

By: /s/ *Michael J. Ash*

Michael J. Ash

Counsel for Monitoring Analytics, LLC