

WRITER'S DIRECT DIAL NO.  
(212) 849-7170

WRITER'S INTERNET ADDRESS  
sandyweisburst@quinnemanuel.com

February 3, 2016

**VIA EMAIL**

Ms. Donna Giliberto  
Records Access Officer  
New York State Department of Public Service  
Three Empire State Plaza  
Albany, NY 12223-1350

Re: Matter # 15-02730 - In the Matter of the Investigation of Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC and Entergy Nuclear Operations, Inc.  
Request for Exception from Disclosure  
**ATTACHMENT CONTAINS CONFIDENTIAL INFORMATION**

Dear Ms. Giliberto:

Pursuant to Sections 87(2)(d) and 89(5)(a)(1) of the New York Public Officers Law ("NYPOL") and Section 6-1.3 of the New York Public Service Commission's ("NYPSC") rules and regulations, Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc. (together, "Entergy") hereby respectfully submit this letter requesting that the enclosed unredacted document bearing the Bates range IPEC-15-PSC-INV 0279294 through IPEC-15-PSC-INV 0279307 (the "Exception Document"), which is submitted by Entergy in response to the Interrogatory/Document Request No. 46 issued by the Staff of the New York Department of Public Service ("NYDPS") on January 22, 2016 in the above-referenced investigation, be granted trade secret information and confidential commercial information status and thus excepted from public disclosure.

The Exception Document includes highly confidential and commercially sensitive data regarding Entergy's capital and operations maintenance budgets and expenditures ("Confidential Information"). The Confidential Information qualifies as both trade secret information and confidential commercial information under the Freedom of Information Law, NYPOL §§ 84, *et seq.* and the NYPSC's rules and regulations.

NYPOL Sections 87(2)(d) and 89(5) and Section 6-1.3 of the NYPSC's rules and

regulations govern the nondisclosure of trade secret information and confidential commercial information.<sup>1</sup> NYPOL Section 87(2)(d) states in relevant part that agencies may deny access to records that “are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise.”<sup>2</sup>

New York courts have held that an entity that seeks to except trade secret information from disclosure need only show that such information meets the definition set forth in the NYPSC’s rules and regulations and the requirements established by case law; no proof of substantial competitive injury is required.<sup>3</sup> The NYPSC defines a trade secret as “any formula, pattern, device or compilation of information which is used in one’s business, and which provides an opportunity to obtain an advantage over competitors who do not know or use it.”<sup>4</sup> New York courts examine the following factors in a trade secret determination:

- i. the extent to which the information is known outside of the business;
- ii. the extent to which the information is known by employees and others involved in the business;
- iii. the extent of measure taken by the business to guard the secrecy of the information;
- iv. the value of the information to the business and its competitors;
- v. the amount of effort or money expended by the business in developing the information; and
- vi. the ease or difficulty with which the information could be properly acquired or duplicated by others.<sup>5</sup>

To be deemed confidential commercial information, two requirements must be met: (i) the enterprise seeking to redact information must be subject to actual competition; and (ii) disclosure of the information must be likely to cause competitive injury.<sup>6</sup> NYPSC’s rules and regulations require a party requesting confidential commercial status to “show the reasons why the information, if disclosed, would cause substantial injury to [its] competitive position.”<sup>7</sup>

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<sup>1</sup> See N.Y. Pub. Off. Law § 87(2)(d); N.Y. Pub. Off. Law § 89(5); 16 N.Y.C.R.R. § 6-1.3.

<sup>2</sup> See N.Y. Pub. Off. Law § 87(2)(d).

<sup>3</sup> See *Verizon N.Y. Inc. v. NYPSC*, 46 Misc. 3d 858, 878 (N.Y. Sup. Ct. Albany Cnty. 2014), *aff’d*, 2016 WL 155481 (3d Dep’t Jan. 14, 2016).

<sup>4</sup> 16 N.Y.C.R.R. § 6-1.3(a).

<sup>5</sup> *Ashland Mgt. v. Janien*, 82 N.Y.2d 395, 407 (1993); *accord Verizon N.Y. Inc.*, 46 Misc. 3d at 854 n. 15.

<sup>6</sup> See *Encore Coll. Bookstores, Inc. v. Auxiliary Serv. Corp. of State Univ. N.Y. at Farmingdale*, 87 N.Y.2d 410, 420 (1995).

<sup>7</sup> 16 N.Y.C.R.R. § 6-1.3(b)(2).

Factors to be considered by the NYPSC in determining whether to grant such status include, but are not limited to:

- i. the extent to which the disclosure would cause unfair economic or competitive advantage;
- ii. the extent to which the information is known by others and can involve similar activities;
- iii. the worth or value of the information to the person and the person's competitors;
- iv. the degree of difficulty and cost of developing the information;
- v. the ease or difficulty associated with obtaining or duplicating the information by others without the person's consent; and
- vi. other statute(s) or regulations specifically excepting the information from disclosure.<sup>8</sup>

As participants in New York's wholesale electric markets, Entergy is engaged in markets that are subject to actual competition, a determination confirmed by your office and affirmed by the Secretary of the NYPSC. The Confidential Information goes to the core of its business operations, guiding, among other things, its investment, strategic, and operating decisions. It constitutes the very type of information deemed to be trade secret information by New York courts.<sup>9</sup> In addition, the Confidential Information constitutes trade secret information and confidential commercial information pursuant to the criteria listed above because: (i) Entergy does not publicly disclose the Commercial Information and has employed a number of steps internally to ensure against its inadvertent release; (ii) the Commercial Information is not replicable by the public without Entergy's permission and assistance; (iii) the Commercial Information would provide others—including Entergy's competitors, vendors, and load serving entities and financial parties with whom Entergy may negotiate future bilateral contracts—an unfair economic or competitive advantage; and (iv) if disclosed, the Commercial Information would cause Entergy to suffer substantial economic harm and adversely affect the ongoing development and operation of the wholesale competitive market.

Specifically, the Confidential Information contains confidential commercial data regarding Entergy's capital and operations maintenance budgets and expenditures that Entergy has not provided, and does not intend to provide, to the public. The Confidential Information has not been shared with persons outside of Entergy and/or its affiliates except for such agents, counsel, and other individuals who are under an obligation to hold such information in confidence or who have agreed to keep it confidential. Entergy employs safeguards to ensure that this data is not publicly disclosed inadvertently. Further, this Confidential Information reflects a significant investment of specialized staff time and expertise and/or outside expert fees.

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<sup>8</sup> *Id.*

<sup>9</sup> *See Verizon*, 46 Misc. 3d at 878.

This information could not be replicated without access to underlying data that is not publicly available nor could it be replicated, if at all, without substantial expense.

Moreover, some, if not all, of the Confidential Information constitutes “inside information.” Like other public companies, Entergy Corporation generally provides important business information to very limited groups (such as lenders who agree not to trade in the company’s securities after receipt of such information). When such information is disclosed by public companies, it is accompanied by detailed assumptions and qualifications so that potential investors can better understand the information being disclosed and its meaning. Here, if disclosed, this information would have no context, which could mislead investors and could potentially subject Entergy Corporation and/or its affiliates to liability for releasing misleading information under the rules and regulations of the United States Securities and Exchange Commission.

In summary, the Confidential Information falls squarely within the categories of information deemed to be both trade secret information and confidential commercial information, and its public dissemination would cause Entergy significant economic and competitive harm. Therefore, it is within the ambit of NYPOL Section 87(2) and Section 6-1.3 of the NYPSC’s rules and regulations. Accordingly, Entergy respectfully requests that the Confidential Information be granted trade secret information and confidential commercial information status and be excepted from disclosure.

Should you have any questions regarding this filing, please contact us.

Very truly yours,



Sanford I. Weisburst

Encl.

cc (without encl.): John Favreau, Esq. (New York Department of Public Service)

Bridget Frymire (New York Department of Public Service)

Doreen U. Saia, Esq. (Greenberg Traurig LLP)

Paul M. Bessette, Esq. (Morgan Lewis & Bockius LLP)

William B. Glew, Jr., Esq. (Associate General Counsel, Entergy Services, Inc.)

T. Michael Twomey (Vice President, External Affairs, Entergy  
Wholesale Commodities)