



STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

OFFICE OF THE EXECUTIVE DIRECTOR

IN THE MATTER OF THE APPLICATION OF PSEG) ORDER SETTING A
NUCLEAR, LLC FOR THE ZERO EMISSION) PROCEDURAL SCHEDULE
CERTIFICATE PROGRAM - HOPE CREEK)
)
)
) DOCKET NO. ER20080559

Parties of Record:

Stefanie A. Brand, Esq., Director, New Jersey Division of Rate Counsel
Philip J. Passanante, Esq., Assistant General Counsel, Atlantic City Electric Company
Robert H. Oostdyk, Jr., Esq., for Butler Power and Light Company
Joshua R. Eckert, Esq., Jersey Central Power and Light Company
Matthew Weissman, Esq., Managing Counsel, State Regulatory, Public Service Electric and Gas Company
Margaret Comes, Esq., Associate Counsel, Rockland Electric Company
Jeanne J. Dworetzky, Esq., Assistant General Counsel, Exelon Generation Company, LLC
Grace H. Park, Deputy General Counsel and Chief Litigation Counsel, PSEG Nuclear

BY PRESIDENT JOSEPH L. FIORDALISO

BACKGROUND

On May 23, 2018, Governor Phil Murphy signed into law L. 2018, c. 16 (C.48:3-87.3 to -87.7) ("Act"). The Act required the Board to create a program and mechanism for the issuance of Zero Emission Certificates ("ZECs"), each of which represents the fuel diversity, air quality, and other environmental attributes of one megawatt-hour of electricity generated by an eligible nuclear power plant selected by the Board to participate in the program.¹ Under the program, certain eligible nuclear power plants may be approved to provide ZECs for the State's energy supply, which in turn will be purchased by New Jersey's four investor-owned electric distribution companies, Atlantic City Electric ("ACE"), Jersey Central Power and Light Company ("JCP&L"), Public Service Electric and Gas Company ("PSE&G"), and Rockland Electric Company ("RECO"), and municipal electric distribution company Butler Electric Utility ("Butler") (collectively, "EDCs").

¹ The Act identifies the basic steps for the Board to establish a ZEC program, including program logistics, funding, costs, application, eligibility requirements, selection process, and the timeframes for meeting several requirements of the Act. N.J.S.A. 48:3-87.5.

Under N.J.S.A. 48:3-87.5(a), a ZEC applicant "shall provide to the board any financial information requested by the board pertaining to the nuclear power plant." Also, N.J.S.A. 48:3-87.5(e)(1) through (e)(5) specifies the criteria for an applicant to be certified by the Board as an eligible nuclear power plant. Four of the five criteria, N.J.S.A. 48:3- 87.5(e)(1), (2), (4), and (5)), deal with information that is readily ascertainable. The remaining criterion, N.J.S.A. 48:3-87.5(e)(3), requires the applicant to demonstrate to the satisfaction of the Board that, among other things, the fuel diversity, air quality, and other environmental attributes of the nuclear power plant "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 [it] experiences a material financial change." Id.

Because certain application information may be claimed to be confidential by the ZEC applicant, the Act provides:

The financial and other information required pursuant to this subsection may be submitted on a confidential basis and shall be treated and maintained as confidential by the board and shall not be subject to public disclosure, notwithstanding any law to the contrary, including the common law. The board and the Attorney General shall jointly approve the disclosure of such confidential information to a party that they deem essential to aid the board in making the determinations required under this subsection, provided that the party is not in a position such that disclosure could harm competition and the party agrees in writing to maintain the confidentiality of the confidential information.

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

PROCEDURAL HISTORY

On August 12, 2020, the Board established the application process for the second eligibility period (June 1, 2022 – May 31, 2025) and ordered that the application period be open and remain open until October 1, 2020 ("August 12, 2020 Order").² The Board also designated President Joseph L. Fiordaliso, as the presiding Commissioner, who is authorized to rule on all matters that arise during the proceeding and to modify any schedules that may be set as necessary to secure a just and expeditious determination of the issues, subject to ratification by the full Board in any final decision.

On August 19, 2020, PSEG Nuclear, LLC ("PSEG Nuclear") filed a Notice of Intent to File Applications in connection with the ZEC proceeding. PSEG Nuclear provided that it is the sole owner of the Hope Creek Plant.³

² 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 12, 2020) (Agenda Item 9A).

³ PSEG is also the operator and majority co-owner of Salem 1 and Salem 2 along with Exelon Generation Company, LLC ("Exelon Generation") as co-owner of the minority interests. Therefore, PSEG's notice also discussed its intent to file applications with respect to its three nuclear generation units: (1) Salem 1; (2) Salem 2; and (3) Hope Creek. PSEG expects to submit the applications for the Salem units on behalf of both PSEG and Exelon Generation. Exelon Generation will submit separately supplemental information that cannot be shared with PSEG. Therefore, all applications have a separate docket number.

DISCUSSION AND FINDINGS

In compliance with the Act, and as Presiding Commissioner in this matter, I **HEREBY DIRECT** all entities seeking to intervene or participate to file the appropriate application with the Board on or before September 16, 2020, and to file any opposition thereto or support thereof with the Board on or before September 22, 2020.

Furthermore, in the interest of securing a just and expeditious determination of the issues, I **HEREBY EXTEND** the deadline to file Requests for Access to Confidential Information to September 16, 2020, and consequently extend the deadline to file any opposition thereto or support thereof to on or before September 22, 2020. Those entities seeking access to confidential information included in the non-redacted version of the application shall sign and submit the Agreement of Non-Disclosure of Information Claimed to Be Confidential (“NDA”), signed on behalf of the applicant, as part of any Request for Access to Confidential Information. This NDA is included as Attachment A. As such, I **HEREBY ORDER** that the Procedural Schedule regarding to this Docket, attached hereto as Attachment B, be controlling in this matter, and take precedence over any prior Orders or Schedules previously entered.

Additionally, I **HEREBY DIRECT** that:

1. In accordance with N.J.S.A. 48:3-87.5(a), any party seeking confidential information must certify that it meets the disclosure criteria set forth in N.J.S.A. 48:3-87.5(a).
2. If the NDA has not been fully executed, the applicant shall serve the redacted, public version of the application on the entity electronically, with a hard copy of only a cover letter and an index of the included documents to the Board and other parties to be determined. Applicants shall also serve one electronic copy each to participants. In the event the Board determines it needs a full hard copy, one will be requested and provided within 10 days of request. Applicants shall also serve one electronic copy each to participants.
3. If the NDA has been fully executed on or before the date of service, or once the NDA has been fully executed, the applicant shall electronically serve the full application, including all information provided on a confidential basis, to the entities granted access to confidential information, as described above.
4. Applicants shall submit spreadsheets in an Excel or comparable format.

This ruling is subject to ratification or modification by the Board as it deems appropriate during the proceedings in this matter.

This Order shall be effective on September 10, 2020.

DATED: September 10, 2020

By:



JOSEPH L. FIORDALISO
PRESIDENT

ATTACHMENT A:

IN THE MATTER OF THE APPLICATION OF PSEG NUCLEAR, LLC FOR THE ZERO
EMISSION CERTIFICATE PROGRAM – HOPE CREEK

DOCKET NO. ER20080559

NON DISCLOSURE AGREEMENT

**STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES**

I/M/O THE APPLICATION OF PSEG NUCLEAR, LLC FOR THE ZERO EMISSION CERTIFICATE PROGRAM - HOPE CREEK	DOCKET NO. ER20080559
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**AGREEMENT OF NON-DISCLOSURE OF INFORMATION
CLAIMED TO BE CONFIDENTIAL**

It is hereby AGREED, as of the ____ day of _____, 2020, by and among PSEG Nuclear, LLC ("**APPLICANT**"), the Staff of the New Jersey Board of Public Utilities ("Board Staff"), and _____ (collectively, the "Parties"), who have agreed to execute this Agreement of Non-Disclosure of Information Claimed to be Confidential ("Agreement"), and to be bound thereby that:

WHEREAS, in connection with the above-captioned proceeding before the Board of Public Utilities ("Board"), and in which the Board has designated President Joseph L. Fiordaliso as the Presiding Officer to rule on all motions that arise during the pendency of final Board action as required under N.J.S.A. 48:3-87.3 to -87.7, **APPLICANT** and/or another party ("Producing Party") may be requested or required to provide documents, analyses and/or other data or information regarding the subject matter of this proceeding that the Producing Party may claim constitutes or contains confidential, proprietary or trade secret information, or which otherwise may be claimed by the Producing Party to be of a market-sensitive, competitive, confidential or proprietary nature (hereinafter sometimes referred to as "Confidential Information" or "Information Claimed to be Confidential"); and

WHEREAS, the Parties wish to enter into this Agreement to facilitate the exchange of information while recognizing that under Board regulations at N.J.A.C. 14:1-12 et seq., a request for confidential treatment shall be submitted to the Custodian who is to rule on requests made

pursuant to the Open Public Records Act ("OPRA")⁴, N.J.S.A. 47:1A-1 et seq., unless such information is to be kept confidential pursuant to court or administrative order (including, but not limited to, an Order by the Presiding Officer sealing the record or a portion thereof pursuant to N.J.A.C. 1:1-14.1, and the parties acknowledge that an Order by the Presiding Officer to seal the record is subject to modification by the Board), and also recognizing that a request may be made to designate any such purportedly confidential information as public through the course of this administrative proceeding; and

WHEREAS, the Parties acknowledge that unfiled discovery materials are not subject to public access under OPRA; and

WHEREAS, the Parties acknowledge that, despite each Party's best efforts to conduct a thorough pre-production review of all documents and electronically stored information ("ESI"), some work product material and/or privileged material ("protected material") may be inadvertently disclosed to another Party during the course of this proceeding; and

WHEREAS, the undersigned Parties desire to establish a mechanism to avoid waiver of privilege or any other applicable protective evidentiary doctrine as a result of the inadvertent disclosure of protected material;

NOW, THEREFORE, the Parties hereto, intending to be legally bound thereby, **DO HEREBY AGREE** as follows:

1. The inadvertent disclosure of any document or ESI which is subject to a legitimate claim that the document or ESI should have been withheld from disclosure as protected material

⁴ Although OPRA and the Board Rules are referenced in this Agreement, N.J.S.A. 48:3-87.5(a) applies if there is any conflict between N.J.S.A. 48:3-87.5(a) and OPRA or the Board Rules regarding the disclosure of confidential information.

shall not waive any privilege or other applicable protective doctrine for that document or ESI or for the subject matter of the inadvertently disclosed document or ESI if the Producing Party, upon becoming aware of the disclosure, promptly requests its return and takes reasonable precautions to avoid such inadvertent disclosure.

2. Except in the event that the receiving party or parties disputes the claim, any documents or ESI which the Producing Party deems to contain inadvertently disclosed protected material shall be, upon written request, promptly returned to the Producing Party or destroyed at the Producing Party's option. This includes all copies, electronic or otherwise, of any such documents or ESI. In the event that the Producing Party requests destruction, the receiving party shall provide written confirmation of compliance within thirty (30) days of such written request. In the event that the receiving party disputes the Producing Party's claim as to the protected nature of the inadvertently disclosed material, a single set of copies may be sequestered and retained by and under the control of the receiving party until such time as the Producing Party has received final determination of the issue by the Board of Public Utilities or the Presiding Officer, provided that the Board has not modified or rejected an order by the Presiding Officer.

3. Any such protected material inadvertently disclosed by the Producing Party to the receiving party pursuant to this Agreement shall be and remain the property of the Producing Party.

4. Any Information Claimed to be Confidential that the Producing Party produces to any of the other Parties in connection with the above-captioned proceeding and pursuant to the terms of this Agreement shall be specifically identified and marked by the Producing Party as Confidential Information when provided hereunder. If only portions of a document are claimed to be confidential, the producing party shall specifically identify which portions of that document are claimed to be confidential. Additionally, any such Information Claimed to be Confidential shall be provided in the form and manner prescribed by the Board's regulations at N.J.A.C. 14:1-12 et

seq., unless such information is to be kept confidential pursuant to court or administrative order. However, nothing in this Agreement shall require the Producing Party to file a request with the Board's Custodian of Records for a confidentiality determination under N.J.A.C. 14:1-12 et seq. with respect to any Information Claimed to be Confidential that is provided in discovery and not filed with the Board.

5. With respect to documents identified and marked as Confidential Information, if the Producing Party's intention is that not all of the information contained therein should be given protected status, the Producing Party shall indicate which portions of such documents contain the Confidential Information in accordance with the Board's regulations at N.J.A.C. 14:1-12.2 and 12.3. Additionally, the Producing Party shall provide to all signatories of this Agreement full and complete copies of both the proposed public version and the proposed confidential version of any information for which confidential status is sought.

6. With respect to all Information Claimed to be Confidential, it is further agreed that:

- (a) Access to the documents designated as Confidential Information, and to the information contained therein, shall be limited to the Party signatories to this Agreement and their identified attorneys, employees, and consultants whose examination of the Information Claimed to be Confidential is required for the conduct of this particular proceeding.
- (b) Recipients of Confidential Information shall not disclose the contents of the documents produced pursuant to this Agreement to any person(s) other than their identified employees and any identified experts and consultants whom they may retain in connection with this proceeding, irrespective of whether any such expert is retained specially and is not expected to testify, or is called to testify in this proceeding. All consultants or experts of any Party to this Agreement who are to receive copies of documents produced pursuant to this Agreement shall have previously executed a copy of the

Acknowledgement of Agreement attached hereto as "Attachment I," which executed Acknowledgement of Agreement shall be forthwith provided to counsel for the Producing Party, with copies to counsel for Board Staff and Rate Counsel.

- (c) No other disclosure of Information Claimed to be Confidential shall be made to any person or entity except with the express written consent of the Producing Party or their counsel, or upon further determination by the Custodian, or order of the Board, the Government Records Council or of any court of competent jurisdiction that may review this matter.

7. The undersigned Parties have executed this Agreement for the exchange of Information Claimed to be Confidential only to the extent that it does not contradict or in any way restrict any applicable Agency Custodian, the Government Records Council, the Presiding Officer, the Board, or any court of competent jurisdiction from conducting appropriate analysis and making a determination as to the confidential nature of said information, where a request is made pursuant to OPRA, N.J.S.A. 47:1A-1 et seq. Absent a determination by any applicable Custodian, Government Records Council, the Presiding Officer, the Board, or any court of competent jurisdiction that a document is to be made public, the treatment of the documents exchanged during the course of this proceeding and any subsequent appeals is to be governed by the terms of this Agreement.

8. In the absence of a decision by the Custodian, Government Records Council, the Presiding Officer, or any court of competent jurisdiction, the acceptance by the undersigned Parties of information which the Producing Party has identified and marked as Confidential Information shall not serve to create a presumption that the material is in fact entitled to any special status in these or any other proceedings. Likewise, the affidavit submitted pursuant to N.J.A.C. 14:1-12.8 shall not alone be presumed to constitute adequate proof that the Producing Party is entitled to a protective order for any of the information provided hereunder.

9. In the event that any Party seeks to use the Information Claimed to be Confidential in the course of any hearings or as part of the record of this proceeding, the Parties shall seek a determination by the trier of fact as to whether the portion of the record containing the Information Claimed to be Confidential should be placed under seal. Furthermore, if any Party wishes to challenge the Producing Party's designation of the material as Confidential Information, such Party shall provide reasonable notice to all other Parties of such challenge and the Producing Party may make a motion seeking a protective order. In the event of such challenge to the designation of material as Confidential Information, the Producing Party, as the provider of the Information Claimed to be Confidential, shall have the burden of proving that the material is entitled to protected status. However, all Parties shall continue to treat the material as Confidential Information in accordance with the terms of this Agreement, pending resolution of the dispute as to its status by the trier of fact.

10. Confidential Information that is placed on the record of this proceeding under seal pursuant to a protective order issued by the Board, the Presiding Officer, provided that the Board has not modified or rejected an order by the Presiding Officer, or any court of competent jurisdiction shall remain with the Board under seal after the conclusion of this proceeding. If such Confidential Information is provided to appellate courts for the purposes of an appeal from this proceeding, such information shall be provided, and shall continue to remain, under seal.

11. This Agreement shall not:

- (a) Operate as an admission for any purpose that any document or information produced pursuant to this Agreement is admissible or inadmissible in any proceeding;
- (b) Prejudice in any way the right of the Parties, at any time, on notice given in accordance with the rules of the Board, to seek appropriate relief in the exercise of discretion by the Board for violation of any provision of this Agreement.

12. Within forty-five (45) days of the final Board Order resolving the above-referenced proceeding, all documents, materials and other information designated as "Confidential Information," regardless of format, shall be destroyed or returned to counsel for the Producing Party. In the event that such Board Order is appealed, the documents and materials designated as "Confidential Information" shall be returned to counsel for the Producing Party or destroyed within forty-five (45) days of the conclusion of the appeal. Notwithstanding the above return requirement, Board Staff and Rate Counsel may maintain in their files copies of all pleadings, briefs, transcripts, discovery and other documents, materials and information designated as "Confidential Information," regardless of format, exchanged or otherwise produced during these proceedings, provided that all such information and/or materials that contain Information Claimed to be Confidential shall remain subject to the terms of this Agreement. The Producing Party may request consultants who received Confidential Information who have not returned such material to counsel for the Producing Party as required above to certify in writing to counsel for the Producing Party that the terms of this Agreement have been met upon resolution of the proceeding.

13. The execution of this Agreement shall not prejudice the rights of any Party to seek relief from discovery under any applicable law providing relief from discovery.

14. The Parties agree that one original of this Agreement shall be created for each of the signatory parties for the convenience of all. The signature pages of each original shall be executed by the recipient and transmitted to counsel of record for **APPLICANT**, who shall send a copy of the fully executed document to all counsel of record. The multiple signature pages shall be regarded as, and given the same effect as, a single page executed by all Parties.

IN WITNESS THEREOF, the undersigned Parties do **HEREBY AGREE** to the form and execution of this Agreement.

PSEG NUCLEAR, LLC

By: _____

**GURBIR S. GREWAL
ATTORNEY GENERAL
OF NEW JERSEY
Attorney for the Staff of the
Board of Public Utilities**

By: _____
Deputy Attorney General

By: _____

DATED: _____, 2020

ATTACHMENT I
STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

I/M/O THE APPLICATION OF PSEG NUCLEAR, LLC FOR THE ZERO EMISSION CERTIFICATE PROGRAM - HOPE CREEK	DOCKET NO. ER20080559
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ACKNOWLEDGMENT OF AGREEMENT

The undersigned is an attorney, employee, or consultant, or expert for a party or an intervenor who, under N.J.S.A. 48:3-87.5(a), has received, or is expected to receive, Confidential Information provided by **APPLICANT** or by another party (Producing Party) which has been identified and marked by the Producing Party as "Confidential Information." The undersigned acknowledges receipt of the Agreement of Non-Disclosure of Information Claimed to be Confidential and agrees to be bound by the terms of the Agreement.

Dated: _____ By: _____

(Name, Title and Affiliation)

ATTACHMENT B

IN THE MATTER OF THE APPLICATION OF PSEG NUCLEAR, LLC FOR THE ZERO
EMISSION CERTIFICATE PROGRAM – HOPE CREEK

DOCKET NO. ER20080559

Procedural Schedule

July 1, 2020	Staff issues application requirements for the second eligibility period for public comment
August 19, 2020	Applicants submit Notices of Intent to File
September 10, 2020	President Fiordaliso establishes procedural schedule
September 16, 2020	Motions for intervention/participation and Requests for access to confidential information (extended)
September 22, 2020	Opposition to/support of intervention/participation and Opposition to/support of access to confidential information (extended)
September 29, 2020	Order on motions and access to confidential information
October 1, 2020	Applications due (public and confidential versions)
October 15, 2020	Discovery requests on initial testimony
October 29, 2020	Responses to discovery requests on initial testimony
November 5, 2020	Additional discovery requests
November 19, 2020	Responses to additional discovery requests
Week of November 23, 2020	Discovery teleconference
January 2021	Public hearings on applications
January 6, 2021	Comments on Staff's preliminary findings
January 20, 2021	Final discovery requests
January 27, 2021	Responses to final discovery requests
February 2021	Evidentiary hearings
February 3, 2021	Final comments
March 3, 2021	Initial briefs
March 17, 2021	Reply briefs
On or before April 30, 2021	Board action

**IN THE MATTER OF THE APPLICATION OF PSEG NUCLEAR, LLC FOR THE ZERO
EMISSION CERTIFICATE PROGRAM – HOPE CREEK - DOCKET NO. ER20080559**

SERVICE LIST

Division of Rate Counsel

140 East Front Street, 4th Floor
Post Office Box 003
Trenton, NJ 08625-0003

Stefanie A. Brand, Esq., Director
sbrand@rpa.nj.gov

Brian Lipman, Esq., Litigation Manager
blipman@rpa.nj.gov

Felicia Thomas-Friel, Esq.
Managing Attorney – Gas
ftthomas@rpa.nj.gov

Ami Morita, Esq.
Assistant Deputy Rate Counsel
amorita@rpa.nj.gov

Sarah H. Steindel, Esq.
Assistant Deputy Rate Counsel
ssteinde@rpa.nj.gov

Debora Layugan, Paralegal
dlayugan@rpa.nj.gov

Tylise Hyman, Legal Secretary
thyman@rpa.nj.gov

Rate Counsel Consultants

Andrea Crane
The Columbia Group
2805 East Oakland Park Blvd, #401
Ft. Lauderdale, FL 33306
ctcolumbia@aol.com

Max Chang
Bob Fagan
Synapse Energy Economics, Inc.
485 Massachusetts Ave., Suite 2
Cambridge, MA 02139
mchang@synapse-energy.com
rfagan@synapse-energy.com

Division of Law

Division of Law
Public Utilities Section
R.J. Hughes Justice Complex, 7th Floor West
25 Market Street, P.O. Box 112
Trenton, NJ 08625

David Apy, Assistant Attorney General
david.apy@law.njoag.gov

Daren Eppley, Deputy Attorney General
Section Chief
daren.eppley@law.njoag.gov

Pamela Owen, Deputy Attorney General
Assistant Section Chief
pamela.owen@law.njoag.gov

Alex Moreau, Deputy Attorney General
alex.moreau@law.njoag.gov

Brandon Simmons, Deputy Attorney General
Brandon.Simmons@law.njoag.gov

Atlantic City Electric Company

Pepco Holdings LLC – 92DC56
500 N. Wakefield Drive
P.O. Box 6066
Newark, DE 19714-6066

Philip J. Passanante, Esq.
Assistant General Counsel
philip.passanante@pepcoholdings.com

Susan DeVito
Director, Pricing and Regulatory Services
susan.devito@pepcoholdings.com

Thomas M. Hahn, Principal Rate Analyst
thomas.hahn@pepcoholdings.com

Board of Public Utilities

44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, NJ 08625-0350

Aida Camacho-Welch, Secretary of the Board
board.secretary@bpu.nj.gov

Paul Flanagan, Esq., Executive Director
paul.flanagan@bpu.nj.gov

Bob Brabston, Deputy Executive Director
robert.brabston@bpu.nj.gov

Benjamin Witherell, Chief Economist
benjamin.witherell@bpu.nj.gov

Abe Silverman, General Counsel
abe.silverman@bpu.nj.gov

Carole Artale, Esq. Deputy General Counsel
Carol.Artale@bpu.nj.gov

Heather L. Weisband, Esq., Senior Counsel
Heather.weisband@bpu.nj.gov

Ken Sheehan, Esq., Ombudsman
Ken.sheehan@bpu.nj.gov

Kevin Nedza, Director of Special Projects
kevin.nedza@bpu.nj.gov

Stacy Peterson, Director, Division of Energy
stacy.peterson@bpu.nj.gov

Cynthia Holland, Director, Office of Federal and
Regional Policy
cynthia.holland@bpu.nj.gov

Charles Gurkas, Paralegal
charles.gurkas@bpu.nj.gov

Butler Electric Utility

Robert H. Oostdyk, Jr., Esq.
Murphy McKeon P.C.
51 Route 23 South
P.O. Box 70
Riverdale, NJ 07456
roostdyk@murphymckeonlaw.com

Jason Lampmann
Borough Administrator
One JCP&L Road
Butler, NJ 07405
jlampmann@butlerborough.com

Jersey Central Power and Light

300 Madison Avenue
PO Box 1911
Morristown, NJ 07962-1911

Joshua R. Eckert, Esq.
Attorney
jeckert@firstenergycorp.com

Mark A. Mader
Director, Rates and Regulatory Affairs – NJ
mamader@firstenergycorp.com

Tom Donadio
tdonadio@firstenergycorp.com

Yongmei Peng
ypeng@firstenergycorp.com

Lauren M. Lepkoski, Supervising Counsel
FirstEnergy Service Company
2800 Pottsville Pike
Reading, PA 19612-6011
llepkoski@firstenergycorp.com

Public Service Electric and Gas Company

80 Park Plaza, T5G
PO Box 570
Newark, NJ 07102-4194

Matthew Weissman
Managing Counsel, State Regulatory
matthew.weissman@pseg.com

Steven Swetz
Senior Director, Corporate Rates and
Revenue Requirements
stephen.swetz@pseg.com

Michele Falcao
Regulatory Filings Supervisor
michele.falcao@pseg.com

Caitlyn White
Regulatory Case Coordinator
caitlyn.white@pseg.com

Michael McFadden
michael.mcfadden@pseg.com

Bernard Smalls
bernard.smalls@pseg.com

PSEG Nuclear LLC

Grace H. Park
Deputy General Counsel and
Chief Litigation Counsel
PSEG Services Corporation
80 Park Plaza, T5D
Newark, New Jersey 07101-4194
grace.park@pseg.com

Exelon Generation Company, LLC

Jeanne J. Dworetzky
Assistant General Counsel
101 Constitution Avenue, NW, Suite 400E
Washington, DC 20001
jeanne.dworetzky@exeloncorp.com

Rockland Electric Company

4 Irving Place
New York, NY 10003

Jane J. Quin, Vice President
quinja@coned.com

Margaret Comes
Associate Counsel
comesm@coned.com

John L. Carley
Associate General Counsel
carleyj@coned.com

Kelly Ziegler
zieglerk@coned.com

Kristen M. Barone
baronekr@oru.com

JoAnne Siebel
seibeljo@oru.com

Cheryl Ruggiero
ruggerioc@coned.com