

Energy Choice Matters

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Spitzer Aides Escape in IG Report

***Mitnick Pushed for Curry Resignation, Report Reveals
ALJ, PSC Staffers Discussed Promotions with Beddoe***

Two of New York Governor Eliot Spitzer's former top energy advisors acted "improperly" but did not violate criminal or ethical statutes, the state's Inspector General reported yesterday. But actions of several members of the PSC staff were referred to the state's Commission on Public Integrity for further review.

At 134 pages, the IG report offered a rare glimpse into the inner workings of the PSC and interactions among Commissioners and staff. We'll start with the highlights for those wanting just a quick review but include much more detail further below. The reading is essential for anyone with business before this Commission.

In Brief:

The report, originally due in August, covered two series of allegations concerning Spitzer's meddling at the Public Service Commission. First, Commissioner Cheryl Buley had accused Spitzer's former assistant energy secretary Steve Mitnick of threatening her job if she didn't back off criticisms of Consolidated Edison's reliability and the slow pace of investigations into the utility's 2006 Queens blackout. Separately, the IG was forced to probe allegations that Spitzer's first nominee for the PSC Chair, Energy East executive Angela Sparks Beddoe, improperly directed staff reorganization and received access to confidential PSC files while awaiting confirmation.

The fact Mitnick asked Buley to resign her post because Mitnick believed she was "unqualified" isn't disputed, noted Inspector General Kristine Hamann, a Spitzer appointee. Such requests are typical, Hamann reported. But Hamann did not find sufficient evidence to support the claim that

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Constellation Wants Rehearing on RPRS

The Public Utility Commission of Texas erred when it reversed an ALJ's proposal for decision that would have required resettlement of the ERCOT market due to improper allocation of charges for Replacement Reserve Service (RPRS), Constellation Energy Commodities Group and J. Aron argued in a rehearing request (docket 33500).

The case has been simmering at the PUCT in various dockets for nearly two years and we won't recount all the arguments here. But the basic disagreement stems from payments for RPRS, an ancillary service needed when QSEs submit short schedules. ERCOT allocated RPRS costs on a zonal basis, but Constellation believes that the ERCOT Protocols clearly require a system-wide view.

Constellation thinks it was over-charged for RPRS because ERCOT considered Constellation short in certain zones, even though on a system-wide basis Constellation submitted a balanced schedule. ERCOT's allocation has produced large "windfalls" for other market participants at the expense of Constellation, the wholesaler said.


Constellation wants a rehearing because the Commission did not explain or justify deleting an ALJ's proposed finding that the intent of the ERCOT Protocols was to calculate RPRS costs on a system-wide basis. The ALJ determined that a Protocol using a zonal calculation contradicted this

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Surges and Circuits

A weekly review of what's up and down in energy markets.


Power Surges


 **Demand Response:** Two of the top C&I retailers have picked demand response as “the” new product of the year (Matters, 2/14/08, 2/13/08), while mass market demand response is getting closer in ERCOT.

Push

 **Mass. Retailers:** It probably won't matter in a final ruling, but there has to be some moral vindication in Nstar's concession that hardly anyone will sign up for its utility-offered green program (Matters, 2/12/08), exposing the utility's true intent.

Short Circuits

 **New York PSC:** Do we really need to say anything more? We'll note that Steve Mitnick, who claimed he needed to rescue the PSC's lagging national reputation (see top story), has done more damage to the agency than any ConEd blackout. We know new Chair Garry Brown can right the ship, but he has a long road ahead.

 **Illinois Retail Mass Markets:** We're waiting for the other shoe to drop on AG Lisa Madigan's suit against U. S. Energy Savings, with either actions against other gas marketers or similar actions against ARES's now in play. We'll also note that other states have taken up a habit of following Madigan and Illinois policy (see the Maryland PSC's attempt to get Exelon-style concessions) and question if we'll see other states get into the act. We have to question how Energy Savings allowed this to happen since it knows it's always going to be in CUB's crosshairs. We know it's a low-margin business exacerbated by SOS prices that aren't market reflective, so acquisition costs need to be minimal, but some policymakers are always going to be suspect of retail marketers when their sales channels rely on high-pressure cold calling and door-to-door marketing. Moving to a model where

customer acquisition is mostly driven by inbound calls from mass marketing (as the market is moving to in ERCOT) will alleviate a lot of the suspect practices that have plagued the industry since there will be much less reliance on contracted, commissioned sales forces that are hard to police.

Mass Market Demand Response Takes Another Step Forward with Reliant Product

Reliant Energy's installation and tests of a residential demand-response system in the Dallas area have proved successful, opening the door for Reliant to roll out a pilot program. Reliant conducted successful tests in Houston last year.

“This is the first of a number of new products and services we plan to launch this year that will give customers better control and more insight into how they use energy,” said Glen Stancil, Reliant Energy's vice president of Smart Energy research and development.

Called the Energy Saver Partner, Reliant's offer includes a free Web-controlled, programmable thermostat (a \$250 value), a free 25-point air conditioning inspection (a \$75 value), an enrollment bonus and monthly bill credits from May through September.

Reliant's system uses new smart meters that Oncor is installing with broadband over power line technology to communicate with and control Web-programmable thermostats and high-usage appliances in the home.

Eligible Houston-area customers have already received mail-outs encouraging them to sign up for the pilot, and installation of the system is under way. Reliant will contact customers in the Dallas area who have the required smart meters for the pilot program by telephone or mail.

Reliant's pilot is part of a larger study sponsored by the Center for the Commercialization of Electric Technologies to develop demand-response programs.

Briefly:

PJM Credit Fix Not Good Enough for DTE

CONTINUING COVERAGE

PJM's proposed revisions (Matters, 2/12/08) to its credit policies in response to defaults in the financial transmission rights (FTR) market fail to provide sufficient relief to innocent market participants, DTE Energy Trading told FERC (ER08-455). DTE wants FERC to probe Power Edge, a transmission rights trader which defaulted, for market manipulation since the trader's numerous affiliates may have been designed to game the market, DTE alleged. DTE noted PJM's credit policies aren't "dynamic" to reflect changing risks and that PJM's proposed solutions represent a "piecemeal" scramble. DTE suggested a rulemaking on RTO credit policies.

Suez Wants Fix for Entergy ICT

CONTINUING COVERAGE

Suez Energy North America joined a group of munis (Matters, 2/6/08) in asking FERC for changes to Entergy's ICT (ER05-1065). Suez told FERC that SPP, which is acting as the ICT, must fix the data and modeling issues in the Available Flowgate Capacity (AFC) model that routinely cause "Phantom Congestion." Suez believes that the phantom congestion is caused primarily by Entergy's dispatch assumption which assumes certain Entergy-owned generation will run, when in fact, such generation almost never runs in real time because it is uneconomic for it do so. Thus a potential fix is to use actual generation dispatch history in lieu of, or as an adjustment to, Entergy's dispatch assumption, Suez said.

ERCOT Updates Peak Report

ERCOT filed with the PUCT an updated Coincident Peak Load "4 CP" Data Report on the monthly coincident peak loads in the ERCOT system for the months of June, July, August, and September 2007 in docket 35011. The new report includes data for the Cherokee County Electric Cooperative Association that wasn't available in the November report.

FERC, States to Talk on Smart Grid

FERC and state regulators will get together to

facilitate the transition to a smart electric grid. The collaborative project will be co-chaired by FERC Commissioner Suede Kelly and NJ BPU Commissioner Frederick Butler.

Direct CEO Links Market Prices, Conservation

"Regulation and price caps carry a clear message: Don't worry, everything will be OK," cautioned Direct Energy CEO Derek King at a Cambridge Energy Research Associates conference. "But we know everything will not be OK," he added. King and Energy Future Holdings (owner of TXU Energy) chairman Donald Evans both stressed their REPs are examining smart meter and efficiency technologies for the ERCOT mass market.

ConEd Development Notes High Barrier for RMR Changes

Consolidated Edison Development reminded FERC that payments in Reliability Must Run pacts for several of its power plants in ISO New England (to be sold to North American Energy Alliance) can't be changed without all settling parties, which includes a protesting group of munis, agreeing to the changes. Thus munis should not be worried that costs could rise due to the plants' sale, ConEd's IPP said. And FERC should not accept a complaint from munis concerning the sale, the IPP added.

NYSEG Marketers Win With Green

Energetix and NYSEG Solutions' Clean Energy customer count has risen 75% versus 2007, at over 10,500 accounts, the Energy East affiliates reported.

Barstow Wind Farm Planned

Western Wind Energy plans to build 100 MW of wind and solar power on 2,400 acres near Barstow, Calif. Unlike other sites in the area, the site is not located in a critical habitat area for the Desert Tortoise and Western Wind anticipates a normal permitting timeline. Western Wind expects a 40% net operating capacity factor from the wind farm based on the 20 mph mean average annual wind speed.

ERCOT RPRS ... From 1

tenet.

“The Commission deleted the finding only because it supports a conclusion the Commission rejected. The Final Order does not state how or even that the finding is not supported by a preponderance of evidence,” Constellation argued.

The PUCT simply found that the ERCOT Protocols which mentioned a system-wide cost allocation but then created a formula including a zonal component did not conflict.

But in doing so the PUCT deleted “numerous conclusions of law based upon [a] conclusory and unexplained statement,” in contravention of rules that prevent the Commission from acting as its own fact-finder without evidentiary hearings, Constellation claimed.

NY PSC IG Report ... From 1

Buley was threatened with removal under Public Service Law § 4-b if she didn’t follow Mitnick’s orders. Section 4-b allows the governor to remove PSC Commissioners for “inefficiency, neglect of duty or misconduct in office.”

Although the phone conversations in dispute weren’t recorded or witnessed by third parties, “Buley’s claims tend to be supported by several colleagues at the [Department of Public Service] who testified that she told them of Mitnick’s alleged threats at or near the time they purportedly occurred,” the IG found.

Buley’s allegations are also consistent with accounts of Mitnick’s “impatient, overbearing, and even aggressive manner” in dealing with PSC staff, the report added.

The IG then throws cold water on the allegations, noting Buley agreed to move a vote on an investigation into ConEd to April 2007 to allow for more public comment. The IG also claimed Buley was “dissatisfied” at the PSC and noted “a number of Buley’s colleagues, including PSC commissioners, testified that they had doubts about Buley’s credibility and said she was prone to exaggeration.”

The evidence does not support a conclusion that Mitnick violated criminal or ethical

statutes, or that he threatened Buley to influence her actions as commissioner, the IG said. The investigation did conclude that Mitnick mismanaged his efforts to obtain the resignations of PSC commissioners, including Commissioner Robert Curry.

Former PSC nominee Beddoe skated legal wrongdoing because she was a private citizen and was not subject to the state’s ethic laws, the IG ultimately found.

Mitnick, the IG noted, initiated a series of meetings between Beddoe and PSC staff which went beyond routine acclimation for a potential new Chair and got into specific questions regarding the future of the agency.

“In doing so, Mitnick created a climate fraught with apparent ethical conflicts. Beddoe acted improperly when she discussed actual promotions, demotions, and possibly terminations of DPS employees during the meetings,” the IG found.

The report singled out three PSC staffers, ALJ Eleanor Stein, Acting Counsel Peter McGowan, and Acting Chief Administrative Law Judge Judith Lee for improperly discussing possible promotions with Beddoe. Stein’s “job interview” with Beddoe was most troubling to the IG because Stein was presiding over two cases (energy efficiency portfolio standard and the ConEd prudence review) where Energy East was an “active party” and had an established interest in the cases’ outcome. McGowan and Lee were also faulted but their actions were less severe since any relationship they had to cases involving Energy East was only supervisory. Stein, McGowan and Lee were referred to the Commission on Public Integrity and the IG suggested new Chair Garry Brown determine whether the three violated agency policy under Public Service Law § 15.

The IG also found PSC staff gave Beddoe an internal calendar of PSC decisions most likely in violation of internal PSC policy, although state confidentiality laws did not protect the document.

Buley-Mitnick Controversy

The most salient points to come out of the IG’s report regarding the interactions between

Buley and Mitnick stem from testimony provided about each.

While not finding criminal or unethical conduct, the report does paint an unflattering picture of Mitnick's actions.

Mitnick, who had been given charge of the PSC by the administration but no specific directions, wanted to get his own people on the PSC. In addition to seeking Buley's resignation, Mitnick asked Commissioner Robert Curry to resign as well.

Mitnick believed that the PSC had lost some of its prestige within the energy community, a view shared by "past administration officials" that spoke with the IG. That's a perplexing view considering other state regulators at NARUC often looked to New York for the next great idea when it came to restructuring during the Bill Flynn and Maureen Helmer years, when New York created first-in-the-nation programs such as non-recourse purchase of receivables and an Office of Retail Market Development.

Mitnick claimed he sought Curry's resignation because some PSC staff members had told him Curry did not work full time to fulfill his commissioner role. Mitnick later changed his opinion and now says he respects Curry.

The report paints Mitnick having a free-hand in how he approached the PSC. Although he briefed Spitzer twice on his desire to get two resignations from the PSC, the governor offered no reaction or direction, according to Mitnick.

Mitnick testified that he had "zero" discussions with the governor about changes in the PSC leadership.

Secretary to the Governor Richard Baum stated that he was not familiar with Buley's name until she made her accusations on April 18, 2007 and then- Director of State Operations Olivia Golden testified that until Buley's public allegation against Mitnick on April 18 "the PSC just never bubbled up to a level where we had a focused conversation about it."

Several witnesses recounted a January 2007 meeting in which Mitnick spoke to a group of PSC bureau directors, the IG said. While Mitnick characterized the meeting as an

"initiative of mine to raise the morale and get the intellectual juices running," it had the opposite effect. At the meeting, Mitnick described the governor's broad goals. He then declared, "This is a new administration and there'll be a lot of opportunities to do new things, but not everyone in this room will be here in six months ... No one person is as important as the governor's goals." Mitnick added that the PSC staff did not have the professional reputation that it once had and that he was going to "turn that around."

Mitnick's remarks were not received favorably by his audience, with one official stating that Mitnick's remarks caused "serious morale damage," the IG reported.

Lee told the IG that while she had an overall positive impression of Mitnick, she chided him before a second such meeting. Lee said she hoped that he wasn't going to utter a similar statement, since she was still "cleaning up the mess" from the first meeting. Mitnick reportedly concurred. But, despite Lee's warning, Mitnick proceeded to inform the PSC employees in attendance at the next meeting that he used to have a private industry job paying three times as much as his state salary. The comments were perceived as arrogant.

Curry characterized the incident as unusual for a representative of the governor's office and damaging to PSC morale, calling Mitnick "politically tone-deaf."

Commissioner Maureen Harris felt that Mitnick was intimidating to the staff, and that it interfered with agency business. "I have to have the confidence that staff is giving me their unbiased objective advice," she testified. Harris even inquired of McGowan if Mitnick's behavior was inappropriate, to which Harris said McGowan responded that it would be "very difficult, very tough situation for Judy [Lee] and I to tell him, 'You can't come in here.'"

But testimony in the report isn't kind to Buley either, who bears a brunt of criticism from her fellow commissioners.

Then-Chair Patricia Acampora did not put much stock Buley's initial allegation. "Only based upon Cheryl, period. I think she blows up things out of proportion ... I think she is a

person that likes to get attention,” Acampora testified.

Acampora added that Buley “likes playing the victim role” and that the storm was caused because Buley and Mitnick were both “nuclear.”

Acampora testified that she believed Buley was actually looking to leave the PSC, lending support to Mitnick’s story he was trying to help put Buley back onto the Racing and Wagering Board (RWB) where she had served for six years. Acampora told the IG, “right from the beginning” of Buley’s term on the PSC that Buley wanted “something better than what she already had,” a position with higher pay and fewer hours, according to the IG. Acampora further testified that Buley “[w]as really not that thrilled to be coming here. I mean the other position [at the RWB] wasn’t half the amount of work that this thing was ... [Being a Public Service Commissioner] is a very hard job. It’s a very steep learning curve.”

But Buley told the IG although she mulled a return to the racing commission, she thought it was a “mischaracterization to say that I was really eagerly pursuing a departure from the Public Service Commission.”

“I was getting some traction at the Public Service Commission and the longer I was there, I was dedicating myself ... [and] I was getting more familiar and pleased with my contributions,” Buley said.

Mitnick later told his top aide Thomas Congdon that Buley was “a little crazy” and “unpredictable,” Congdon told the IG.

One market participant who has interacted with the PSC for over a decade sharply rebutted those views of Buley, arguing she’s getting a “bum wrap.”

“There are Commissioners who sit on the PSC just to pass time away but Cheryl Buley is not one of them,” the stakeholder said who refused to be identified because of the delicate nature of the report.

Buley has done “one hell of a job” in her brief tenure and has put in a “100% effort” into undertaking and understanding the utility industry.

The stakeholder also praised Buley for not taking staff’s word on issues when staff is

shoveling its own agenda, and for pursuing her own questioning and investigation.

Mitnick, meanwhile, was also feeling victimized.

Mitnick speculated, while acknowledging he had no evidence, that Buley’s allegations against him were part of an organized effort to discredit him, Beddoe, and Spitzer’s energy policies.

“He surmised that interest groups promoting retail competition in the energy industry might be behind the effort,” the IG report said.

“That’s a desperate quote from a desperate man,” one retail marketer told us upon hearing it.

Finding credence and doubts in both Buley’s and Mitnick’s accounts, the IG ultimately found Mitnick had no obvious motivation to push Buley to vote against the ConEd investigation, as it was backed by the governor and unanimous PSC support was expected. Mitnick would have had to persuade at least one other commissioner in order to prevent the commission from voting to initiate the investigation, and the three other Commissioners testified they were never threatened by Mitnick.

But don’t think Mitnick is taking any of the criticisms of his brash, arrogant style to heart. “It’s like I’m Eli Manning,” he told the *New York Times*. “They doubted me in a couple games, but I blew out the favorites.” If by blowing out, Mitnick meant being forced to resign in August and not getting his first pick on the PSC, we guess he’s right.

Beddoe-Staff Controversy

From the start, Beddoe’s relationship with the PSC while awaiting an expected confirmation was going to be difficult because she continued to work as an executive for Energy East during the period.

Energy East and its affiliates were involved in at least 38 cases pending before the PSC at that time.

Beddoe participated in at least five meetings, perhaps as many as eight meetings, with senior members of PSC from February to May 2007, the IG found. None of the sitting PSC commissioners were included.

Mitnick requested that PSC staff and Beddoe participate in meetings focused on reforming and restructuring the agency – not simply orientation for Beddoe. As part of his reorganization that first included disbanding the Office of Retail Market Development, Mitnick wanted to create a policy research and advisory group devoted to the commissioners.

Beddoe took part in personnel discussions and made offers to promote persons of significant responsibility at the PSC, including some of those present at the meetings, the IG said. “In light of Beddoe’s ongoing employment at Energy East, these actions were inappropriate and created the appearance of undue influence, as it could be argued that employees promised promotions could feel pressure to avoid any conflict with Energy East until their promotions were confirmed.”

“Compounding the inherent ethical difficulties of this situation, several planned negative personnel actions may have been linked to past conflicts that the targeted employees had with Energy East or Beddoe herself,” the IG added.

“These actions, if truly a result of these conflicts, would have been troubling regardless of whether or not Beddoe had divested herself of any interest in Energy East prior to her assuming a position at the PSC,” the IG cautioned.

Since, “it was known by meeting participants that Beddoe intended to fire, demote or refuse to promote other employees who had disagreed with Energy East in the past or who had made trouble for Beddoe personally,” it created an even greater appearance of impropriety that staff members were discussing promotions, the IG said.

During the meetings with Beddoe, four long-tenured PSC officials, including the agency’s ethics officer and two directors, were specifically identified by Beddoe for negative personnel action upon her confirmation, the IG reported.

Although not named in the report, one of the directors Beddoe had initially identified for negative personnel action had played a central role in NYSEG’s dispute with the PSC that led Beddoe’s company to take out a full-page

advertisement in several newspapers attacking the PSC. This director was one of the signatories on a PSC letter responding to the energy company’s advertisement. Beddoe intended to transfer him to another unit because she supposedly thought that his “experience” was limited and that “he’s not director material,” the IG said.

Beddoe was also not receptive to the promotion proposed by Lee and Chief of Policy and Program Management Michael Corso of another well-respected PSC official who was criticized by NYSEG during this same disagreement with the PSC. He was the other author of the PSC letter responding to the energy company’s advertisement.

The IG did not name either staffer but based on the descriptions, whispers have suggested the targets could have been James Gallagher, former Director of the Office of Electricity and Environment (who recently left the PSC), and Charles Dickson, former Director of the Office of Accounting and Finance and now Director, Utility Rates and Service. Dickson, in particular, as part of the PSC’s accounting bureau would have been included in NYSEG’s 2006 swipes at the PSC’s “junior accounting staff,” and was given more responsibility in his new role as Director, Utility Rates and Service.

Equally problematic, the IG said, was that another employee allegedly targeted by Beddoe for dismissal was the PSC ethics officer. The ethics officer appeared to be the subject of personal animus that Beddoe developed after the officer expressed concerns to the governor’s office regarding Beddoe’s ability to serve as a PSC commissioner, the IG found.

The IG also noted Mitnick was involved in two other personnel decisions ultimately carried out by then-Chair Acampora. Mitnick had urged that one senior-level employee be demoted while another dismissed. Acampora stated she made the decisions on her own and the IG found Mitnick violated no laws in making a suggestion. Still, Mitnick “should have been more diplomatic about revealing his role in the personnel actions,” the IG said.

The interaction that occurred between ALJ Eleanor Stein and Beddoe “presents the most direct appearance of a conflict of interest,” the

IG said. Beddoe met with Stein to offer Stein the job of general counsel in March 2007, at which time Stein was presiding over the ConEd prudence case where Energy East was an active party. Later Stein would be assigned the PSC's energy efficiency portfolio standard case, where Energy East again had a large interest.

"Stein's actions in presiding over matters involving Energy East while effectively accepting a promotion dependent on Beddoe's continuing favor and contingent upon her confirmation are troubling and could be viewed as violating the state's code of ethics," the IG said.

Stein admitted one meeting was basically a "job interview" and a Beddoe email confirmed Beddoe was awaiting Stein's resume to make her general counsel.

Stein is subject to ethics standards regarding conflicts of interest that are applicable to all state employees, the IG noted. In addition, PSC rules require a presiding judge to disqualify herself from any matters in which she has "a personal bias or interest with respect to the matter involved." Having interviewed with Beddoe and expressed an interest in the promotion, Stein was, "obligated to recuse herself from any matters involving Energy East, but did not do so," the IG admonished.

Other senior PSC officials, notably Lee and McGowan, also met with Beddoe to discuss promotional opportunities, the IG noted. Lee was to direct the new Commissioner policy office while McGowan would become Managing Director of Policy.

Beddoe's offers to promote persons of significant responsibility at the agency created the appearance of impropriety, the IG concluded. It could appear that given a promised promotion, these employees could feel pressure to avoid any conflict with Energy East until their promotions were confirmed.

All of the PSC employees at the meetings should have recognized the potential ethics violation of having these discussions with Beddoe while matters involving Energy East were pending at the agency, the IG scolded.

"It is difficult to fault employees who serve at the pleasure of the PSC chairperson and lack

civil service protection from demotion or termination from meeting with the soon-to-be-appointed chairperson at her or Mitnick's request. However, New York State ethics rules require state employees to avoid even the appearance of impropriety," the IG reminded.

The IG found that the PSC staff provided Beddoe with organizational charts; personnel reports that included employees' names, titles and salaries; budget documents; and a schematic diagram of the rate-setting process.

The IG concluded Beddoe did not receive "confidential" information that wasn't available to the public or accessible through a Freedom of Information Law (FOIL) request. While Beddoe was given an internal PSC calendar of case timelines and decision dates, the document was not "confidential" under ethics laws. Lee testified that she guessed she "must have given it to," Beddoe. While not confidential per se, knowing the dates of when a case comes before the Commission ahead of other parties would give a stakeholder an advantage in lobbying efforts and subject the commission to charges of pre-decisional bias, the IG noted.

The IG urged the Commission on Public Integrity to review the question of permissible contact between nominees coming from the industry and PSC staff since it's reasonable to think the situation will arise again.