

NEW JERSEY SENATE BILL 877 IS REALLY AN ENERGY TAX ON ELECTRICITY CONSUMERS AND AN APPROPRIATION TO TWO PROFITABLE FORTUNE 500 COMPANIES

Continuing its efforts to protect competitive power markets and consumers in New Jersey, EPSA has examined this year's initial version of legislation to unnecessarily subsidize the state's nuclear power plants. As with last year's bill that was not enacted into law, the latest proposal, unveiled in the state Senate on January 25, 2018 as Senate Bill 877, would force the state's consumers to pay more for electricity through a mandatory customer charge. The revenues raised would go to the two owners of New Jersey's nuclear power plants, PSEG and Exelon, each a Fortune 500 company and among the most profitable utilities in the country.

➤ ***Apply the Duck Test: The Bill "Walks and Talks" Like an Energy Tax***

- Peeling apart the legislative onion reveals that Senate Bill 877 proposes to use the sovereign legislative power of the State of New Jersey to impose what amounts to a tax on all electricity provided to all consumers of all kinds in the state to raise \$300 million each year.
- The legislation essentially appropriates the \$300 million each year to two companies, PSEG and Exelon. Most of these funds – while disguised as payments for a new currency created by the legislation and branded as a "zero emission certificate" – would likely flow through directly to the shareholders of each company in the form of increased earnings per share, higher dividend payments, and thus a higher price for each company's stock.
- The so-called "zero emission and fuel diversity attributes" that the revenues from the tax would compensate nuclear plant owners for are *already* being provided to consumers *without the imposition of additional out-of-market payments*. In fact, the actual intent and effect of the legislation is to compensate PSEG and Exelon for wholesale sales from their nuclear plants at rates *much higher* than the just and reasonable rates for those sales as determined under rules approved by the Federal Energy Regulatory Commission (FERC).

➤ ***How Does the Bill Impose a New Energy Tax on Electricity Consumers?***

- First, the new charge to be collected from consumers is set by statute in the fixed amount of .004 cents per kilowatt hour, which the Office of Legislative Services has estimated would raise \$300 million per year based on recent electricity consumption levels in New Jersey.
- Second, the charge is expressly non-bypassable and irrevocable, to be imposed on all the state's retail distribution customers regardless of whether they can shop among competitive retail suppliers other than the state's government-sanctioned monopoly distribution utilities. This means residential customers, small and large businesses, hospitals, schools, transit systems, and various units of state and local government, among others, cannot escape the tax regardless of their financial circumstances or electricity supply decisions. This makes New Jersey's economy less competitive relative to other states and competitors overseas.

- Third, Senate Bill 877 only *appears* to grant the Board of Public Utilities (BPU) the discretion to reduce the amount of the tax. For starters, the same paragraph that at first seemingly gives the BPU authority to reduce the amount of the charge on consumers, later takes it away by prohibiting the BPU from doing so if the reduced charge would not be sufficient to prevent the so-called “premature retirement” of the nuclear plants as determined by the owners of the plants themselves (see below for details). This circular language is a mirage. Furthermore, were the BPU to reduce the .004 cents per kilowatt hour charge, another provision of the bill would excuse the nuclear plant owners from performing as promised.

➤ ***Follow the Money: The Bill Appropriates Funds to PSEG & Exelon***

- PSEG and Exelon are guaranteed to receive the revenues raised by the tax because the state’s electric distribution utilities would be required by law to both collect the charge on consumers and then purchase the new “zero emission certificates” in amounts according to a formula set by statute (40% of electricity consumed) and the total amount of money raised, minus BPU costs, must be allocated to the nuclear plant owners, PSEG and Exelon.
- The bill essentially lets the owners of the state’s nuclear plants – and potentially their out-of-state plants in Pennsylvania and those of others – self-certify that they are eligible for the new subsidy program. This occurs because eligibility is *not* at the full discretion of the BPU nor determined by non-discriminatory criteria set by the BPU, but by detailed legislative provisions that only benefit the nuclear plant owners. The “tilt” is so obvious given that nuclear plant owners could qualify in perpetuity even if the plants are profitable today and going forward applying common sense and long accepted definitions of profitability.
- Examples of the legislative provisions that grant the nuclear plant owners the power to self-certify eligibility include supplying company certifications and data on a confidential basis without public disclosure, basing eligibility on multi-year projections that may or may not prove accurate, and self-calculations of various “risks” that all tilt in favor of the nuclear owners. These “operational and market risks” include unanticipated price fluctuations, operating difficulties, and wholesale capacity market penalties for non-performance that New Jersey’s restructuring law and federal wholesale market rules properly place on generators, not consumers, because only generators can prevent, manage, or hedge those costly risks.
- If not already preordained in favor of the two nuclear plant owners, the bill allows that, when determining need to qualify for subsidies, the nuclear plant owners must only show a bare minimum unspecified and unquantified “risk of loss.” There is no requirement that they prove a substantial or even likely “risk of loss” – any chance, no matter how small, is sufficient to force consumers to pay more for electricity. As EPSC testified last year, should the nuclear owners merely show a \$5 million shortfall in each year, as an example, the legislation allows them to qualify for a full share of the entire \$300 million.
- As with the nominal BPU authority to reduce the customer charge, the potential offsets to reduce what the plant owners would receive as subsidies are very faulty. For instance, only payments that *fully* “eliminate the need” for subsidies are offset (partial payments are not required to be offset). Similarly, the “double payment” protection is non-sensical since the wholesale market pricing reforms that PSEG and Exelon are separately seeking from federal regulators do not expressly pay for fuel diversity, resilience, or environmental attributes as the bill requires for the BPU to be able to reduce the total amounts paid to PSEG and Exelon.

➤ ***Do the Math: The One-Sided Artificial Attributes Arithmetic Does Not Add Up***

- PSEG and Exelon artificially package and hide the nature of the subsidies as payments to their shareholders for nuclear's "fuel diversity" and environmental attributes they say are not reflected in wholesale prices. They do so hoping to avoid a U.S. Supreme Court case that prohibits one state from interfering in how power prices are set in interstate power markets.
- New Jersey consumers are already receiving the "fuel diversity" and "zero carbon emissions" attributes of nuclear *today* through PJM's competitive regional wholesale markets *at the lowest electric energy prices in two decades*. To the extent that market conditions are challenging for suppliers, and they are, that is true for *all* suppliers, *nuclear and non-nuclear*, that *all* contribute to a resilient, diverse, and environmentally responsible power grid.
- Environmental attributes are already reflected in wholesale prices through the compliance costs imposed by the Clean Air Act and other environmental laws on sources of electricity that compete with nuclear. In addition, carbon reduction attributes will soon be reflected in electricity prices when New Jersey rejoins the Regional Greenhouse Gas Initiative (RGGI). That is a market-based, fuel neutral program that addresses carbon emissions in an efficient and non-discriminatory manner. By contrast, Senate Bill 877 is a separate, discriminatory scheme to pay a further premium to nuclear plants *over and above* the value determined through RGGI, while ignoring and not pricing the negative attributes of nuclear.
- Flying under an environmental flag to seek a premium price for their nuclear plants is more than ironic given that PSEG and others in the nuclear industry strongly supported the Trump Administration Department of Energy's proposal to pay *both* coal and nuclear plants extra for on-site fuel, which was widely seen as keeping uneconomic coal plants in operation. FERC flatly rejected that proposal by a bipartisan and unanimous 5-0 vote in early January 2018.
- Forcing consumers to pay a hefty premium for "fuel diversity" is illogical. The "fuel diversity" slogan was heavily invoked by supporters of the on-site fuel scheme FERC wisely rejected. By definition, no one fuel (including nuclear) is "diverse" on its own, otherwise a 100 percent nuclear generating fleet would be considered diverse. In fact, nuclear only contributes to a diverse fuel mix in combination with other, *non-nuclear* fuels, yet the bill only pays nuclear for an "attribute" that nuclear power in isolation simply does not possess. Moreover, data from independent sources confirms that the regional market is *more fuel diverse than ever before*.
- Basing eligibility for subsidy payments on "financial need" – even by a process as flawed as the one here – contradicts on its face the notion that consumers would be paying PSEG and Exelon for "attributes" that they are presently providing them for free. If the subsidies were really for "attributes" and not just extra side payments for the same electricity consumers already receive, then consumers should be paying for those "attributes" regardless of whether the generator supplying them claims not to be making enough money. As PSEG and Exelon have testified, these state subsidies are "required" in their view because of their dissatisfaction with both (1) current wholesale market rules (that by law federal regulators must determine are just and reasonable) and (2) the slow pace of changes to those rules.

Founded over 20 years ago, EPSA is the national trade association representing leading independent power producers and marketers. EPSA members provide reliable and competitively priced electricity from environmentally responsible facilities using a diverse mix of fuels and technologies. EPSA seeks to bring the benefits of competition to all power customers. For more information, go to www.epsa.org.