

**BEFORE THE  
STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION**

In the Matter of )  
 )  
The Investigation of Entergy Nuclear )  
Indian Point 2, LLC, Entergy Nuclear ) Matter No. 15-02730  
Indian Point 3, LLC and Entergy )  
Nuclear Operations, Inc. )

**EXPEDITED MOTION FOR APPOINTMENT OF  
AN ADMINISTRATIVE LAW JUDGE TO SERVE AS PRESIDING OFFICER  
AND TO ADJUDICATE DISCOVERY-RELATED DISPUTES**

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Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc. (together, “Entergy”) respectfully bring this expedited motion, pursuant to Sections 3.6, 5.3(d) and 5.4(d) of the New York Public Service Commission’s Rules and Regulations, 16 NYCRR §§ 3.6, 5.3(d), and 5.4(d), for appointment of an Administrative Law Judge (“ALJ”) to serve as presiding officer and to adjudicate discovery-related disputes in the above-captioned informal investigation.

**PRELIMINARY STATEMENT**

Entergy respectfully requests appointment of an ALJ to serve as presiding officer and to adjudicate discovery-related disputes in this informal investigation. While designated as an informal proceeding at this stage, political pressures on the Staff of the Department of Public Service (“DPS Staff”) heighten the need for an impartial agency officer, and prompt rulings by such an impartial officer to resolve already-ripe disputes (and any future disputes) between the parties could potentially avoid the need for litigation in court.

On December 16, 2015, Governor Andrew M. Cuomo directed Public Service Commission (“PSC”) Chairwoman Audrey Zibelman to require DPS Staff to launch an investigation into nuclear safety at the Indian Point Energy Center in Buchanan, New York (“Indian Point”), a merchant generator operating exclusively in federally-regulated wholesale markets. Specifically, Governor Cuomo asserted that “we must ensure that the twenty million people that live within the shadow of Indian Point are truly safe from a nuclear incident,” and that “New York State will not sit idly by while the NRC [*i.e.*, the U.S. Nuclear Regulatory

Commission] and Entergy drag out the federal licensing proceedings.” Declaration of Sanford I. Weisburst (“Weisburst Dec.”), Ex. 1.

Such an attempt by a state to regulate a nuclear plant based on nuclear safety concerns is preempted by federal law. “[T]he federal government [through the Atomic Energy Act] has occupied the entire field of nuclear safety concerns . . . .” *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 212 (1983). “Congress’ decision to prohibit the states from regulating the safety aspects of nuclear development was premised on its belief that the [Atomic Energy, now the Nuclear Regulatory] Commission was more qualified to determine what type of safety standards should be enacted in this complex area.” *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 250 (1984).

The investigation is equally unprecedented in that it seeks highly detailed financial and operational information regarding Indian Point spanning across five to ten year time periods, even though Indian Point must earn its revenues from the wholesale markets pursuant to tariffs within the exclusive regulatory authority of the Federal Energy Regulatory Commission under the Federal Power Act, and even though Indian Point is unable to pass its costs onto ratepayers, unlike the investor-owned retail utility that previously owned the Indian Point plant and was subject to PSC jurisdiction.

Notwithstanding these fundamental flaws that affect the investigation, Entergy has chosen to reserve its rights to object to the Investigation as a whole on those grounds, and to cooperate with the investigation in good faith by producing a significant portion of the large number of documents and information that appear responsive to the Interrogatory/Document Requests (“IRs”) issued by DPS Staff. However, the scope of certain of those IRs is objectionable. The first two sets of IRs, 37 IRs in total, seek documents on a wide range of

subjects for time periods of five to ten years, requiring production of tens of thousands of documents. And such requests seeks documents far beyond any matter that the State of New York would be entitled to investigate or to take regulatory action upon. For example, DPS Staff IR-5—to which Entergy has objected and declined to produce documents or information—expressly seeks information that is at the core of NRC’s exclusive federal regulatory authority, asking for “a list of capital projects required by the [NRC] for Indian Point Units 2 and 3 for the last 5 years,” as well as further information including “all studies and alternative analysis of each project.” Weisburst Dec., Ex. 3. For another example, DPS Staff IR-22—to which Entergy has also objected and declined to produce documents—is extremely burdensome in terms of the volume of documents requested over a five-year time period: “Provide supporting documents provided to approving party and minutes of the party that approved capital expenditure budgets for Entergy Nuclear Indian Point 2, LLC and Entergy Nuclear Indian Point 3, LLC for the period January 1, 2011 through December 31, 2015.” *Id.*<sup>1</sup>

Entergy timely filed its objections and identified the estimated time frames to produce documents and information responsive to each IR in DPS Staff’s first set of IRs on January 7, 2016. On that same date, Entergy received DPS Staff’s second set of IRs. Entergy nevertheless maintained its schedule and began issuing responses to the first set of IRs on January 8, 2016 and will continue to forward responses as completed per DPS Staff’s request. Entergy will timely file its objections and, where possible, its responses to DPS Staff’s second set of IRs by January 18, 2016.

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<sup>1</sup> The parties’ disputes over DPS Staff IR-5 and IR-22, among other disputes, are ripe for resolution. Entergy wishes to emphasize, however, that these are among the few IRs to which Entergy has rested on its objections and declined to produce documents or information. As to the majority of IRs, Entergy, while objecting, has committed to produce documents or information and further has provided an estimated date on which it will commence production.

This motion respectfully seeks appointment of an ALJ to serve as the presiding officer and to adjudicate Entergy's objections and any further disputes that may arise. Such an appointment is warranted based on both fairness and efficiency concerns. *First*, given the political and timing pressures being imposed on DPS Staff, there is a particular need for an impartial ALJ to resolve Entergy's objections. *Second*, it would be more efficient to utilize the customary approach of having an ALJ as the presiding officer in place as he or she may be able to resolve certain disputes in this informal investigation quickly and without the need for one or the other party to seek relief in court.

### **BACKGROUND**

As also set forth in the accompanying Weisburst Declaration, this informal investigation was prompted by Governor Cuomo's December 16, 2015 directive to Chair Zibelman to commence an investigation based on purported concerns that a nuclear safety incident at Indian Point could harm the surrounding population. Weisburst Dec., Ex. 1. Chair Zibelman in turn notified William M. Mohl (of Entergy Wholesale Commodities) on December 22, 2015, that the Investigation was beginning. Weisburst Dec., Ex. 2.

On December 28, 2015, DPS Staff issued its first set of IRs (31 in total) to Entergy. Weisburst Dec., Ex. 3. On January 7, 2016, Entergy issued Responses and Objections to the first set of IRs. Entergy indicated its willingness to provide documents and information in response to most of the IRs; as to IRs that explicitly touch on nuclear operations or safety (which is exclusively a matter of federal regulatory authority), Entergy agreed to identify publicly available documents and to produce other documents that previously had been produced to the New York Attorney General's office in the Indian Point NRC proceeding. As to a minority of

the IRs, Entergy rested on its Objections given the substance of these IRs and did not commit to make any further response.

On January 7, 2016, DPS Staff issued a second set of IRs. Weisburst Dec., Ex. 4. Entergy's time to respond to this second set has not yet elapsed, and Entergy intends to make a timely response.

During a phone conversation on January 4, 2016, that included Entergy Assistant General Counsel William Glew and PSC General Counsel Kimberly Harriman, among others, Mr. Glew asked Ms. Harriman whether DPS Staff would consent to the appointment of a presiding officer to resolve discovery-related disputes that were likely to arise during the investigation. Weisburst Dec. ¶ 9. Ms. Harriman indicated that she would respond within a day or two. *Id.* In a further phone conversation on January 8, 2016, that included Mr. Glew and Ms. Harriman, among others, Ms. Harriman stated that DPS Staff would not consent to the appointment of a presiding officer. *Id.* ¶ 10.

### **ARGUMENT**

In formal proceedings before the PSC, discovery disputes (concerning either timing or scope of discovery, or both) are submitted to a presiding officer—most often an ALJ—for decision. *See* 16 NYCRR §§ 5.3(d), 5.4(d).<sup>2</sup> Having an ALJ serve in this capacity provides a decisionmaker who is more neutral, and less susceptible to political pressures, than parties such as DPS Staff who serve in an advocacy role. As the U.S. Supreme Court has explained:

“There can be little doubt that the role of the modern federal hearing examiner or administrative law judge . . . is ‘functionally comparable’ to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may

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<sup>2</sup> While the PSC's regulations contemplate that the officer conducting an investigation may serve as presiding officer, *see* 16 NYCRR § 1.2(f), we respectfully submit that in this matter a neutral ALJ—unconnected to the investigation—should be appointed.

issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions. More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency.”

*Fed. Maritime Comm’n v. S. Carolina State Ports Auth.*, 535 U.S. 743, 756 (2002) (alteration in original) (quoting *Butz v. Economou*, 438 U.S. 478, 513 (1978)).

While the instant investigation is an informal investigation, the need for a neutral presiding officer is clear.<sup>3</sup> DPS Staff is under an explicit directive from Governor Cuomo to complete the investigation by February 15, 2016—an extremely tight timeframe. Moreover, the explicit purpose of the investigation, according to Governor Cuomo’s December 16 letter, is to examine nuclear safety at Indian Point based upon Governor Cuomo’s concerns that Indian Point is not currently safe. And Governor Cuomo has repeatedly and recently announced his goal to shut Indian Point down. *See, e.g.*, Freeman Klopott & Jim Polson, *Why Cuomo Is Trying to Save One Nuclear Plant and Shut Another*, BLOOMBERG BUSINESS, Nov. 2, 2015, <http://www.bloomberg.com/news/articles/2015-11-02/why-cuomo-is-trying-to-save-one-nuclear-plant-and-shut-another> (“I want to close Indian Point . . . . It is a nuclear plant that is in the most dense community on the planet . . . . They’re supposed to have an evacuation plan for the entire surrounding area. The surrounding area is New York City. What’s the plan? Jump in the river and swim to New Jersey?”) (quoting Governor Cuomo).

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<sup>3</sup> Notably, the PSC and/or DPS Staff have taken the unusual step of posting documents concerning this informal investigation on the PSC website, *see* Weisburst Dec. ¶ 8—a feature of a formal proceeding, not an informal investigation. Additionally, DPS Staff has structured its IRs in the manner used in formal proceedings and has generally adopted the initial time frame (at least for the first set of IRs) and framework for IR responses in formal proceedings. *See* Weisburst Dec., Ex. 3.

With timing and overt political pressures at the forefront of DPS Staff's implementation of the investigation, there is a particular need for appointment of a more neutral decisionmaker to resolve discovery-related disputes. Aside from the question of federal preemption of state regulation based on nuclear safety concerns or otherwise addressing nuclear operations or safety, the IRs seek financial and operating information far broader (so far as Entergy is aware, based on publicly available information) than that previously sought by PSC or DPS Staff from any merchant generator. The IRs are drafted so broadly as to require Entergy to produce tens of thousands of documents, including publicly available information and documents bearing no possible connection to any matter within the PSC's jurisdiction. Appointment of an ALJ would likely assist DPS Staff and Entergy in narrowing the IRs and allotting reasonable time frames for responses thereto.

Additionally, it will be faster and more efficient to have an ALJ available to resolve discovery-related disputes, as compared to proceeding directly to DPS Staff's use of its subpoena power, which will result in court litigation over the propriety of the subpoena, among other issues. Specifically, to the extent that the presiding officer is able to resolve disputes and the parties do not pursue further review in court, the dispute will have been resolved more quickly and efficiently.

### **CONCLUSION**

The Secretary should appoint an ALJ as presiding officer and to resolve discovery-related disputes in this informal investigation.



Dated: New York, New York  
January 12, 2016

Respectfully submitted,



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