

**State of New York
Office of the Inspector General**



**Report on the Investigation of Two Allegations
Relating to the Public Service Commission**

February 2008

**Kristine Hamann
State Inspector General**

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EXECUTIVE SUMMARY

This report discusses the findings of an investigation by the New York State Inspector General's Office (Inspector General) of two separate complaints relating to former Assistant Secretary to the Governor for Energy and Telecommunications Steven Mitnick and the New York State Public Service Commission (PSC). The PSC, which consists of five commissioners, regulates the gas, electric, steam, water, telecommunications, and cable television industries within New York State. Under this authority, the PSC is responsible for assuring the safe and efficient delivery of services and for setting the rates that these utilities may charge their business and residential consumers. The chairperson of the PSC, who is appointed by the governor from among the commissioners, oversees the Department of Public Service (DPS), which makes policy recommendations to the PSC and implements its decisions.

From his appointment on January 5, 2007 until his resignation on August 3, 2007, Mitnick pursued changes at the PSC and the DPS as part of his responsibilities within the administration. During his tenure, Mitnick encouraged the PSC to adopt certain policies, advocated for a major reorganization within DPS, and sought the resignations of two PSC commissioners.

On April 18, 2007, PSC Commissioner Cheryl Buley, one of the commissioners who Mitnick wanted to replace, publicly alleged that Mitnick had threatened to remove her from her position at the PSC unless she accepted his directions regarding her conduct as commissioner.

On May 4, 2007, a complainant requesting confidentiality accused both Mitnick and Angela Beddoe, the governor's nominee for PSC chairperson, of exercising improper influence over the PSC. It was alleged that Beddoe participated in meetings with DPS staff and was directing agency matters while still employed as a vice president of Energy East, an electricity and gas provider regulated by the PSC.

Both sets of allegations occurred during the transition from the 12-year administration of Republican Governor George Pataki to that of an incoming Democrat, Governor Eliot Spitzer. By its nature, such a transition results in widespread structural and personnel changes at the highest levels of most state agencies, as the new administration seeks to implement its own vision and program.

The Inspector General conducted an extensive investigation of both allegations. Sworn testimony was taken from all significant witnesses. The Inspector General interviewed current and former officials and employees of the PSC and DPS, members of the Executive Chamber, senior officials of past administrations, and private citizens with relevant information as to the matters alleged. In all, more than 40 interviews were conducted, with a number of witnesses interviewed multiple times. Over a thousand pages of documents, statutes, case law, regulations, policies, and ethics opinions were researched, reviewed and analyzed.

Findings Regarding Cheryl Buley's Complaint Against Steven Mitnick

On April 18, 2007, at a public session of the PSC, Buley read a prepared statement alleging that Mitnick had "attempted to coerce [her] into not commenting publicly" about a high-profile matter before the PSC and that her "failure to act consistent

with his requests could result in [Buley's] being removed from [her] commissioner position.” The high-profile matter in question was if and when the PSC would initiate a prudence investigation to determine whether electricity provider Consolidated Edison (Con Ed) and its shareholders would be made to bear costs related to a major outage in Queens that occurred the previous summer. Westchester Assemblyman Richard Brodsky had led a petition, sent to the PSC in September 2006, formally requesting a prudence investigation, but by February 2007, the PSC had still not acted on the petition. Assemblyman Brodsky, who chairs a committee overseeing entities such as the PSC, presided at a hearing on February 26, 2007, in which he demanded that PSC Chairperson Patricia Acampora explain the delay. Buley agreed with Assemblyman Brodsky that the investigation was delayed unnecessarily, and she believed that Mitnick had supported and even helped to orchestrate the delay.

The Inspector General found that Mitnick did ask Buley to resign her position on the PSC, and that he made at least some comments to Buley about the prudence investigation. Neither of these actions on its own is a violation of law or standards of ethics. The actual misconduct alleged is that Mitnick, either expressly or implicitly, linked Buley's ability to remain on the PSC with her compliance with his demands or instructions. This investigation could not establish such a link.

Mitnick's Recommendations

As early as November 2006, Mitnick, then an advisor to Governor-elect Spitzer on energy matters, expressed his view that commissioners with experience and knowledge about energy issues were needed to implement the new administration's energy policies. Mitnick hoped to replace 10 sitting commissioners, including Buley, in

various energy-related agencies and authorities. Although commissioners with term appointments are not obligated to resign based on a simple request, Mitnick believed that most commissioners would resign if asked to do so.

In the event that a PSC commissioner refused to resign, Mitnick noted, in memos written in the fall of 2006, that the governor has the power under Public Service Law § 4-b to remove them for “inefficiency, neglect of duty or misconduct in office.” However, in January 2007, prior to any contact between Mitnick and Buley, Secretary to the Governor Richard Baum and Counsel David Nocenti informed Mitnick that the administration would not be invoking § 4-b to remove any commissioners.

The widely-publicized blackout in Queens in 2006, as well as another blackout in Westchester later that summer, had thrust the performance of the PSC into the spotlight during the 2006 campaign. Buley, appointed by former Governor Pataki only weeks before the Queens blackout, was criticized by some in the press as being unqualified to be a commissioner of the PSC. Witnesses testified that Buley was aware of § 4-b even before Governor Spitzer took office, and was considering hiring a lawyer at that time. Buley feared becoming unemployed if the new administration wished to replace her on the PSC. Buley had been chairperson of the New York State Racing and Wagering Board (RWB) immediately prior to her appointment to the PSC and had expressed her desire to return to the RWB. Before Mitnick ever spoke with Buley, she asked a mutual friend to contact Mitnick on her behalf to relay her interest in returning to the RWB.

Interactions between Mitnick and Buley

In a phone call on February 14, 2007, Baum gave Mitnick permission to request the resignations of 10 commissioners in various energy agencies and authorities. On February 16, 2007, Mitnick called Buley and requested her resignation. Ten days later, in another telephone call on February 26, 2007, Mitnick again requested Buley's resignation. Although Mitnick knew that Baum, his superior, had decided against using § 4-b to remove any commissioners, Mitnick admitted that in one of these conversations with Buley, he did mention § 4-b. He testified that he was provoked by Buley's statement that she would retain her position "whether the governor likes it or not." Mitnick denied trying to influence Buley's actions on policy matters in any way.

Mitnick continued to pursue Buley's resignation. In a lunch meeting with Buley on April 2, 2007, Mitnick encouraged her to move to another position within state government. On April 17, 2007, Mitnick and Buley had a final telephone conversation in which he attempted to be conciliatory. Buley claimed in her testimony that Mitnick then expanded his threats, this time saying her position depended also on how she acted towards him at the next day's session of the PSC.

There is no doubt that the interactions between Mitnick and Buley were, at times, contentious and upsetting to Buley. Mitnick's clear wish for Buley's departure from the PSC and his ill-advised reference to the governor's power to remove Buley as commissioner increased her fear of losing her position. However, due to the contradictory testimony of Mitnick and Buley; the absence of third-party witnesses to the conversations of significance; the ambiguous nature of the extrinsic evidence; and the testimony of numerous witnesses as to the credibility of the primary parties, the Inspector

General cannot conclude that Mitnick committed any criminal or ethical violations under New York law with regard to his interactions with Buley.

Although some of Mitnick's actions were offensive to Buley, these same actions were clearly within his authority. It is undisputed that Mitnick urged Buley to resign. It is also undisputed that policy issues, including the possibility of a prudence investigation of Con Ed, were mentioned during conversations between Mitnick and Buley. On their own, neither of these actions constitutes wrongdoing.

The Inspector General considered whether Mitnick, in mentioning § 4-b in the context of requesting Buley's resignation, violated any provision of law. Mitnick's supervisors had told him that the administration would not use § 4-b to remove a PSC commissioner, but Buley did not know this fact at the time of her conversations with Mitnick. His mention of the statute could have been interpreted by Buley as an indication that she would be the subject of such a proceeding if she did not resign. In both Buley's and Mitnick's accounts, his single mention of § 4-b was a response to Buley's stated intention to fulfill her term, not in relation to any specific policy before the PSC. A mere reference to a lawful procedure in the context of a request for a resignation is permissible, regardless of whether the recipient of the statement finds it alarming. This is true even if Mitnick mentioned § 4-b while knowing the statute would not be invoked.

The actual misconduct alleged is that Mitnick expressly or implicitly linked Buley's continued employment in state government with her willingness to comply with his specific directives regarding the prudence investigation. Although Mitnick was permitted to convey the administration's wishes to a PSC commissioner, he could not compel compliance with those wishes through a threat of removal. The conclusions of

the Inspector General, as discussed below, focus primarily on whether the evidence can establish such a link.

The testimony of multiple witnesses indicates that Buley believed that Mitnick's actions were improper. Even if, in Mitnick's eyes, his comments regarding policy issues and his request for Buley's resignation were unrelated, Buley might have drawn a connection. This is supported by Buley's conversations with three colleagues, to whom she complained of Mitnick's alleged threats, at or near the time they purportedly occurred. In addition, notes that Buley reportedly made during a phone call on April 17 indicate that Mitnick acknowledged having engaged in some form of inappropriate behavior. Buley's interpretation is also supported by the testimony of a former DPS official who said that Mitnick told him that commissioners who did not vote as he wished would be asked to leave. PSC and DPS staff who dealt with Mitnick described him as aggressive and overbearing. PSC Commissioner Maureen Harris testified that Mitnick was so intimidating to DPS staff that she was concerned that they were afraid to offer their honest opinions.

Buley alleged that Mitnick was not in favor of the prudence investigation and that he worked to delay the investigation. The evidence gathered in this case does not support this claim. To the contrary, even before his appointment as Assistant Secretary for Energy and Telecommunications, Mitnick was a strong critic of Con Ed and the PSC in regard to the blackout of 2006. Mitnick had no obvious motivation to push Buley to vote against the investigation, as it was backed by the governor and unanimous PSC support was expected. All of the other commissioners both stated in public and testified in this

investigation that they did not receive such a request from Mitnick, including PSC Commissioner Robert Curry who, like Buley, had been asked by Mitnick to resign.

Similarly, there is no evidence to show that Mitnick delayed the prudence investigation by pulling it from the February or March agenda as alleged by Buley. The delay from February to April in the PSC's voting to initiate the prudence investigation was to allow for a comment period on the DPS staff report regarding the Queens blackout. Then-PSC Chairperson Patricia Acampora made the decision to hold the vote for a comment period, after consulting with DPS staff. In fact, on February 27, 2007, Buley stated publicly in a PSC session that she recognized the need for a comment period. Then, prior to the next PSC session in March, Acampora testified that Buley made an emotional plea to Acampora and others to ensure that the prudence investigation would not be addressed at the meeting due to her scheduled vacation.

It is plausible, as cited by Buley in her public statement, that Mitnick asked her to "refrain from any public support for the Assembly petition filed months ago to commence [the prudence] investigation immediately." Mitnick allegedly made this statement during a call to Buley on February 26, the same day as the Assembly hearing on the Con Ed matter and the day before the next scheduled session of the PSC. It is possible that Mitnick could have asked Buley to "hold off" on speaking about the prudence investigation "for a few months," as Acampora was attending the Assembly hearing that very day and stating that the PSC most likely would not vote on the prudence hearing until its April meeting, two months later. Mitnick supported Acampora's decision to delay the vote for a comment period.

In contrast, it is also plausible that, during the February 26 call, Buley asked Mitnick what to say at the PSC meeting. Mitnick testified that during this conversation Buley was “fishing for something I would like about her.” He claimed that she went on to ask him what to do regarding the prudence investigation and said, “I’ll do whatever you say.” Given Buley’s ongoing attempts to return to the RWB and her fear of being removed from the PSC, it is possible that Buley tried to curry favor with Mitnick by asking what to say or do at the next day’s PSC session.

Even if, as Buley claims, Mitnick did instruct Buley not to make public comments, the central issue is still whether Mitnick’s support for Buley’s continued employment was conditioned on her following his instructions. The investigation did not establish this link.

When directly asked by the Inspector General whether she perceived Mitnick’s reference to § 4-b as a threat, Buley said, “I guess it’s subjective . . . I don’t know if that’s a threat.” She continued, “It was just a phone call . . . I hung up feeling as though he was trying to get a sense of how committed I was to serving on the Public Service Commission.” Moreover, in her testimony about her conversation with Mitnick on April 17, the day before her public accusations against him, Buley stated that the threat from Mitnick changed; no longer was it linked solely to her position on the prudence investigation, but rather also how she behaved toward Mitnick.

In her dealings with Mitnick and the PSC after the alleged threats, Buley did not act as if she was concerned that the integrity of her office had been compromised. After the February 26 call, in which Mitnick allegedly first linked his desire for her departure to

her actions regarding the prudence investigation, Buley continued contact with him to explore other job prospects for another five weeks.

Their subsequent interactions included a friendly meeting, initiated by Mitnick, about a possible job for Buley at New York State Energy Research and Development Authority. Also, Buley addressed a cordial letter to Mitnick on March 7, 2007 suggesting that the lieutenant governor meet with a group of renewable energy experts. At neither the February nor March PSC sessions, both of which took place after the alleged threats, did Buley make any mention of Mitnick or his alleged improper conduct. It was not until April 18, 2007, after Buley had refused Mitnick's help in finding a new job, that Buley decided that "the public had a right to know" about Mitnick's actions.

Mitnick denied threatening Buley or attempting to influence her on the prudence investigation. Mitnick made clear in his sworn testimony that he considered her unqualified for the PSC and that his only goal was for her to resign. With that aim in mind, Mitnick stated, he had no reason to discuss with her any PSC policy matter. Mitnick testified that Buley's position on the prudence investigation was irrelevant to him and that there was no reason for him to request her silence on the matter. PSC Commissioners Acampora, Harris, and Curry all stated publicly on April 18, and subsequently testified during this investigation, that Mitnick never threatened them or attempted to improperly influence their positions on the prudence investigation.

Testimony gathered during this investigation sheds doubt on the credibility of both Mitnick's and Buley's version of events. Mitnick's characterization of his own behavior in general differs markedly from that of other witnesses, shedding doubt on his story. While Mitnick used the words "careful," "circumspect," and "sensitive" to

describe his actions, others called him overbearing and pushy. On the other hand, a number of witnesses, including Buley's fellow commissioners, were skeptical of her credibility and said that she was prone to exaggeration.

Conclusion

In the end, there is insufficient proof that Mitnick intended to link Buley's continued employment to any official action that she might take. Mitnick had clear authority to request resignations and advocate policy to the PSC. Based on the lack of credible evidence, no criminality was found. Similarly, no ethics violations under the Public Officers Law, which require a lower level of proof, were substantiated.

The record is clear, however, that Mitnick's conduct exacerbated the understandable anxieties experienced by state officials, including Buley herself, during a time of flux affecting both state employees and the policies they implement. As knowledgeable and capable as Mitnick may have been in his field, he proved a poor fit for his position.

Former PSC Chairperson and current Commissioner Acampora aptly summed up the dispute between Mitnick and Buley, saying, "It's a real he said, she said thing and, unfortunately, I think these two people are both nuclear, basically."

Findings Regarding Steven Mitnick, Angela Beddoe, and Employees of the Department of Public Service

On January 24, 2007, Governor Spitzer announced the nomination of Angela Beddoe as chairperson of the PSC. At the time, Beddoe was Vice President for Public Affairs at Energy East Management Corporation, a utility regulated by the PSC. While Beddoe's confirmation was pending before the Senate, Energy East and its affiliates were involved in at least 38 cases pending before the PSC.

Energy East has had a contentious relationship with the PSC and DPS. In March 2006, after an adverse decision from the PSC regarding a rate increase, a subsidiary of Energy East purchased full-page advertisements in several papers criticizing the DPS. The advertisement termed the auditors at the agency "junior accounting staff."

Beddoe declined to assume an acting position with PSC while her nomination was pending. She continued to serve as an executive at Energy East, with financial interests in the company. This decision became the major source of ethical conflicts that emerged during this period.

Beddoe participated in at least five meetings, and as many as eight meetings, with senior members of DPS from February to May 2007. None of the sitting PSC commissioners were included. Beddoe participated in one or two initial meetings that primarily served to introduce her to the agency. Mitnick then requested that DPS staff and Beddoe participate in additional meetings focused on reforming and restructuring the agency. Although the complainant in this case alleged that Energy East was exercising influence through Beddoe's contacts with the PSC, there was no allegation of any specific regulatory action taken at DPS in favor of Energy East that was the result of such

influence. Nonetheless, given Beddoe's continued employment at Energy East, her involvement in these matters was premature, and some of the actions taken by Beddoe and the DPS staff during this time were inappropriate.

Mitnick's Involvement in the Beddoe Meetings

Although Mitnick did not attend every meeting, he requested them, and initiated the substantive discussions regarding the agency's restructuring. Mitnick acted inappropriately in involving Beddoe in planning changes that were to occur prior to her assuming the PSC chair. Notably, then-Chairperson Patricia Acampora, was absent from these meetings. Mitnick should have identified the obvious risks of this situation and proceeded carefully and thoughtfully, encouraging Beddoe to do the same.

Additionally, Mitnick was overeager in pushing DPS staff to engage in conversations with Beddoe, which contributed to the perception that Beddoe was exerting improper influence over the agency. By facilitating discussions about the future structure of the agency, Mitnick placed the participating parties in ethically compromising situations.

At one point, Beddoe spoke to Mitnick outside of the meeting room to express her discomfort with taking actions within the agency prior to her assuming her position as chairperson. Mitnick himself acknowledged that he was being "too nose, too overbearing," and he attended no more meetings after that.

Beddoe's Participation in Personnel Decisions

Beddoe took part in personnel discussions and made offers to promote persons of significant responsibility at DPS, including some of those present at the meetings. 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.

Promotions for Eleanor Stein and Other DPS Officials

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 interaction that occurred between DPS Administrative Law Judge Eleanor Stein and Beddoe presents the most direct appearance of a conflict of interest. In late March 2007, Stein met with Beddoe to discuss Stein's assuming the position of general counsel. At the time and thereafter, Stein was presiding over at least one matter in which Energy East was involved. 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.

Other senior DPS officials, notably Chief Administrative Law Judge and Acting Executive Deputy Judith Lee and Acting General Counsel Peter McGowan, also met with Beddoe to discuss promotional opportunities. The public's confidence could be

negatively affected by the fact that the chief legal officer and chief judge of an agency met with an official of a regulated utility with matters pending before that agency to discuss promotions contingent on her confirmation and continued favor.

Demotions or Firings Planned by Beddoe

Troubling as well were the identities of two DPS employees that Beddoe appears to have targeted for demotion or dismissal. One was a DPS director who had played a central role in the rate dispute with Beddoe's company. The other was the DPS ethics officer who had expressed concerns to the governor's office regarding Beddoe's ability to act as a commissioner due to her connections to Energy East and who appeared to be the subject of Beddoe's personal animus. Beddoe's claim in testimony that she had not targeted any employee for firing, only reassignment, was contradicted by several officials present during discussions about the ethics officer.

Disclosure of Confidential Material

The investigation found that during their meetings with Beddoe, DPS officials provided her with several documents marked "confidential." None of these items were expressly barred from disclosure by applicable state law. One of the items marked "confidential" and provided to Beddoe was a draft PSC meeting agenda, which, according to the testimony of PSC and DPS officials, would not be disseminated outside the agency, pursuant to agency policy. In this one instance, DPS staff provided Beddoe with an internal document possibly in violation of agency policy but not contrary to any law.

Referrals to the Public Service Commission and the Commission on Public Integrity

The Inspector General finds that the actions of several parties, as outlined in the second set of allegations discussed in this report, raise concerns that deserve the attention of the New York State Commission on Public Integrity. As a general proposition, the situation presented by Beddoe's lengthy pending nomination while she still worked for a regulated entity is not one that is specifically addressed in New York law. However, the provisions of the Public Officers Law are applicable to state employees at all times during their service. Since Beddoe was not a state employee, the Public Officers Law does not apply to her. The Inspector General requests that the Commission on Public Integrity examine the actions of DPS employees regarding any improper contacts that they had with Beddoe. In particular, the Inspector General finds that the actions of Eleanor Stein, Judith Lee, and Peter McGowan may have presented an appearance of conflict in discussing their potential promotions with Beddoe.

The Inspector General's findings have also been referred to PSC Chairperson Garry Brown, the official with authority to effect personnel and disciplinary action within the DPS, for a determination if any action against DPS staff is appropriate. The Inspector General also requested that Chairperson Brown determine whether any DPS employee violated that policy by providing Beddoe with a draft agenda.

It was permissible for Mitnick to discuss his ideas for a reorganization of the DPS with Beddoe and DPS officials. It was further permissible for Mitnick to generally arrange for meetings between Beddoe and DPS staff to educate Beddoe about the agency. Although Mitnick encouraged immediate action and created the environment in which

Beddoe prematurely engaged in interviews and offered promotions to DPS officials, Mitnick was not aware of the details of these conversations. While Mitnick should have recognized the ethical conflicts which could arise and exercised caution, Mitnick's mere fostering of an atmosphere in which DPS employees may have transgressed ethical limitations is not likely to violate the Public Officers Law.

Mitnick resigned his state position on August 3, 2007.

As it is reasonable for an administration to seek nominees with expertise in energy matters from within the regulated industry, the question of permissible contacts between such nominees and employees of the DPS may arise again in the future. The Inspector General invites the Commission of Public Integrity to examine this topic and consider establishing parameters for future interactions.

The Inspector General can make no referrals regarding Beddoe, as she is not subject to the Public Officers Law. Beddoe withdrew her nomination on June 29, 2007.

The Inspector General is forwarding this report in its entirety to the Commission on Public Integrity for its review and for any action it deems appropriate.

INTRODUCTION AND BACKGROUND

Summary of Allegations

During April and May of 2007, the Office of the State Inspector General received two separate complaints relating to the New York State Public Service Commission (PSC). In the first, it was alleged by a PSC Commissioner, Cheryl Buley, that the then-Assistant Secretary to the Governor for Energy and Telecommunications, Steven Mitnick, pressured her to resign and threatened to remove her from her position unless she refrained from speaking publicly about the Consolidated Edison (Con Ed) prudence investigation pending before the PSC. The matter was referred to the Office of the State Inspector General by Governor Eliot Spitzer and PSC Commissioner Robert Curry. In addition, Senate Majority Leader Joseph L. Bruno stated that the governor “should be calling for a complete and thorough investigation.”¹

In the second allegation, a confidential complainant alleged that both Mitnick and Angela Beddoe, the governor’s nominee for chairperson of the PSC, were interfering with the conduct of PSC business, and that employees of the Department of Public Service (DPS), the staff which supports the PSC, were meeting with Beddoe. At the time, Beddoe was an executive with Energy East, a utility company regulated by the PSC. Beddoe’s actions as both nominee and Energy East executive created an alleged conflict of interest.

¹ Fredric Dicker, “Eliot Opens Probe into Aide’s Threat,” *New York Post*, Apr. 21, 2007.

Scope of Investigation

The Inspector General's Office conducted an extensive investigation of each allegation. Sworn testimony was taken from all significant witnesses. The Inspector General interviewed current and former officials and employees of the PSC and DPS, members of the Executive Chamber, senior officials of past administrations and private citizens with relevant information as to the matters alleged.

Included in these interviews, among others, were Cheryl Buley, Steven Mitnick, Angela Beddoe, then-PSC Chairperson Patricia Acampora, and PSC Commissioners Robert Curry and Maureen Harris. High-ranking DPS officials interviewed included Acting Executive Deputy to the Chairperson and Chief Administrative Law Judge Judith Lee, Administrative Law Judge Eleanor Stein, and then-Chief of Policy and Program Management Michael Corso. Interviews of members of the Executive Chamber included Secretary to the Governor Richard Baum, then-Director of State Operations Olivia Golden, Appointments Secretary Francine James, Deputy Secretary to the Governor for the Environment Judith Enck, First Assistant Counsel to the Governor Terryl Brown Clemons, and Special Assistant for Energy Thomas Congdon. Sworn statements were taken from all of these witnesses. In total, more than 40 interviews were conducted, with a number of key witnesses interviewed multiple times. Investigators reviewed more than 1,000 pages of documents, including electronic records, e-mails, and telephone records and researched and analyzed public databases and numerous statutes, case law, regulations, policies, and ethics opinions.

The report is organized into three sections. This first section provides background about the transition to the new administration, the PSC, and the 2006 Queens power outage. This information is necessary to understand the context for many of the events discussed in this report. The final two sections discuss the Inspector General's findings regarding the allegations of Buley against Mitnick, and the allegations related to Beddoe, respectively.

Transition to a New Administration

The events described in this report took place during the transition from the 12-year administration of Republican Governor George Pataki to that of an incoming Democrat, Governor Eliot Spitzer. By its nature, such a transition results in widespread structural and personnel changes at the highest levels of most state agencies, as the new administration seeks to implement its own vision and program. This last occurred 12 years ago when top state officials under Governor Mario Cuomo were replaced by the Pataki administration. The personnel changes made during a transition include both high-level officials serving at the pleasure of the governor, as well as those with fixed terms of office. In the case of the former, these officials are simply replaced. In the case of the latter, their resignations are typically requested by the new administration.

To gain insight into the dynamics of such a transition, the Inspector General's Office interviewed individuals who had held senior executive positions in previous administrations during times of transition. They described the transitions as intense, even chaotic, and portrayed the atmosphere as heightened by tension and concern on

the parts of incumbent commissioners and other senior employees. It was during such a period that both sets of allegations arose.

Post-Election, Pre-Inauguration 2006

Governor Spitzer's transition efforts began immediately after his election in November 2006 with the appointment of a number of policy advisory committees, each with a focus on a core area of government ranging from such areas as economic development and health care to energy and education. The committees consisted of dozens of experts from the public and private sectors. The committees prepared recommendations for short-term and long-term action to help the governor-elect achieve his policy goals. Each committee summarized its conclusions in a one-hour presentation to the governor-elect and senior staff.

Angela Beddoe was one of three co-chairs of the policy advisory committee on energy and environment. Mitnick belonged to a smaller "working group" on energy and environment, evaluating agencies and recommending organizational and personnel changes. His group reviewed the New York Power Authority (NYPA) and New York State Energy Research and Development Authority (NYSERDA), as well as the PSC and the Department of Public Service, interviewing experts in the field and agency employees.

Mitnick had advised Governor Spitzer on energy matters during the campaign, and was appointed Assistant Secretary for Energy and Telecommunications on January 5, 2007. Previously, he had been a senior advisor at McKinsey & Company, a management consulting firm, as part of its North America Electric Power and

Natural Gas Practice. From 2002 to 2004, Mitnick was Chief Executive Officer of Conjunction LLC, an energy transmission company. Prior to that, he had held various senior positions in companies dealing with energy-related issues. Mitnick has an M.B.A. from the Wharton School of the University of Pennsylvania and two B.S. degrees from Rensselaer Polytechnic Institute.

The Public Service Commission and the Department of Public Service

Among the agencies reviewed by the transition's energy and environment working group was the PSC. The PSC is responsible for regulating the gas, electric, steam, water, telecommunications, and cable television industries within New York State. A critical part of its regulatory responsibilities is setting rates and assuring the sufficient and safe delivery of services.

Under the Public Service Law, the PSC consists of five commissioners appointed by the governor with the advice and consent of the New York State Senate. The governor appoints the chairperson from among the commissioners, with the chairperson serving in that capacity at the pleasure of the governor. No more than three commissioners may be of the same political party, with their terms of office fixed until six years from the February of the calendar year of their appointments.² The PSC holds monthly public sessions dealing with regulatory matters within its statutory authority.

² The PSC became bipartisan as of 1970. N.Y. Public Service Law § 4 provides a mechanism for the PSC to certify to the governor that additional members are required, a certification which allows the governor to appoint two additional commissioners. If this mechanism is utilized, then four commissioners may share the same party affiliation. If a vacancy occurs during a commissioner's term, the governor may appoint a new commissioner, with the advice and consent of the Senate, to fill the remainder of the unexpired term.

The Commission is supported by a staff within the DPS. According to the DPS's website:

. . . staff responsibilities include advising the Commission on all decisions it must make in matters such as rate determinations, utility financing, and certificates of environmental compatibility and public need; representing the Commission in state and federal proceedings that have an impact on New York consumers and a bearing on how the Commission carries out its legislative mandate; representing the Commission in state and federal court proceedings; developing and implementing state regulatory and energy policies; receiving, investigating and resolving complaints on billing, services, or other utility practices; and inspecting and reviewing utility equipment and apparatus necessary for rendering service to the public.³

The chairperson of the PSC is the chief executive officer of the DPS and has the authority to appoint all employees required to carry out the chairperson's directions, and to remove DPS employees, subject to any applicable requirements of the Civil Service Law. The chairperson directs the day-to-day operations of the DPS. The chairperson also is charged with directing the agency's counsel to commence or defend PSC actions, and may authorize the DPS to conduct investigations or hold hearings.

Section 4-b of the Public Service Law authorizes the governor to remove any PSC commissioner on the basis of "inefficiency, neglect of duty or misconduct in office," affording a commissioner charged under this provision with 10 days notice and an opportunity to be publicly heard in his or her defense. This is the only statutory mechanism for involuntary removal of a PSC commissioner. A record of any such proceeding must be filed with the Secretary of State. The Department of

³ <http://www.dps.state.ny.us/pscinfo.html>.

State has informed the Inspector General that it could not locate any record of a removal pursuant to § 4-b.

Relationship of the Governor to the Public Service Commission

The PSC chairperson is a member of the governor's cabinet, and in that capacity, functions as other agency heads appointed by the governor, providing information and advice to the governor and implementing the governor's programs and policies for the agency. Although the independence of the PSC historically has been the subject of some dispute, a review of the record makes clear that governors have utilized the PSC as the vehicle for the implementation of their energy policies and programs.⁴ Governor Pataki, in his 2003 State of the State Address, declared: "I am *directing* the Public Service Commission to implement a Renewable Portfolio Standard," and, in his 2004-2005 Executive Budget, stated that he was "*requiring* the New York State Public Service Commission to implement" his renewable energy program (emphasis supplied). Governor Cuomo participated in rate settings over which the PSC has jurisdiction, and reportedly "ousted" the PSC chairperson who disagreed with his position and involvement.⁵

⁴ Governor Charles Evans Hughes, who championed creation of the PSC, strenuously argued for executive control of the agency and warned that without executive authority to appoint and remove commissioners, the PSC could become a fourth branch of government without sufficient accountability. Subsequently, various governors of New York, including Nathan Miller, Alfred E. Smith and Franklin Roosevelt, aggressively attempted to influence the direction of the PSC to comport with their policies and challenged the decisions and actions of the PSC and its Commissioners. See Martin Landau, *The New York Public Service Commission, 1907-1930: A Study of Regulation in Its Political Environment*, (New York: New York University Press, 1957).

⁵ Elizabeth Kolbert, "Nominee to Head P.S.C. Defends Cuomo's Action on Utility Rates," *New York Times*, Jun. 11, 2007; Michael Oreskes, "P.S.C. Aide is Critical of Cuomo." *New York Times*, Apr. 23, 1987.

The propriety of communications between interested parties, including lawmakers and the PSC, is addressed in New York law. Section 307 of the State Administrative Procedure Act generally prohibits private contacts, referred to as *ex parte* communications, between officials of an agency of New York State and any party appearing before it regarding disposition of a pending matter. However, § 307(2) substantially excludes the PSC and DPS from the limits of this prohibition. It states that its terms do not apply in determining initial license applications for public utilities and carriers or to proceedings on the validity or application of rates, facilities, or practices of public utilities or carriers.

Consequently, in regard to policy issues, members of the regulated industry may express their views and exchange information with PSC and DPS staff *ex parte*, as may members of state government. In fact, members of state government, including the governor, can be seen as having a duty to share their policy views with the agency.⁶

In interviews with senior members of past administrations as to the relationship between the Executive Chamber and the PSC, the former officials confirmed that it is both within the governor's authority, and fully appropriate, for the governor to attempt to influence and shape the policies of the PSC. The recent PSC chairperson and current commissioner, Patricia Acampora, stated that the role of the PSC is to "promote" the governor's energy policies.

⁶ *McSpedon v. Roberts*, 117 Misc.2d 679, 683 (Sup. Ct. N.Y. Co. 1983).

Despite the governor’s authority to influence energy policy through the PSC, the law places general ethical limitations on the conduct of anyone in state service. In the first allegation discussed in this report, Buley alleged that Mitnick engaged in actions that exceeded the scope of his duties, and that were unethical. With regard to the accusations concerning Mitnick’s excessive interference with the business of the PSC and the DPS, the most relevant provision of state ethical standards is Public Officers Law § 74(3)(h), which provides that a public official “should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust.”

The Queens Blackout and the Prudence Investigation Debate

A massive power failure affecting 174,000 Queens County residents provided the context and background for the work of the energy and environment policy advisory committee and Mitnick’s recommendations regarding the PSC. The outage struck customers of the Long Island City power network operated by Consolidated Edison (Con Ed), which primarily affected the Queens County neighborhoods of Sunnyside, Long Island City, and Astoria. Customers in Westchester County were also affected. The blackout continued for nine days, from July 17-25, 2006.⁷ On July 26, 2006, then-PSC Chairperson William Flynn, who was appointed in 2003 by

⁷ During the blackout, Con Ed estimated that 25,000 households were without power. During its investigation following the event, the DPS reported that 65,000 households were either without power or experiencing low wattage to the extent that appliances could not function. The DPS criticized Con Ed for its inability to assess accurately the extent of the outage.

Governor Pataki, issued an order directing DPS staff to conduct a “comprehensive examination of the circumstances surrounding” the blackout.⁸

Mitnick’s opinion that the credibility and effectiveness of the PSC had declined was reinforced by media criticism during the Queens blackout and then-Attorney General Spitzer’s early positions on the PSC.

A few weeks after Buley, Harris and Curry were confirmed as Commissioners of the PSC by the Senate, a *New York Times* article, on July 28, 2006, discussed the PSC’s oversight of Con Ed and cited two critics who questioned the competence and experience of Governor Pataki’s appointees to the PSC.⁹ Similar criticisms appeared in other media reports.¹⁰ Public officials and others accused the PSC of insufficiently monitoring Con Ed and failing to require it to upgrade its Queens facilities prior to the blackout. While running for governor, then-Attorney General Spitzer was particularly critical of both Con Ed and the PSC. After a prior blackout in the Washington Heights section of Manhattan in 1999, Spitzer had recommended that the PSC compel Con Ed to make the necessary changes to prevent a similar incident from occurring in the future. In a July 24, 2006 press release addressing the Queens blackout, Spitzer stated, “It is clear that Con Ed did not heed the warnings from the earlier blackout, and that the PSC’s oversight of the utility has been wholly inadequate.” In a statement submitted to an August 3, 2006 Assembly committee

⁸ New York Public Service Commission, Order of Public Service Chairperson William Flynn, “Order Instituting Proceeding and Directing Staff Investigation,” Jul. 26, 2006.

⁹ Sewell Chan, “Official Unsure of Monitoring on Con Ed,” *New York Times*, Jul. 28, 2006.

¹⁰ Mark Johnson, “Democrats Fault Public Service Commission for Queens Blackout,” *Associated Press*, Aug. 4, 2006; James Odato, “Candidate Urges Reform at PSC,” *Albany Times Union*, Aug. 4, 2006; Fritz Mayer, “Democrats and Advocacy Groups Bash PSC,” *The River Reporter*, Aug. 10-16, 2006; Elizabeth Benjamin, “Maloney Connects the Energy Dots,” *Albany Times Union*, Aug. 3, 2006.

hearing, Spitzer also criticized the PSC commissioners themselves as lacking necessary experience.

Assemblyman Richard Brodsky, a Westchester Democrat and chairperson of the Assembly Committee on Corporations, Authorities and Commissions, led a petition by lawmakers in September 2006 urging the PSC to begin a so-called “prudence investigation” to determine Con Ed’s liability to victims of the July 2006 outage as well as those affected by another outage in early September in Westchester County. A prudence investigation can lead to findings that would prohibit Con Ed from recovering equipment repair costs from consumers.

The PSC has the statutory authority to set “reasonable” utility rates and to decide which utility costs should be shouldered by the utility’s shareholders rather than its rate-paying customers.¹¹ Under New York law, it is unjust and unreasonable for utility customers to bear the costs of a utility’s “inefficient management or poor planning.” A principal function of the PSC, in cases where a utility exercised lack of care in providing gas or electrical service, is to separate those costs which should be borne by ratepayers from those which are properly borne by shareholders of the utility. The PSC makes this determination through a process known as a “prudence investigation.”¹² PSC and DPS officials testified that a prudence investigation is a rarely utilized tool. Then-PSC Chairperson Flynn resisted the Assembly’s pressure to begin the prudence proceeding immediately. Instead, Flynn directed the DPS to

¹¹ *Rochester Gas & Elec. Corp. v. Public Serv. Comm’n*, 51 N.Y.2d 823, 825 (1980).

¹² N.Y. Public Service Law §§ 66(12) (k); 72; *Rochester Gas and Electric Corp. v. Public Service Comm’n*, 51 N.Y.2d 823 (1980); *Long Island Lighting Co. v. Public Service Comm’n*, 134 A.D.2d 135 (3d Dept. 1987).

prepare its own report, stating, “The time frame I am working on is a complete and thorough investigation, however long it takes.” Although the DPS staff would eventually fault Con Ed for the blackout, a prudence investigation by the PSC was necessary to impose costs against Con Ed and its shareholders. The final DPS report was issued February 9, 2007. Unsurprisingly, Con Ed opposed the initiation of a prudence investigation and preferred a negotiated settlement.

During the first few days after the blackout, Buley accompanied DPS staff in surveying the damage in Queens. Buley testified to the Inspector General that, “early on, I took an immediate and active interest in the outage, and not just from the ivory tower, but boots on the street, and also with monitoring what the Assembly was doing in September calling for a prudence investigation. . . .” Buley also testified that she was sympathetic to the position of Assemblyman Brodsky: “I thought we had enough information just based on history and practice and also where this was headed, that we could have commenced the prudence investigation in September when the Assembly also thought we should have.” She continued, “I don’t see the wisdom in commencing an investigation a year later to fill in the blanks after the fact.”

According to Buley’s testimony, she expected that, since the DPS had issued its report on the Queens blackout on February 9, 2007, the vote to initiate the prudence investigation would appear on the agenda of the PSC session on February 27, 2007. This did not occur.

Buley’s allegations against Mitnick center on the scheduling of the PSC’s vote to authorize a prudence investigation of Con Ed’s actions relating to the Queens blackout. At its public session on April 18, 2007 – the same meeting at which Buley

voiced her accusations against Mitnick – the PSC voted unanimously to proceed with a prudence investigation of Con Ed’s responsibility for the blackout.

Steven Mitnick’s Recommendations to the Governor-Elect During the Transition

Mitnick testified that, during the campaign, the governor advocated three broad policy goals on energy. The goals were to improve and expand the state’s energy infrastructure; reduce energy costs; and promote environmentally friendly energy alternatives. Mitnick believed that to accomplish these goals, the administration needed commissioners and staff at the various energy-related agencies who were experienced and who would energetically advocate for the governor-elect’s programs and positions. Partly with the Con Ed blackout in mind, Mitnick also believed that the PSC had lost some prestige within the energy community.¹³

These views were set out in documents Mitnick prepared during the transition, which addressed recommended changes. In one such document, Mitnick urged that “changing [the] leadership at [the] PSC [was] crucial to effect [the] needed policy redirection.” He expressed the view that the PSC needed commissioners with strong backgrounds and expertise in the energy field, and referred to the then-incumbent commissioners as “[e]xtraordinarily weak . . . in terms of experience, commitment and capability relative to regulatory bodies of other states.”

In his testimony to the Inspector General, Mitnick emphasized his opinion that the PSC needed stronger commissioners who were experienced, fully engaged, and

¹³ Officials from past administrations interviewed by the Inspector General also expressed that the PSC had lost some of the national prestige it once held.

informed, and who challenged the staff and had credibility and the respect of the regulatory agencies and professionals in the field. What was needed, he said, were commissioners who could be entrusted with resolving important issues and events such as the Queens blackout of 2006.

In November 2006, Mitnick briefed the governor-elect and several others on his ideas to replace commissioners. According to Mitnick, he did not receive feedback on how to accomplish these goals. Among the commissioners Mitnick wanted to replace were two PSC commissioners, Buley and Robert Curry, both of whose terms of office expire in 2012. Curry, a registered Democrat, is an attorney who obtained experience in energy issues through his corporate legal work.

Buley, a former Republican now registered as independent,¹⁴ testified to the Inspector General that she was nominated to the PSC by Governor Pataki with the support of Senate Majority Leader Joseph Bruno. Buley's appointment to the PSC was one of Governor Pataki's late-term appointments criticized in the press. Previously, Buley served on the New York State Racing and Wagering Board, first as a commissioner beginning in June 2000 and then as chairperson beginning in November 2005 until her appointment to the PSC in June 2006.¹⁵ Buley also worked in the private sector developing public relations campaigns and acting as a consultant.

¹⁴ Senate Democrats accused Buley of changing her party affiliation from Republican to independent to circumvent Racing and Wagering Law § 101(2), which prohibits all three Racing and Wagering Commissioners from sharing a party affiliation. See James Odatto, "Senate Confirms Pataki's Racing Board Nominee," *(Albany) Times-Union*, Jun. 14, 2000; Sam Roberts, "Pataki Creates Legacy, Filling Scores of Posts," *New York Times*, Sept. 15, 2006.

¹⁵ In fact, it was widely reported at the time that Buley's ascent to the Acting Chair of the Racing and Wagering Board was the result of the previous Chairman's, Michael Hoblock's, refusal to resign or accept another position in state government at the request of Governor Pataki which resulted in his demotion from the Chair and replacement by Buley. See Fredric U. Dicker, "Pataki Snubs Bruno Buddy," *New York Post*, Dec. 5, 2005; Erik Kriss, "Racing and Wagering Chief is Out" (*Syracuse*)

Buley holds a master's degree in public relations from Boston University and a bachelor's degree in business and marketing from the State University of New York at Plattsburgh.

Neither of the two remaining commissioners, then-Chairperson and now Commissioner Patricia Acampora, and Commissioner Maureen Harris, both registered Republicans, was recommended for replacement by Mitnick. Flynn, the previous chairperson, had resigned in December 2006, leaving one seat open on the PSC.

In recommending that Buley be replaced, Mitnick cited her lack of experience and expertise in the energy field. With respect to Curry, Mitnick said he had been informed by certain DPS staff that Curry did not work full time to fulfill his commissioner role. Mitnick later came to see Curry as a competent professional. Mitnick testified that at the time he made these recommendations, he did not know either Buley or Curry. However, he may have met one or both fleetingly at a social event.

In a transition document, "Roadmap for Energy Appointments," that was prepared on December 7, 2006, Mitnick wrote, "Many if not all board members and commissioners will quickly agree to resign, honoring the incoming governor's request." Acknowledging that some appointees may not resign, Mitnick proposed and advocated, as a "last resort," the use of the "governor's unilateral power of

Post-Standard, Nov. 30, 2005; James Odató, "Pataki Ousts Racing Official," (*Albany Times Union* Nov. 30, 2005; James Odató, "Pataki Moves to Keep Horses on Track," (*Albany Times Union*, Dec. 29, 2005; Tom Precious, "Pataki Names New Head of New York State Racing and Wagering Board", *The Blood-Horse*, Nov. 30, 2005.

removal.” Mitnick asserted that this power resided in Public Service Law § 4-b, which he believed was a “relatively simple procedure,” adding, “Once informed about the [removal authority], this power apparently [has not been] widely known . . . commissioners would presumably opt for the resignation route.” As discussed below, the use of § 4-b to remove appointed officials was categorically rejected by Mitnick’s superiors.

In late December 2006, the transition’s energy policy advisory committee made a presentation. Mitnick, one of the committee’s presenters, told the governor-elect and his staff that the “most important energy issue is improving the energy leadership especially of the New York Power Authority and the Public Service Commission.” The governor-elect, according to Mitnick, listened to the committee’s presentations but offered no response. This presentation and the similar presentation in November were the only two occasions when Mitnick informed the governor of his intention to seek resignations from commissioners. At these presentations, Mitnick received no direction from the governor about how to proceed with obtaining resignations.

All of the events described above, including Mitnick’s recommendation that Buley be replaced, occurred prior to any of the events related in Buley’s allegations.

The New Administration Takes Office

Once Governor Spitzer took office, on January 1, 2007, the pace of activity quickened. One of the most immediate tasks facing the new administration during the first months of 2007 was to identify and recruit individuals who would support and

implement the governor's policies and goals to fill hundreds of high-level positions in state agencies, authorities and commissions. At the same time, some top agency officials who had served in the prior administration had either already resigned or were in the process of doing so, allowing the new governor to form his own management team. Others, who had not decided to leave on their own, were being asked to do so. Those serving at the pleasure of the governor were obligated to resign upon the new administration's request. Those serving fixed terms that refused could only be compelled to leave office through the application of relevant statutory procedures. As Mitnick had pointed out in his transition memos, Public Service Law § 4-b is the statutory provision controlling the removal from office of PSC commissioners.

On January 5, 2007, Mitnick assumed his position in the new administration as Assistant Secretary to the Governor for Energy and Telecommunications. Mitnick testified that he was eager to immediately begin to implement the governor's energy program, including personnel changes at the agencies for which he had responsibility, primarily the PSC, NYPA, and NYSERDA.

Mitnick testified that his responsibilities within the administration were never clearly laid out. Mitnick also related that the lines of authority were unsettled throughout the entire period discussed in this report and characterized his position as a "no man's land." Mitnick testified that "[Secretary to the Governor] Rich Baum told me on January 5th [the day of Mitnick's appointment] that I reported to him," but he had little contact with Baum after that. Baum similarly characterized his relationship with Mitnick, testifying that he expected subordinates to "take the

general direction and turn it into specifics. There was no way I could deal with any specifics without losing off the other end.”

Mitnick said that in early March, then-Director of State Operations Olivia Golden “did more and more things that made it seem evident that I was now reporting to her.” Mitnick believed that the administration was considering hiring a Deputy Secretary for Infrastructure, and that Mitnick would report through this person to Baum, but no such position was created. Deputy Secretary to the Governor for the Environment Judith Enck worked closely with Mitnick and held a more senior position than he within the administration, but she was not his direct supervisor. When asked whether Enck supervised Mitnick, Baum characterized the relationship as follows: “She was working closely with him but if you looked in the org chart it wouldn't be that way, and I'm not sure she would even say that. . . .”

On January 17, 2007, nearly two weeks after Mitnick’s appointment, the DPS released a draft report about the Queens blackout that had occurred six months earlier. The final report, released on February 9, 2007, was highly critical of Con Ed. Among other findings, the report concluded that the outage stemmed from Con Ed’s failure to address pre-existing problems in the system, that Con Ed did a “gross disservice” to Long Island City network customers in its response to the outage, and that the company lacked the necessary management procedures to “accurately develop and process information in an emergency.”

The report asserted that Con Ed should have shut down the entire Long Island City network to avoid damage to its equipment.¹⁶ It further read, “the Company failed to fulfill its responsibilities under the Public Service Law.”¹⁷ The report recommended that the PSC initiate a prudence investigation “to consider the prudence of the Company’s actions or lack thereof.” The findings could lead to costs being shifted to Con Ed and its shareholders.

On January 24, 2007, the governor announced his nomination of Angela Beddoe as the new chairperson of the PSC. In an e-mail that same day, Mitnick expressed his view to Appointments Secretary Francine James and Counsel to the Governor David Nocenti that quick action on resignations should be taken, as delay would make the process more difficult and would undercut implementation of the administration’s energy initiatives. He specifically urged quick action in regard to Buley, who, along with the entire PSC, had been strongly criticized in a *New York Times* editorial the previous day. In citing Con Ed’s failures in regard to the 2006 blackout, the editorial stated:

The commission’s failure is, sadly, not surprising. The just-departed governor, George Pataki, treated this important body as a collection of plum six-figure sinecures, and he stacked it with cronies ill suited to the job, including, most recently, a former public relations executive, Cheryl Buley, whose husband has been a major Republican donor...The Public Service Commission is badly in need of reform.¹⁸

¹⁶ In his testimony to the Inspector General, Mitnick indicated that this finding was controversial. To shut down the entire Long Island City network would have affected more customers and disabled the subway in the area.

¹⁷ Department of Public Service, *Staff Report on Its Investigation of the July 2006 Equipment Failures and Power Outages in Con Edison’s Long Island City Network in Queens County, New York*, Feb. 2007, p. 9.

¹⁸ Editorial, “Watching the Energy Watchdog,” *New York Times*, Jan. 23, 2007. This editorial was raised various times during the Inspector General’s investigation, and Mitnick and Buley testified that they discussed it.

With planned personnel changes at the top of NYPA, NYSERDA, and the PSC already identified, Mitnick e-mailed his superiors to seek permission. Neither of the recipients, James nor Nocenti, responded to Mitnick's e-mail. Although Mitnick was anxious to obtain vacancies on the PSC, others in the administration felt that it would be better to wait for Beddoe's confirmation. James stated that she was in no hurry to secure vacancies at the PSC, since she was busy filling the hundreds of positions that were already vacant.

Although both parties testified that they do not remember speaking in January 2007, phone records reveal that Mitnick called both Buley's cell phone and her office phone on the morning of January 24. Both calls lasted approximately one minute. Phone records indicate that Buley returned the call to Mitnick and that return call lasted nearly six minutes. Both Buley and Mitnick remember their first significant interaction being on February 16, 2007.

ALLEGATIONS OF COMMISSIONER CHERYL BULEY

At the April 18, 2007 meeting of the Public Service Commission, the commissioners were called upon to vote whether to initiate a prudence investigation against Con Ed. When it was her turn to speak, Cheryl Buley preceded her vote with a statement alleging that Steven Mitnick, in previous conversations with her, had threatened her about the prudence investigation. When interviewed by the Inspector General's Office, Buley repeated her allegations against Mitnick. In her public statement and in her testimony, Buley alleged that Mitnick acted unethically by:

- attempting to coerce her to not comment publicly about delays in the prudence investigation or to mention the Assembly petition on the matter;
- attempting to influence her vote on the prudence investigation;
- threatening her PSC position if she failed to follow his instructions on the prudence investigation;
- arranging for the postponement of PSC action on the prudence investigation past the February 27, 2007 meeting of the PSC; and
- acting in a threatening and intimidating manner toward her.

Buley's Efforts to Return to the New York Racing and Wagering Board

Prior to any contact with Mitnick, Buley was attempting to leave her position at the PSC and return to the New York Racing and Wagering Board (RWB), where she had served from 2000 until her PSC appointment in 2006.

According to James Crane, a lobbyist and personal friend of Buley's, in late January 2007, probably after being criticized in the *New York Times* editorial, Buley contacted Crane and expressed her "frustration" with her position at the PSC. She

told Crane that she was interested in returning to the RWB, telling Crane that the PSC was “bigger and more bureaucratic” than the RWB and that the RWB was “possibly a better fit for her skill set.” Crane and Mitnick knew each other from Crane’s previous lobbying work for Mitnick’s company, Conjunction, LLC. While Crane was not certain as to who had first thought of the idea, he told Buley that he knew Mitnick and would be happy to call him about Buley’s interest in returning to the RWB.

On January 26, 2007, Crane sent Mitnick an e-mail asking Mitnick to call him regarding Buley. In the e-mail, he told Mitnick that Buley was “a good friend and I wanted to pass along some intel.” Soon after, Crane testified, he spoke with Mitnick by telephone and told Mitnick, “I thought that [Buley] would be possibly interested in returning to the Racing and Wagering Board. I would imagine that Governor Spitzer would like to have some of his own people at the PSC, and if Mitnick could be helpful in her return to the Racing and Wagering Board, then there would be a vacancy at the PSC which the governor could fill.” Crane stated that Mitnick appeared interested.

Crane testified that after his conversation with Mitnick, he called Buley to report to her how the conversation went. He stated that he told Buley, “I said you were a good person, somebody who is connected politically, and I let him know that [you] might have an interest in going back to the Racing and Wagering Board.”

Mitnick similarly recalled that Crane told him that Buley understood that she would be asked to leave the PSC and that she would be interested in returning to the RWB. Mitnick testified that he had never heard of the RWB, and that he had not given any thought to another position for Buley. He stated that he simply wanted her

to resign from the PSC. Hearing Crane's suggestion, Mitnick thought that given Buley's past experience, she might be able to make a contribution at the RWB. Reflecting this conversation with Crane, Mitnick noted in his calendar, "Cheryl Buley go to Racing and Wagering Board [sic]." The next day, January 27, 2007, Mitnick sent an e-mail to Appointments Secretary James stating:

A mutual friend told me this afternoon that Public Service Commissioner Cheryl Buley, the Commissioner so heavily criticized by name in the New York Times editorial last Tuesday, is looking to resign. She wants to return to the Racing and Wagering Board where she was a long-time Member until Pataki switched her last summer to open a seat for a Pataki friend.

Crane was not the only one to whom Buley expressed her dissatisfaction with her position on the PSC and her desire to return to the RWB. Patricia Acampora, the then-PSC chairperson, testified that "right from the beginning" of Buley's term on the PSC she wanted "something better than what she already had," a position with higher pay and fewer hours. 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." After the new administration took office, Acampora said, Buley sought her advice about asking Mitnick "if she could get another job" through the governor's office.

Similarly, PSC Commissioner Maureen Harris testified that she had a number of conversations with Buley who said, "She was not happy at the PSC. She wanted to go back to Racing and Wagering and she said . . . 'How do I get my old job back?' " Harris testified further, "It was very well known among a certain circle of people that

she did not like this job. She did not like the subject matter . . . she felt she was in over her head . . . and that if offered another job by the governor — given the right job — she would jump at it.”

Harris testified that Buley was also fearful of becoming unemployed, and was worried that the incoming administration would seek her removal from the PSC. Harris stated that Buley was very concerned that she was going to be the subject of a § 4-b proceeding, so much so that Buley believed that she would be required to take an examination about energy to test her competence.

Diane Burman, an attorney who served as Buley’s assistant, testified that Buley was so afraid of a § 4-b proceeding that she told Burman that she planned to hire a lawyer, and asked Burman if DPS would pay for it. Buley, however, testified that it was Burman who approached her and offered to research § 4-b.

Harris also testified that Buley said she would “play hard ball if they want to get rid of me.” To Harris, that meant that Buley would become “a little bit of a problem” on the PSC so that the new administration would offer her a better state job.

In contrast, Buley testified to the Inspector General that she was not very concerned about being removed from office. She stated that she thought it was a “mischaracterization to say that I was really eagerly pursuing a departure from the Public Service Commission,” contradicting Crane’s and her colleagues’ testimonies. She stated further, “I was getting some traction at the Public Service Commission and the longer I was there, I was dedicating myself to this job, I had been working on a national level . . . I sponsored a policy there and as time was marching on, I was getting more familiar and pleased with my contributions there.”

Early Discussions About the Prudence Investigation

As noted above, on February 9, 2007, the DPS issued a report on the Queens blackout criticizing Con Ed and recommending that “the Commission initiate a proceeding to examine the prudence of the Company’s actions or inactions that led to unnecessary expenditures of funds provided by ratepayers.”

On February 11, 2007, Mitnick received an e-mail from Gil Quiniones, Energy Advisor to the Mayor of New York City, regarding the prudence investigation. Quiniones wrote that the “City recommends that we focus on what Con Ed needs to do in terms of investing and upgrading their grid going forward – and hold them accountable for the needed actions in their upcoming electric rate case in March/April of this year – instead of a prudency hearing. It’s time to look forward and not backwards....” Mitnick replied in an e-mail, writing, “Great!!!!!!!!!!!!!!!!!!!!”

During this period, Con Ed was preparing to submit a new request to the PSC for an adjustment in its rates. Mitnick testified that Con Ed’s rate filing was his “number one priority.” In regard to the rate filing, Mitnick said, “Our primary goal, similar to the primary goal of the Mayor of New York, was to get Con Ed to invest as much money as it took to improve and modernize that distribution network to minimize the probability that these things [the blackout] would happen again.” Mitnick stated his effusive response to Quiniones was about Quiniones’s desire to encourage investment in Con Ed’s infrastructure, not to the city’s objection to the prudence investigation.¹⁹

¹⁹ Con Ed ultimately requested PSC approval to raise its rates by 17 percent for a typical residential customer and 10.7 percent for businesses. Con Ed officials defended the request, stating “[t]he rate plan we filed in May reflects what we believe will fund the investment necessary to meet New York’s

Mitnick Seeks Buley's Resignation

Once appointed Assistant Secretary for Energy and Telecommunications on January 5, 2007, Mitnick was eager to put his energy plan into action, including obtaining resignations from various commissioners. As mentioned above, Mitnick had discussed the use of § 4-b as a means of removing commissioners in a document prepared on December 7, 2006 for the transition. However, in his testimony, Mitnick acknowledged that § 4-b, though authorized by the Public Service Law, was rejected by his superiors in the Executive Chamber.

Mitnick stated that through January 2007, he had brought up § 4-b twice with the governor's counsel, David Nocenti, but was told, "No." Nocenti, Mitnick stated, told him that while the governor clearly has the authority to use § 4-b, it was not going to be used. Nocenti explained that it had never been used in the past, and that the administration was not going to do it.

Secretary to the Governor Richard Baum testified that while he recalled Mitnick's proposal of utilizing § 4-b as an option for removal of commissioners unwilling to resign, both he and Nocenti thought it was a bad idea. Baum said he felt that Mitnick's proposal was not consistent with the "posture we wanted to take with the new administration." Baum testified, "I decided not to go that way." Baum further testified that both he and Nocenti made their decision clear, and that if Mitnick attempted or threatened to use § 4-b to remove a commissioner, he would have been doing so against his and Nocenti's direction.

growing energy needs." See William Sherman and Adam Lisberg, "Are You Kidding, Con Ed?" *Daily News*, Sep. 30, 2007.

Appointment Secretary James stated that she had researched the process for removal of commissioners with term appointments in general and had concluded that it was “quite cumbersome” and that removal would be difficult to achieve. She stated that while asking commissioners with fixed terms to leave was certainly proper, their refusals would bring the issue to an end as they were entitled to remain in their appointed positions. She further told the Inspector General that she advised Mitnick of her view on this matter.

Enck confirmed that Nocenti had informed Mitnick that § 4-b was “a non-starter.” She stated that the use of § 4-b “was an idea Steve had in the fall, in the early part of the year, but I think it fell off the table when there was a decision not to pursue that . . . it just wasn’t discussed after Dave Nocenti said we’re not utilizing it.”

Mitnick testified that, as a result, he understood that if any commissioner with a fixed term refused to honor the new administration’s request to resign, it would put an end to the issue.

Though he was given an answer about § 4-b, he was not authorized to proceed with requesting the resignations. He repeatedly sought approval from senior administration officials to begin this process, but was unable to get a reply until February 14. On that day Mitnick participated in a conference call,²⁰ which included Baum, Nocenti, and James. In the course of the conversation, which addressed a variety of energy topics, Mitnick finally received approval from Baum to seek 10 resignations in various energy agencies. Mitnick testified that § 4-b was not raised

²⁰ Mitnick was at home, sick, so he had to participate in the meeting via conference call.

during this call, and he did not get any instructions about how to effectuate the resignations.

On February 15, 2007, Mitnick e-mailed a memorandum to James entitled “7-Step Gameplan [sic].” In the memorandum, Mitnick set out as a first step to “[r]equest resignation of PSC Commissioner Cheryl Buley, effective when a replacement is confirmed.” Having been informed by Crane of Buley’s desire to return to the RWB, Mitnick wrote James, “As she knows, the PSC is not her field. Consider moving her back to the Racing Commission.” Also in this memo, he again raised the option of utilizing § 4-b. James did not reply to this e-mail.

When asked why he mentioned § 4-b again in his February 15 memo to James, despite earlier instructions to the contrary, Mitnick testified that he still believed that it was a step that should be considered. He stated, however, that he would not actually take such a step without the approval and participation of his superiors.

Mitnick’s Contacts with Buley

Having received permission on February 14, 2007 to request resignations, Mitnick contacted PSC Commissioners Buley and Curry on February 16. Mitnick ultimately had several telephone conversations with both Buley and Curry. There are no witnesses to, or tapes of, any of these calls. The primary parties to the dispute, Buley and Mitnick, were in agreement on many facts, but gave conflicting testimony on some of the more pertinent issues. In some instances, neither individual’s account was completely consistent with phone records.

To address Buley's allegations, the Inspector General's Office reviewed the contacts between Mitnick and Buley, from the February 16, 2007 telephone call through April 17, 2007, their last contact before Buley made her allegation at the PSC's public session the next day. According to testimony, six relevant contacts took place: five telephone calls (February 16, February 26, April 5, April 6, and April 17) and one face-to-face meeting (April 2), the only contact in which a third party participated.²¹ It is from these six contacts and the surrounding facts that support for Buley's allegations must be found, and therefore, each was fully reviewed.

From this review, it was determined that in only two of the contacts between Buley and Mitnick did Buley allege that the subjects of Con Ed or the prudence investigation were raised. These calls, in connection with a third call in which Buley claimed that Mitnick mentioned Public Service Law § 4-b, are the basis for her allegations of coercion. These were the telephone conversations of February 16, February 26, and April 17. The other three contacts did not refer at all to either Con Ed or the prudence investigation. Thus, while each of the six contacts was fully analyzed, the three telephone conversations of February 16, February 26, and April 17 comprise the core of this investigation's focus.

²¹ As noted above, Buley and Mitnick may have both been present at two social events early in the year, but no interaction of note occurred between them.

Telephone Conversation on February 16, 2007

On February 16, 2007, Mitnick placed calls to Buley and Curry and made his initial requests that they resign their PSC positions.²²

Mitnick testified that, in his telephone conversation with Buley, he was very direct in stating that the governor intended to make changes at the PSC and that, therefore, “we would request that you resign from the Public Service Commission.” Mitnick described Buley’s reaction as “fairly accepting” although she believed that she could be an effective commissioner. Mitnick was not certain as to whether he mentioned his previous conversation with Crane and Buley’s interest in returning to the RWB. He stated that he did not mention § 4-b during this conversation and that by the end of the conversation, it was his impression that Buley might resign.

Buley, in her testimony, stated that Mitnick explained that he intended to make wholesale changes at the PSC and inquired as to her career plans. Buley said she responded that she intended to complete her term at the PSC. She stated that Mitnick then made reference to the January 23, 2007 *New York Times* editorial and that she responded that she had “shouldered media criticism before.” Buley testified, “[T]hen he referenced § 4-b of the Public Service Law on removals and said that ‘the governor can do anything that he wants.’ . . . So it set a tone.” The Inspector General’s Office then questioned Buley as follows:

²² Three days earlier, on February 13, 2007, the Public Service Commission had released a public “notice of comment schedule” regarding its February 9 report on the Queens Blackout. According to the notice, initial comments were due on March 2, 2007 and reply comments were due on March 16, 2007.

Q: And at that point, did he make any threats to you... [anything that] you perceived as a threat?

Buley: I guess it's subjective, if someone is citing section 4-b of a law and then stating, "the governor has total authority in effectuating that law," I don't know is that a threat?

Q: How did you perceive it?

Buley: My perception was that he interpreted it that way, and frankly, if they were going to — I can't be on a hypothetical level. If things are happening, I'd deal with it, but they weren't really happening, it was just a phone call. But you know, that editorial had just run in the *New York Times*, so I hung up feeling as though he were trying to get a sense of how committed I was to serving on the Public Service Commission.

Neither Mitnick nor Buley testified that during this call any reference was made to Con Ed, the Queens blackout, or the prudence investigation. Mitnick denied mentioning Public Service Law § 4-b in this conversation, but he conceded that he did mention it the next time they spoke.

Phone records show that approximately two hours after her conversation with Mitnick, Buley called Crane. Crane called Mitnick two days later on February 18 and again on February 19, informing Mitnick that Buley was still interested in moving to the RWB. Mitnick then e-mailed Appointments Secretary James on February 19, advising her that Buley was "would resign but wants to return to the New York State Racing and Wagering Board." He told James that he understood that there were two vacancies on the RWB and that he intended to follow up with Buley.

Acampora Testifies Before Assembly Committee

On February 26, 2007, a day prior to the scheduled monthly PSC session, then-Chairperson Patricia Acampora, and DPS Directors Charles Dickson, James Gallagher, and Robert Mayer testified under oath before the Assembly Standing

Committee on Corporations, Authorities and Commissions.²³ This hearing is of particular import because it directly addressed one of the principle facts underlying Buley’s claims that she was coerced into silence about the delay in commencing a prudence investigation.

During the Assembly committee hearing, PSC and DPS officials were vigorously questioned about why a formal comment period on the DPS staff report was needed before a prudence proceeding could begin. Acampora strenuously defended the need for a comment period. In response to the nearly 90 recommendations in the DPS report on the blackout, she said, the formal comment period completes “the information gathering process before the Commission renders its decisions.” At the hearing, Acampora argued:

The principal purpose of such a [prudence] proceeding is to ensure that ratepayers do not provide the utility with recovery of cost[s] . . . as a result of a company’s imprudent actions or practices. The Commission takes very seriously its duty to ensure that ratepayers not be responsible for imprudent costs. In deciding whether and when to initiate a prudence proceeding, the Commission will determine whether there is tenable basis for concluding that the company’s actions were imprudent and whether those actions resulted in ratepayer harm. In my judgment, and in the interest of fairness to all parties, that decision should be made after the formal comment process has been completed. Allowing time for due deliberation and to complete the process contemplated by the parties and the administrative law judge overseeing the case can only strengthen future Commission determination on this matter.

Consumers would not be affected by any delay, Acampora added, as the costs had not yet been included in their rates. There was no legal limit on how long the PSC could

²³ As discussed in detail below, this was also the same day as a relevant telephone conversation between Mitnick and Buley.

prolong the comment period, she said. It would be governed by the interests of “fairness.”

Pressed by Assemblyman Brodsky about exactly when the prudence matter would be placed before the PSC, Acampora said she hoped to decide on whether to initiate a prudence investigation “in April or May, at the latest, when the comment period will be done in . . . March.” She could not assure the Assembly that the matter would be addressed by the March 21, 2007, PSC meeting, because she had yet to see the forthcoming comments. “I would say the earliest we would do that – again in order to make sure there is a complete record – would be April or we could call a special session in April.”

When Assemblyman Brodsky complained about the time lag and its effect on the public, Acampora replied that “the process and fulfillment of due process is within the law. And I believe also that because of the seriousness of this matter, what we do will basically be the foundation of how the Commission will go forward in the twenty-first century regarding not only Con Edison but other utilities within the state.”²⁴

Therefore, as of February 26, 2007, it was clear that the PSC was not going to consider launching a prudence investigation most likely until April 2007. Although Mitnick said he spoke with Acampora about the timing of the prudence investigation, he said that it was Acampora’s decision to have the comment period, and he agreed with the delay for that purpose. When asked, Acampora testified to the Inspector

²⁴ At the Assembly hearing, Acampora admitted that the PSC “absolutely” bore some responsibility for the Queens power outage.

General that the delay was her decision and that Mitnick did not threaten or attempt to unduly influence her. Lee confirmed that the comment period was Acampora's decision after consultation with DPS staff.

Telephone Conversation on February 26, 2007

Continuing his pursuit of Buley's resignation, Mitnick made a second telephone call to Buley on February 26, 2007, the same day that Acampora testified before the Assembly committee. Both parties testified that a call took place on this date and that the call was contentious. The Inspector General subpoenaed the records of the telephones on which Mitnick and Buley said that the calls were made. Telephone records reveal only one call on that date from Mitnick's office to Buley's office, taking place at 11:30 a.m. and lasting 1 minute and 12 seconds. Neither Mitnick's nor Buley's version of this conversation could have taken place during such a short call, although it is possible that the call took place on phones whose existence was not disclosed to the Inspector General by either party. Given both Buley's and Mitnick's certainty that the call occurred on February 26, as well as additional facts discussed below, the Inspector General assumes for the purpose of this report that the call was made on February 26, 2007.

Buley alleged that it was during this conversation that Mitnick attempted to influence her in relation to her position on the Con Ed prudence investigation, and threatened to remove her from the PSC if she spoke publicly about her support for the Assembly's petition to initiate the proceeding.

Buley stated that in this conversation, she became uncomfortable as Mitnick began by discussing the futures of the other PSC commissioners. According to Buley, Mitnick told her that he was attempting to move Curry to another agency and that he was not sure what would be done with Harris. As to Acampora, Buley stated that Mitnick said he thought “they’d be leaving [her] alone” as Acampora was testifying before Assemblyman Brodsky’s Committee that same day regarding Con Ed and the prudence investigation. Assemblyman Brodsky had been openly critical of the PSC’s failure to initiate a prudence investigation sooner, and Acampora and her staff must have known they would face hostile questioning at the hearing. Buley testified that Mitnick commented, “How on earth could they go after her after she agreed to testify as to why the prudence proceeding was being delayed?” Concerning her own situation, Buley testified that Mitnick said the following:

I want you to hold off on this prudence investigation for a few months, I do not want you to mention any member of the Assembly or the Assembly’s petition, and depending on how well you follow my instructions . . . I’ll get back to you on how the Administration feels about your term on the Public Service Commission or whether I could help you shift to the Racing Board.

Buley testified that she responded by telling Mitnick, “I haven’t really said that I really want to shift to the Racing Board. The longer I’m at the Public Service Commission, I’m not sure that’s something I would readily agree to, and the longer I’m here and I’m involved, I’m not sure that’s something that - I would consider it - but it’s not that I have agreed to that with you.” Further, Buley testified that she informed Mitnick that she had doubts about his authority to move her to the RWB. Buley stated that Mitnick ended the conversation by saying that he would get back to her “to see if they would support my commissionership on the Public Service

Commission or work to transition my role on the Racing Board.” Buley added, “After this February 26th call, I told [DPS Executive Deputy] Judy Lee that I was considering hiring a lawyer” because “I felt as though [Mitnick] had – that his actions were unethical and I felt as though he was trying to unduly influence my position and intimidate and threaten my commissionership.” Lee testified that Buley never discussed Mitnick’s actions with her.

Mitnick, in his testimony, concurred with some aspects of Buley’s description of the February 26 conversation. They both agreed that when he repeated his request that Buley resign from her position, she was less receptive than in the previous conversation 10 days earlier. Mitnick testified that:

She said that she thought she’d be a good commissioner; that she’d learn; that she started out not knowing anything, but maybe that’s good to have someone on the commission that doesn’t know anything; and so I said – I pushed back at one point and I said, “But we’re really looking for commissioners who have experience and credibility and have the ability to read and articulate papers of cases, testimony, cross, rebuttal, whatever; understand the nuances of that.”

Mitnick testified that Buley responded to his second request for her resignation by stating that her PSC appointment had been confirmed by the Senate, which included, at the time, now-Lieutenant Governor David Paterson. When he told Buley that he believed she lacked credibility and referred to the *New York Times* editorial, Mitnick said she became very angry, saying she was considering hiring a lawyer to sue the *Times*. While he couldn’t remember with certainty, Mitnick said that he might have told Buley that he did not think he was the appropriate person to approach the RWB about a possible appointment for her.

While Buley did not claim that Mitnick had referred to Public Service Law § 4-b during this conversation,²⁵ Mitnick testified that he did, in fact, raise § 4-b in response to what he described as provocative comments by Buley. Although he knew that the use of § 4-b had been rejected by his superiors, Mitnick testified that at some point in the conversation, Buley told him, “You know what, I’m here. I was confirmed. I’m going to be here until February 2012, whether the governor likes it or not.”

Mitnick, feeling that this comment was “over the top,” said he was provoked into responding that “[Buley] should look at section 4-b.” He testified:

What I recall is I did it in the most careful and oblique manner possible cause I knew that – first of all, I knew my guys had decided we weren’t going to remove anyone anyway . . . I said, “You should look at section 4-b. You should have a look at section 4-b.” And she may have said something like, “So what do you mean by that?” And I said, “That’s it. Just look at it” . . . And that was it.

When asked by the Inspector General’s Office what he meant by this reference to § 4-b, Mitnick stated that he wanted to make clear to Buley that “It’s not ‘no matter what’ . . . That’s what I meant by it. Simply that it’s not unconditional, and that’s what I meant, plain and simple.” Mitnick testified that it might have been at this point that Buley made a second mention of hiring a lawyer. Of this reference to hiring a lawyer, Mitnick testified, “It made me scared, a little scared.”

Both agreed that Buley was being asked to resign during this conversation. But Mitnick denied that he asked Buley not to object to the delay of the prudence

²⁵ Buley testified that Mitnick only mentioned Public Service Law § 4-b in their first conversation on February 16, 2007.

investigation. Mitnick in his testimony stated, “A ridiculous claim, no. Wish we had that [on] tape.” He accused Buley of being “purposefully untruthful.” Mitnick also denied having told her not to bring it up at the upcoming session of the PSC.²⁶

In fact, Mitnick testified, “She brought it up; she asked me what to do. I didn’t give her any direction, and there was no direction to give her that was relevant.” Regarding this conversation, Mitnick testified, “It felt like she was fishing for something that I would like about her.” According to Mitnick, Buley cited her agreement with the governor on a number of policy issues:

She said, “You know, I’m more in favor of renewables, I love renewables, you know, I see what the governor said on that, whatever you guys want to do, I’ll do.”...And the same thing on efficiency, “Oh yeah, I’ve read the governor’s speeches, I voted for the governor, I think he’s a great guy, I’m totally in support, I’ll do whatever you want...”

Mitnick further testified that when he tried to steer the conversation back to the subject of her resignation from the PSC, she raised the prudence investigation:

I think [she said] something like, “So, you know, there’s going to be these hearings...Assemblyman Brodsky has said this”...referring to the Con Ed prudence thing, and...I think that she asked me, you know, “Where do you stand?” or “Do you want - I’ll do whatever you say,” this kind of thing. Mitnick went on to note that Buley’s vote was “irrelevant,” as the three other PSC commissioners were all voting to go forward with the prudence investigation. Mitnick continued, “I simply wanted her to resign from the Commission. . . about the last thing that I would want to do

²⁶ In an August 31, 2007 letter, Mitnick’s attorney accused Buley of “stag[ing] a press spectacular” on April 18 and requested that the Inspector General determine if Buley made misrepresentations in her public statement and testified untruthfully in her sworn interview with the Inspector General’s Office.

would be to say – to discuss any policy matter to make her feel like she should stay at the Commission.”

Buley Tells Others About Her Conversations with Mitnick

Buley testified that later that day, she telephoned James Gallagher, Director of the DPS Office of Electricity and Environment, to tell him that Mitnick had threatened her.²⁷ Buley believed that the vote on the prudence investigation had been scheduled for the commission’s session the next day but had been removed at the urging of Mitnick. She said she asked Gallagher why the governor’s office would want to delay the prudence investigation. According to Buley, Gallagher “basically said that he didn’t understand why they were delaying it.” However, Gallagher testified at the Assembly hearing the day before with then-Chairperson Acampora and would have heard Acampora’s explanation for the delay.

Gallagher related that Buley called him the next morning and told him, “The guy [Mitnick] just called me and threatened me with my job.” Gallagher testified that he recalled Buley telling him that although “we’re supposed to be independent . . . he doesn’t want me to reveal certain things.” Gallagher said she continued that “he didn’t want her to have an open discussion at the session on [the prudence investigation] or her job was in jeopardy, it was something to that effect.” He said Buley seemed “angry,” “upset,” “distraught,” and unsure of what to do.

Buley stated that she called DPS Chief of Policy and Program Management Michael Corso after Mitnick’s two February calls. Corso confirmed that Buley had

²⁷ Phone records indicate that the call from Buley to Gallagher actually took place the following day at 8:42 a.m.

spoken with him about the conversations but could not specify when their conversations had occurred. He believed, however, that they happened soon after the events as, he said, Buley seemed “fairly exercised.”²⁸

Corso stated:

A few times . . . we’ve had conversations about Steve Mitnick and her telling me that he was badgering her, forcing her to leave, one can make a deal, try to get her out, try to make arrangements. She claimed that he threatened her, her job; that she serves at the pleasure, and the governor wants this seat and statements such as that.

Corso also stated that Buley told him that Mitnick had stressed that the prudence investigation and the revenue decoupling matter²⁹ were very important to the governor, and that “they wanted there not to be a prudence case,” but that she should vote “yes” on revenue decoupling.

Buley testified that she also spoke with Diane Burman, her assistant at the time, about Mitnick’s threats following both the February 16 and February 26 calls. Burman testified that she recalled a conversation with Buley, but not a specific date, in which Buley said she had been threatened by Mitnick. Burman testified:

The threat that she said was that if she didn’t go along with him . . . that if she didn’t go along with the items that they wanted, that he would bring her up on PSL section 4 or whatever it is, and she had asked me to do research for her on the section of removing a commissioner and what defense she would have to do.

²⁸ Phone records indicate a conversation between Buley and Corso on February 18, 2007, two days after her February 16, 2007 call with Mitnick. After the February 26, 2007 call from Mitnick to Buley, phone records indicate that Buley’s next call to Corso was on March 13, 2007. However, testimony indicates that Buley and Corso also had face-to-face conversations.

²⁹ Under the current system of setting utility rates, companies are assured a continual profit. Under revenue decoupling, companies would not be granted an automatic rate increase when profits fell, giving them incentive to lower their costs. The PSC voted on April 18, 2007 to request proposals for a revenue decoupling program.

Burman said that, although Buley had told her of threats from Mitnick, she never heard Buley mention the Con Ed prudence investigation in relation to those threats until Buley made her public accusation on April 18, 2007. Burman added, “I didn’t put much stock in what she said.”

James Crane testified that, around March 1, 2007, Buley mentioned “an uncomfortable conversation or two” she had had with Mitnick. In the conversations, Crane said, Buley “felt [Mitnick] was trying to compel her to go in a certain direction in her official capacities.” Crane further testified that Buley, while not offering specifics, called Mitnick a “strange guy” and said that he was having conversations with her that were “inappropriate” because he was trying to get her to “take certain actions.” Crane characterized Buley’s complaint as, “something to the effect that [Mitnick] sort of indicated that he could make her life miserable if she didn’t do what he wanted her to do.”

Buley also testified that she spoke with Acampora after her February 16 conversation with Mitnick, and possibly after the February 26 conversation as well. In her testimony, Acampora said she remembered only one time “in passing” Buley mentioned that Mitnick wasn’t “treating her with enough respect. And to be honest with you, I did not want to even get into it. 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.”

Buley testified that she told Lee, the PSC Acting Executive Deputy, that she considered hiring a lawyer because “[Mitnick’s] actions were unethical and I felt as though he was trying to unduly influence my position and intimidate and threaten my

commissionership.” Buley said that Lee responded that Mitnick’s behavior was “very serious.” Lee, however, testified that Buley never spoke to her about conversations with Mitnick.

Buley said she might have talked to John Reese, former PSC Executive Deputy, about her February 26 conversation with Mitnick. Reese testified that he had no information about Buley’s conversations with Mitnick.

While Buley did not mention in her testimony having spoken to Jaclyn Brillig, the PSC Secretary, Brillig testified that Buley told her about “unpleasant” telephone calls with Mitnick. Brillig also testified that there was an “undercurrent” at the PSC of pressuring by Mitnick.

Events Following the Telephone Conversation on February 26, 2007

On February 27, 2007, the PSC met in public session. All of the commissioners were in attendance. At the meeting, Gallagher, a DPS director, presented the final February 9, 2007 report, twice mentioning the staff’s recommendation for a prudence review. The prudence investigation wasn’t on the agenda. A few weeks earlier, Acampora, with input from Lee and DPS Counsel Peter McGowan, had decided that a comment period on the DPS report’s recommendations was needed prior to PSC action. DPS Administrative Law Judge Eleanor Stein, the judge assigned to the Con Ed matter, advised the commissioners that the “first round” of comments was due on March 2, followed by reply comments due March 16. Stein said that “shortly after that” she hoped to be able to present recommendations to the PSC. At the meeting, Commissioner Curry expressed eagerness for the PSC to act on

the report, and said that he hoped it could take up the Con Ed issues at the March 21 session, the next scheduled session following the deadline for comments.

At the February 27 PSC meeting, the day after her contentious conversation with Mitnick, Buley spoke publicly about the delay of the prudence investigation and agreed to a comment period. According to the transcript of the meeting, Buley said:

While I appreciate the need for a due diligence process and to allow for comments and I certainly respect that process, I am a new commissioner who early in my term lived this blackout and went to Queens to see what was happening during the outage itself, saw a lot of the infrastructure above ground and businesses closed down and the throes of a crisis basically. I have very serious concerns about the ratepayer, as I am sure all of you do, and I trust that *we will avoid any undue delay in shoring up the comments and acting expeditiously* (emphasis supplied).

On March 1, 2007, Mitnick e-mailed Appointments Secretary James with an “energy” update. Reporting on his recent conversation with Buley, Mitnick described Buley as a “jumpy” individual and mentioned that she might retain counsel. Despite Buley’s mention of hiring an attorney, Mitnick told James that Buley would probably resign if she could move to either RWB or NYSERDA. Mitnick recently had become aware of an opening at NYSERDA that he felt might be acceptable to Buley.

However, Buley apparently was losing interest in another job. Her friend Crane testified that, at about this time:

I had another conversation with Cheryl [Buley] . . . in which, I think because she had sort of spent a little more time thinking about it, and had realized that it was going to be difficult to assure herself of a term coterminous with her PSC term, and because at that point in her life the job security was more important to her than other considerations, I think she was becoming, as she thought about it, less enthusiastic. So I just sort of let it die, and I didn’t have any more conversations with Mitnick or with her about it.

According to Burman, Buley informed her on March 5 that Buley was recording Mitnick's calls. When asked by the Inspector General whether she had recorded any of Mitnick's calls, Buley said that she had told Burman that she was considering it, but that she did not actually record the calls.

While Burman stated that she didn't believe Buley was taping calls, she did, in fact, alert Acting Executive Deputy Lee and then-Chairperson Acampora. That same day, March 5, the three together placed a call to Mitnick and informed him of Buley's claim. According to Burman, Mitnick seemed unconcerned but thanked them for the information. Lee testified that Mitnick stated, "I will not talk to [Buley] again."

Following this call, also on March 5, Mitnick e-mailed James to inform her of what he had just been told. Mitnick reported to James:

Francine, at approximately 5:15 p.m. this afternoon, PSC Chairperson Pat Acompora [sic], Acting Executive Deputy Judy Lee and the policy advisor to PSC Commissioner Cheryl Buley called me and told me Commissioner Buley was making reckless comments to many individuals internal and external to the PSC, some of which suggest inappropriate or illegal actions, Buley also reportedly said she was taping telephone conversations, so I plan to have no further telephone or face-to-face conversations with her, the PSC folks plan to be extremely circumspect in speaking with her too, making sure PSC Counsel is in attendance at any such discussions, Buley reportedly wants to win a prestigious position in State Government in return for a resignation, needless to say I could not have been more prudent and sensitive in my two telephone conversations with Commissioner Buley regarding her career in State Government and obvious mismatch at the PSC. . . .

In his testimony, Mitnick added that a number of PSC officials had expressed to him their apprehension about speaking with Buley without agency counsel present. These

officials also told him that Buley was seeking “a big-time job . . . for example Secretary of Transportation,” in exchange for leaving the PSC.

The Inspector General obtained a letter dated March 7, 2007 from Buley to Mitnick on DPS stationery. The letter, cordial in tone, is addressed to “Steve” and signed “Cheryl.” In the letter, Buley informed Mitnick that “active interest on renewable energy initiatives” has enabled her to meet “some of the world’s leading experts on renewable energy and clean technology industries.” Buley related that she had previously discussed renewable energy with Lieutenant Governor Paterson at a lunch, and she felt that he would like to meet the above-named experts. Buley concluded the letter by offering to facilitate such a meeting.

Around this time, several witnesses testified that Buley requested that the prudence investigation not appear on the agenda for the PSC’s March session because she was scheduled to be on vacation and did not want to miss a possible vote. Lee said Buley was very emotional when she spoke about missing the March meeting. Acampora also remembered Buley’s concern with the March 21 meeting of the commission. Although Acampora reassured Buley that the vote would not be on the March agenda, Acampora said that Buley was worried that “we were going to pull a fast one on her.” In her testimony to the Inspector General, Buley agreed that she was “beside [herself]” about having to choose between attending the meeting or going on vacation with her mother. Buley stated that rather than requesting that the agenda be adjusted, she had sought to move the date of the session. She said she had never missed a session before, even during her six years on the RWB and that, “I take . . . that responsibility very seriously.”

Meanwhile, DPS was continuing to receive comments regarding its report on the Queens blackout. After receiving a request from DPS staff working on the matter, on March 14, PSC Secretary Jaclyn Brilling extended the initial comment period from March 16 until the end of the month. This meant the prudence proceeding would not be presented for a vote at the PSC's March meeting.

According to Brilling's testimony, the further delay in the prudence investigation vote was neither a result of Buley's requests nor any outside interference. Brilling discussed extending the comment period with DPS General Counsel Peter McGowan and decided that the extension would be beneficial, since it would give the staff time to organize the data to present to commissioners before the vote.

The transcript of the PSC March 21 meeting indicates that Buley participated by telephone.³⁰ At the meeting DPS Administrative Law Judge Stein told the commissioners that the comment deadline was extended to March 30 "because of the sheer bulk of recommendations . . . on the table for parties to analyze and comment on." The comments were both voluminous and complex. Comments had been both for and against the prudence investigation, with Con Ed and the City of New York in opposition. In addition, those favoring the inquiry submitted various comments about its scope.

Although she had asked that the prudence vote be delayed beyond the March session, Buley appeared unhappy with the extension of the comment period. Over the

³⁰ Although Buley participated in the meeting by telephone, pursuant to Public Service Law § 11, she was not permitted to vote on any matter.

telephone, Buley said, “I’d like to request of staff that no additional extensions are made on the Con Ed prudence investigation without commissioner approval.”

McGowan explained that Brilling, as PSC Secretary, had the authority and responsibility to make that determination, to which Buley replied, “Thank you for the clarification.”

Despite his stated intention of having no more conversations with Buley, Mitnick had not yet mentioned to her that he had learned of a public information officer position at NYSERDA. Sometime before the beginning of April, Mitnick, acting in a way he called “a little too clever and a little too adventuresome,” decided that he should present her with this option as an inducement for her to leave the PSC. He testified, “So I got excited when the idea occurred to me that, ‘Gee, there’s this position at NYSERDA, it’s in public relations, she’s a public relations person, maybe that will click.’ ”

However, Mitnick testified that, based on Buley’s reported statements, he needed to exercise caution, deciding that his next contact with Buley would be in a public place and with a witness. “I didn’t want to talk to her on my own, because I was scared of it, so I came up with this idea.” Subsequently, Mitnick had his secretary call Buley’s office to schedule a lunch meeting on the Empire State Plaza concourse, in Albany. Buley attended the meeting alone.

Lunch Meeting on April 2, 2007 in the Albany Concourse

Mitnick and Special Assistant for Energy Thomas Congdon met with Buley for lunch on April 2, 2007. All parties agreed that the meeting was amicable. Buley

and Congdon testified that the conversation even involved small talk about their families.

According to both Mitnick and Buley, Mitnick raised the NYSERDA position. Mitnick described NYSERDA's mission, the administration's ideas for the agency, and Buley's potential role as public information officer. Mitnick then answered a number of questions that Buley raised. Mitnick's assessment of the encounter was, "It seemed like it was going to work because that meeting seemed to have gone so well . . . She had lots of questions. And like I said before, the meeting was so affable and she was of such good temperament, and it seemed like such a cool idea that at the end, Tom Congdon and I left that thinking, 'Problem solved. This is great. Everyone is happy.' "

Buley, giving essentially the same description of the event, testified that Mitnick offered her a higher paying job, and that both agreed to consider it further. In Buley's words, "that was the sum and substance of that lunch." But Buley's testimony indicates that she was not as eager about the NYSERDA job as Mitnick perceived:

I have to tell you all along I never really knew if Steve Mitnick had the authority to be making these job offers, but I . . . tried to be respectful of him. So I listened . . . I just wanted to have an opportunity to maybe get to know each other a little bit in terms of not having him threaten me . . . and I was willing to talk about policy, and I was pleased, frankly, that Tom Congdon was there as a witness to his dialogue.

Congdon, who stated that he was asked by Mitnick to attend the lunch because, as Mitnick told him, Buley was "a little crazy" and "unpredictable,"

described the event as a pleasant, cordial, and professional encounter. He recalled Mitnick telling Buley that he only wanted her to consider the NYSERDA position, and that Buley seemed interested.

During the lunch meeting, they encountered Michael Corso, PSC's Chief of Policy and Program Management. Corso stated in his testimony that the next day he spoke with Buley, who told him that she had an interest in possible positions at both RWB and NYSERDA, positions she had discussed with Mitnick. While he said that Buley stated both jobs "had some appeal," she was concerned that the NYSERDA position was less secure.

Telephone Conversation on April 5, 2007

Three days after the lunch meeting, on April 5, 2007, Mitnick called Buley to set up a time for a telephone conversation the following day. While both agreed that this was the purpose of the call, and that no discussion of another position for Buley was raised, Buley stated that Mitnick raised one substantive issue, the revenue decoupling mechanism, and said, "he would be very excited if I voted in favor of it, the governor would be very excited if I voted in favor of it." Mitnick, Buley said, also told her that he wanted the PSC commissioners, rather than just staff, to be more involved in initiating policy discussions.

Mitnick, while he testified he had no specific recollection of the content of the call, disputed Buley's claim on revenue decoupling. "I find that laughable – no definitely not," he said. "Not only don't I recall saying it, that flies in the face of . . .

what I was trying to do, which [was] to get her to feel that she should leave the PSC. Why would I encourage her about an issue?”

Mitnick did speak with Commissioners Harris and Curry about revenue decoupling. Neither commissioner objected to these discussions even though they disagreed with some of Mitnick’s points and found his personal style to be aggressive. As mentioned above, it is permissible for state government officials to advocate certain policies with Public Service commissioners.

Telephone Conversation on April 6, 2007

On April 6, Buley and Mitnick spoke by telephone. They agreed that during this call, Mitnick encouraged Buley to pursue the position of public information officer at NYSERDA, but that Buley declined. Buley testified that during this conversation, Mitnick stated that the administration would support her for the NYSERDA position but not her remaining at the PSC. Buley stated that Mitnick began again to criticize the other commissioners, this time including Acampora, and Buley told him that she might not wish to speak with him anymore.

Mitnick testified that he was both “frustrated and disappointed” that Buley had decided not to pursue the NYSERDA job. He stated that Buley gave three reasons for her decision. First, Buley was concerned about job security and wouldn’t consider the NYSERDA position unless Mitnick would guarantee that it would last until 2012, the same year that her PSC term expired. Second, Mitnick said, Buley believed that the NYSERDA position was less prestigious than a PSC commissionership. Third, Buley told Mitnick that she had looked into the

NYSERDA position and found that, although Mitnick had told her that the job would pay \$129,000 to \$130,000, the salary was closer to \$90,000, which was less than her PSC salary of \$109,800. Mitnick said he responded to this last concern by telling her that the salary was negotiable. Mitnick further testified that Buley told him, “Steve, some day, you know, months from now, if the Racing and Wagering Board position opens up and not the position that has a tenure till 2008, but the one that has a tenure to 2011 or something like that, then you can . . . call me up about it. But, otherwise, I’m here [at the PSC]” Mitnick testified that after this conversation he was “at a standstill.”

Events Following the Telephone Conversation on April 6, 2007

A few days after this conversation, on April 9, Mitnick attended a meeting with the governor and his senior administration officials. Energy and the environment were the topics to be covered. Mitnick provided the Inspector General with a document he and Deputy Secretary to the Governor Judith Enck had prepared in advance of the meeting. The document outlined a number of policy items for discussion, including Mitnick’s plans to create vacancies on the PSC. However, then-Director of State Operations Olivia Golden, who attended the meeting, testified that the removal of PSC commissioners was not discussed, instead “the purpose of [the meeting] was to lay out the big picture.” Similarly, Mitnick testified that he only spoke for a few minutes at the meeting and did not get the opportunity to discuss replacing the PSC commissioners. In fact, Mitnick thought he’d have more time to speak at the meeting and was “frustrated” that the topic didn’t come up.

Aside from the April 9 meeting, Mitnick testified that he had “so little” contact with the governor after he joined the administration. Specifically, other than the transition presentations, he said that he had “zero” discussions with the governor about changes in the PSC leadership. Secretary to the Governor Baum and Golden confirmed that they knew of no conversations between Mitnick and the governor about the PSC commissioners.

Aside from the February 14 conference call where Mitnick was given the approval to proceed with seeking resignations, neither Baum nor Golden could recall having any further conversations with Mitnick about this issue. Baum stated that he was not familiar with Buley’s name until she made her accusations on April 18 and Golden testified that until April 18 “the PSC just never bubbled up to a level where we had a focused conversation about it.”

After the meeting on April 9, the governor’s press officer, Jennifer Givner, received an inquiry from a television reporter regarding the governor’s position on the prudence investigation. Mitnick helped Givner respond to the request. The story, which aired that day at 6 p.m., reported, “Governor Spitzer is pushing for a [prudence] hearing. His office said, ‘we anticipate that the New York Public Service Commission will soon appropriately and sufficiently address Con Ed’s cost responsibilities in a formal proceeding.’”

In an e-mail sent on April 16, 2007 by Mitnick to Golden, briefing her on the Con Ed prudence investigation issue, Mitnick informed her that the next PSC public session on April 18 “promises breakthroughs on several fronts.” One of the breakthroughs Mitnick expected was that, “The Commission will order the opening of

a new [prudence investigation] proceeding to consider arguments and then decide what penalties Con Ed shareholders must accept, in the form of costs that Con Ed shall not be permitted to recover through rates, for any lack of prudence during the Queens blackout last July.”

Telephone Conversation on April 17, 2007

On April 17, 2007, a reporter called the PSC asking about a public statement that Buley was planning to make at the public session the next day. A surprised Chairperson Acampora testified that she asked Buley about the call, but that Buley responded that while she was upset at Mitnick, “No . . . I’m not doing anything . . . no, no surprises.” Contrary to Acampora’s testimony, Buley testified that she “may have said I’m strongly contemplating it, but I wanted [Acampora] to be aware that it was something I was planning on doing.” Buley said that Acampora warned her not to do it and that she, Buley, “could get into some trouble if I did.” Buley said she answered that she “felt the public had a right to know that I had been unduly influenced to hold back on talking about the prudence investigation.”

Enck advised Mitnick not to attend the session the next day as she had heard from a DPS official that Buley was “acting weird.” Mitnick testified that he never considered not attending. Instead, Mitnick testified that he telephoned Buley the same day, April 17, to attempt “to calm her down.” He stated that he didn’t know the nature of the problem. He testified “maybe other people knew, but I didn’t know that there was a whole thing being staged . . . so I called her pretty innocently.”

According to Buley, Mitnick's tone was "over the top conciliatory," adding that Mitnick said he had used bad judgment, had made a mistake, and "begged . . . my forgiveness." Buley said that she responded "that he had violated, you know, a sense of ethics." In response to Mitnick's suggestion that they try to maintain a good working relationship, Buley said she responded that "based on his past practice and intimidation and threats, particularly on the Con Ed prudence investigation," she no longer wanted to speak with him about her career plans, only about energy issues. Buley said Mitnick agreed to "extricate himself" from further discussion about her career.

Buley continued by stating that Mitnick offered to approach her at the PSC meeting the next day so that the public would see that they have a good working relationship, and, according to Buley, told her that he wanted to have lunch with her so that they "could have fun together." Buley stated that she refused, telling Mitnick that his actions were threatening and unethical. She testified:

And then right before we hung up, he said that depending on how session went, he would let me know in three days whether or not the administration supported my commissionership. And at that point, I realized that Steve Mitnick had deaf ears to our discussion, he was immune from understanding where I had been coming from, and it was really at that point that I decided that I was going to make a statement, because I knew that the prudence [investigation] was finally on the session, I was about to and I knew it would come up for a vote, and I knew that he was intimidating me again.

As she proceeded in her testimony at this point, however, Buley said that Mitnick's threat changed. Now the threat was no longer linked to her position on the prudence

investigation, but rather how she behaved toward Mitnick, starting at the public meeting the following day. Buley continued:

It was a less direct intimidation, but it was very much...you know, that he would meet with this group of people and then in three days time, you know, let me know where I stood and it depended on how receptive I was to his overtures to approach me at session publicly... to have this positive relationship, and have a fun lunch. Those are kind of the terms now of a good working relationship.

The Inspector General received an envelope from Buley with notes on the conversation that Buley testified she made during the call. Written on the envelope were phrases including “extract himself”; “henceworth [sic] 1) good collegial relationship 2) commissioner”; “modest proposal—no discussion non-policy”; “switch gears work with me”; “bad judgment call”; “apologize”; “beg forgiveness mistake”; “sick of it”; “undue influence”; “substantive issue go public” and “Does admin say to you—we’ve satisfied condition serving admirably. [sic]” However, the notes do not mention the reported three-day deadline or the Con Ed prudence investigation.

Mitnick’s description of the same conversation was somewhat consistent. Mitnick agreed in his testimony that he was “being nice” to Buley. He said that she seemed “upset” and “angry” because, she said, “I was isolating her; that I was talking to Commissioner Harris all the time; I was talking to Commissioner Curry all the time; talking to Commissioner-Chairwoman Acampora all the time, never talking to her. I was purposefully isolating her and that was unfair.” Mitnick stated that Buley told him that “she was just as good as the other commissioners.”

Mitnick testified that in order to calm her down and address her concerns, he suggested that they arrange a lunch to discuss only substantive matters and that he would not raise the issue of her resignation. Mitnick stated that he did tell Buley that regarding possibilities for the future, including moving back to the RWB, he was going to “kick that over to someone else” so she wouldn’t even have to worry about Mitnick raising the issue of changing positions in their conversations. Mitnick testified that by this point, he had given up the expectation that Buley might resign, accepting that “she wasn’t going to be moving.”

Mitnick testified that since Buley said she felt isolated and rejected, he suggested that at the end of the PSC’s public session the following day, he could approach her and that, in front of everyone, they could take out their calendar books and set up a meeting. He told her that people would then see that they were getting together and that Buley was not being isolated. Mitnick emphatically denied saying to Buley that he wanted to have “fun” with her in any inappropriate or unprofessional way.

Mitnick denied saying anything at all to her about the Con Ed prudence investigation or about her position on this issue. He denied too, saying anything about informing her within three days regarding the administration’s position on her future at the PSC. Mitnick stated, “No, I don’t recall it, and that sounds so illogical. What’s going to happen in three days?”

This was the last contact between Buley and Mitnick prior to the PSC public session at which Buley made her allegations concerning Mitnick.

The Timing of the Prudence Investigation

Buley variously alleged that Mitnick attempted to control her public comments on the Con Ed prudence investigation, attempted to influence her vote on the investigation, and arranged to prevent the commission from voting on the matter in February. She speculated that Mitnick wanted the delay for political purposes, to gain an advantage in rate negotiations with Con Ed, or to avoid the expense of a prudence investigation. As a result of Buley's claims, the Inspector General's Office examined the circumstances of the timing of the Con Ed prudence investigation.

As detailed above, in September 2006 Assemblyman Richard Brodsky led a petition of 29 Assembly members encouraging the PSC to initiate a prudence investigation. Assemblyman Brodsky was openly critical of the PSC for what he perceived as an unnecessary delay in initiating the proceeding. The release by DPS of its report on the Queens blackout on February 9, 2007 led to renewed calls for a prudence investigation, as the report was highly critical of Con Ed and recommended the prudence proceeding.

While Buley believed that the prudence investigation would be voted on soon after the report's release, PSC Chairperson Acampora publicly testified before Assemblyman Brodsky's committee on February 26, 2007 that the PSC would not vote on the matter until several weeks after the comment period was completed. Buley told the Inspector General that she believed that Mitnick had orchestrated the delay and she was "frustrated" with Mitnick's ability to seemingly pull something as important as the prudence investigation off of the agenda." Buley speculated that Mitnick did not want the prudence investigation to interfere with his discussions with

Con Ed about its upcoming rate request. Gallagher testified that he had also heard rumors to that effect, but had no evidence that was the case. However, the other PSC commissioners and other DPS senior officials did not believe Mitnick was seeking to prevent the prudence investigation. As discussed earlier, the DPS staff asked for the prudence investigation to be taken off the March agenda because they needed more time for comments.

Mitnick denied attempting to delay or prevent the prudence investigation. Specifically, he testified that the governor was in favor of a prudence investigation from the outset and that he would not have gone against the governor's wishes by interfering with the initiation of a prudence investigation. Enck also testified that the governor was in favor of the prudence investigation.

In his testimony to the Inspector General, Mitnick said that the PSC was authorized to initiate a prudence investigation as early as the fall of 2006, after Con Ed had completed its own report on the outage. Although then-PSC Chairperson William Flynn's stewardship of the PSC earned praise from others,³¹ Mitnick criticized Flynn for not initiating the prudence investigation in the fall of 2006, calling it a "huge strategic blunder." "Once Flynn went down that road asking staff to do a report," Mitnick said, a prudence review couldn't start, procedurally, until that report was drafted, analyzed, finalized and commented upon in a "comment period allowing all parties to vent, and then finally they would be in a position to go to a...to a prudence review."

³¹ New York City Mayor Bloomberg characterized Flynn as "very competent." Sewell Chan, "Official Unsure of Monitoring on Con Ed," *New York Times*, Jul. 28, 2006.

Former DPS Executive Deputy John Reese testified that he was confused by Buley's assertion that Mitnick attempted to influence her vote on the prudence investigation. Reese felt that Mitnick would have had little personal inclination to help Con Ed by resisting a prudence investigation. Reese noted that before joining the Spitzer administration Mitnick headed a company trying to build a transmission line from Upstate New York to New York City and had faced resistance from Con Ed.

Public Service Commission Session on April 18, 2007

At the April 18 session of the PSC, the commissioners voted to proceed with a prudence review of Con Ed's actions before and during the July 2006 blackout. On that day, an unusually large number of reporters, including a television crew, were present. Buley denied contacting the media prior to the session, testifying that, "I honestly don't know where it leaked out." When asked whether she showed the statement that she read at the session to anyone else she replied,

I basically did not. I did let [Counsel to the Senate Majority] Mike Avella know in the Senate, who has been a friend of mine for a long time. I let him know that he should know that I was planning on making a statement, and he basically said "that's entirely up to you." And, you know, I felt very much alone, frankly.

Buley told the Inspector General that because Senator Joseph Bruno supported her nomination to the PSC, she felt she should inform his office of the remarks she intended to include.

Buley also testified that she went up to Assemblyman Brodsky shortly before the start of the meeting on the morning of April 18 to let him know she was planning

on making a statement, but that she “didn’t show him the statement or tell him what the statement said.” Buley said she spoke to the Assemblyman because she respected his position on the prudence investigation.

Phone records also indicate that Buley called both the Assembly and the Senate switchboards on the morning of April 18. The Assembly phone calls were brief. One call to the Senate switchboard lasted 12 minutes.

Just prior to the commission’s vote on whether to open the prudence investigation of Con Ed, Buley read her prepared statement accusing Mitnick of attempting to influence her position on the issue and threatening her job.

Prior to my vote it should be known also: I am particularly troubled by communications I personally received from Mr. Steve Mitnick, assistant secretary to the governor for energy and telecommunications, who has sought to influence my position on this issue and attempted to coerce me into not commenting publicly about my concerns over the delays in commencing the prudence investigation.

His comments included a request that I refrain from any public support for the assembly petition filed months ago to commence this investigation immediately. At one point he went so far as to say that my failure to act consistent with his requests could result in me being removed from my commissioner position.

Although Mitnick attended the first part of the meeting, he was not present for Buley’s statement. Although attendees speculated that Mitnick had left because he knew what was to come, Mitnick had a prior lunch engagement with Bernard McGarry, majority counsel to the Senate Committee on Energy and Telecommunications. Mitnick said that he first learned of Buley’s public accusations when McGarry received a message regarding the incident and advised Mitnick to call his office. Upon learning of Buley’s statement, Mitnick testified, “My first notion was that Buley must have got pissed that I had left the room. She must have seen that

I left the room, and that caused her to make some sort of angry statement. Now in retrospect I don't know what it was, but I do understand that it was planned for days ahead of time, being that many people knew. Just not me.”

Following Buley's statement, each of the other commissioners, Chairperson Acampora and Commissioners Harris and Curry, in turn, stated that no one had attempted to influence their votes on the prudence investigation. All three, when questioned under oath by the Inspector General's Office, repeated their public statements that no attempt had been made to interfere with, or in any way influence, their positions on the issue.

At the meeting, the PSC unanimously voted to authorize and proceed with a prudence investigation of Con Ed to determine whether the company had acted reasonably regarding the Queens blackout of 2006.

In his testimony, Mitnick denied Buley's allegations made at the April 18 meeting, defending his interactions with her:

I'm someone who has worked 30 years in the industry. I have testified and worked for commissioners and commissions all around the country. I know what I can do and can't do. I'm extremely circumspect...I have the professional experience and know that I could not have done the things that Commissioner Buley charged. When I first heard about what [Buley alleged], that was my first impression...I think that it's reasonable—it's reasonable that given my bold approach that people would surmise that I was trying to effect a number of personnel changes and policy changes...I might say that that's what the Pataki administration did...when they came in in 1995, and it was lawful and permissible and appropriate then, and it's lawful and appropriate now. That being said, as far as doing anything like what Commissioner Buley charged of me with respect to the Con Ed case on April 18th, not even close. And Commissioner Buley would know that. I didn't even come close. So if you're asking me, could she have—could I have meant to say something and Commissioner Buley would have taken it a different way, no. No chance of that. That's how far from that line I was.

Thomas Congdon, Mitnick's assistant at the time, encountered Mitnick shortly after Buley made her allegations. In his testimony, Congdon said that Mitnick was "shocked and a little upset," and expressed "outrage" at Buley's claims, which he said Mitnick termed "absolutely ridiculous." While acknowledging that he was not privy to any telephone conversations between Mitnick and Buley, Congdon stated that Buley's linking of the Con Ed prudence investigation with Mitnick's interest in Buley leaving her position at the PSC "seemed completely untrue based on everything I know" and came "out of nowhere."

When asked why he thought Buley would make such allegations against him, Mitnick responded, "To me, what Buley said ensured in her mind . . . that no one would ever ask her again to resign, and that would ensure that she would be there, that once she made a statement that I was harassing her and trying to coerce her about a PSC vote or matter, so I believe that was her motivation."

Mitnick also speculated, while acknowledging he had no evidence, that Buley's allegations against him were part of an organized effort to discredit him, Beddoe, and Governor Spitzer's energy policies. He surmised that interest groups promoting retail competition in the energy industry might be behind the effort.

Mitnick's Request for Commissioner Robert Curry's Resignation

While Mitnick was contacting Buley and encouraging her to resign her position, he was simultaneously pursuing the resignation of Commissioner Robert Curry, a Democratic appointee to the PSC. His conversations with Curry parallel those with Buley in important respects. Mitnick contacted Curry several times,

repeatedly urged him to resign his position, and tried to negotiate alternative employment for him. Curry's testimony revealed that he was, at a minimum, taken aback at Mitnick's aggressive manner. However, in contrast to Buley, Curry stated that in Mitnick's efforts to encourage Curry to resign, Mitnick neither threatened or intimidated him, nor raised with him his position on the Con Ed prudence investigation or instructed him as to how to vote.

According to Curry, in an initial call on February 16, 2007 (the same day Mitnick first called Buley) Mitnick "very bluntly" stated that the new administration wanted him to resign his position. Curry testified that he was "astounded" when Mitnick implied that Curry had neglected his PSC responsibilities in favor of a private law practice, a claim Curry said was "baloney." Curry stated that Mitnick had apparently been misinformed and that he corrected Mitnick's understanding. The issue, Curry said, was not raised again. As in the case of Buley's attempts to return to the RWB, Mitnick discussed with Curry a possible opening at the Long Island Power Authority (LIPA). Curry responded that he neither accepted nor rejected the position but said he would consider it. Curry stated that he felt that during the conversation, Mitnick began to realize that he was a commissioner who added value to the PSC.

Mitnick's account of the conversation was very much the same as Curry's. Mitnick testified that Curry "responded in a pretty impressive way" to Mitnick's request for his resignation. He stated that Curry suggested that they meet for lunch, and they agreed to meet the following week to discuss Curry's situation.

As planned, Mitnick met with Curry on February 21. Congdon, Mitnick's assistant, also attended. In contrast to their telephone conversation, Curry described

the lunch meeting as “far more friendly,” recalling that they discussed the governor’s energy policies. Nonetheless, Mitnick encouraged Curry to consider working at the LIPA. In response, Curry said he told Mitnick, “I’d be happy to talk to people, but I’m pretty content with where I am right now.”

Mitnick updated Appointments Secretary Francine James by e-mail later that day. He wrote:

At lunch today with PSC Commissioner Bob Curry I confirmed he would resign if we came up with a plan b for him such as a senior counsel position at LIPA, which would be quite easy and appropriate, that means both the Buley and Curry seats at the PSC are available for appointments assuming we move these two individuals to lower profile spots. . .

Mitnick’s office subsequently provided Curry with the names and telephone numbers of LIPA officials he should contact. In late March 2007, Curry met with the officials, but learned he was not being considered for general counsel, which he testified was the only position he would consider. Several days later, Curry testified, Mitnick followed up, asking him to consider other positions at LIPA, to all of which he said he responded, “Not interested.” But, Curry added:

I was probably gracious, and said if something really fascinating comes up, I’d be happy to hear about it, but the way I see it here, this is a non-starter . . . He seemed to me to be a person who did not want to hear that. It seemed to me that he was under some pressure to get a seat or two on the Public Service Commission, and if someone that you’re trying to displace says, “I’m not really interested,” but says it in a gracious way, which is the way I try to communicate, he wasn’t walking away from that conversation thinking he’d been turned down cold . . . He would not hear what I was saying to him. I mean, he just wasn’t listening.

Curry testified that in an April 13 conversation with Mitnick, he tried to make himself clearly understood:

I called up [Mitnick] and I said, “Under no circumstances am I leaving here. My decision is to stay here, fill out my term, that’s the beginning, that’s the end of it.” He said, “Are you sure, you sure?” And I said, “That’s it.”

However, according to Curry, he and Mitnick had a final exchange about Curry’s career, prompted by Mitnick’s further suggestion that Curry consider an external affairs position at LIPA. Curry testified that he called Mitnick on April 18, the same day that Buley made her allegations at the PSC’s public session, and told him bluntly, “No more about this.”

Mitnick told the Inspector General that his views of Curry had changed, stating, “Now I come to find that Curry is, he’s an impressive individual . . . he has the potential to be a very good Commissioner.”

Mitnick resigned from state service on August 3, 2007.

Credibility of Mitnick and Buley

Given the lack of corroborating evidence, an examination of the credibility of Buley and Mitnick is necessary to evaluate their contradictory accounts.

Steven Mitnick

In the several weeks following his appointment on January 5, 2007 as Assistant Secretary to the Governor for Energy and Telecommunications, Mitnick met and spoke with numerous PSC and DPS officials and staff, many, if not most, for the first time. Mitnick’s reportedly aggressive approach often left a negative impression. A number of DPS employees stated that Mitnick’s interactions with staff were often counter-productive. He reportedly had a tendency to speak rashly, was

“brash,” “tended to put people off” and was “heavy-handed.” Richard Baum, Secretary to the Governor, said of Mitnick: “I would say he was very smart on energy policy, very good at conceptualizing it. Overall, his relationships with others didn’t seem to work out, people seemed to feel put aside...or put off somehow.” PSC Commissioner Curry described Mitnick as “politically tone-deaf.”

Several witnesses recounted a January 2007 meeting in which Mitnick spoke to a group of DPS bureau directors. While Mitnick characterized the meeting to the Inspector General 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 DPS 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.” When asked about this event, Mitnick stated “that was something that I would prefer not to have said...But I had no other motivations than to have that positive impact.”

DPS Acting Executive Deputy Judith Lee indicated 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 DPS 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 DPS morale. Congdon testified that he heard Mitnick make these remarks elsewhere, and had given him "constructive criticism" advising him not to say them again.

Reese, the former DPS Executive Deputy, testified that Mitnick was bombastic and had a "pretty intimidating approach" to the DPS, which he indicated he intended to fundamentally change. Reese said that, on more than one occasion, Mitnick identified Buley and Curry as commissioners he intended to "talk to" and "he made it very clear that it was going to be his way or the highway . . . He would ask commissioners to leave or they would vote the way he wanted." However, Reese said he "never witnessed Steve in any way trying to coerce or pressure commissioners." Mitnick denied making these statements to Reese.

Acampora and Harris saw both positive and negative aspects in their interactions with Mitnick. Acampora testified that while Mitnick took an impolitic and "hard-lined" approach with staff, he never crossed the line with a specific demand for action by her, and never gave her an ultimatum.

Harris testified that she and Mitnick disagreed on policy issues. In one meeting, she and Mitnick argued for 90 minutes on a matter related to revenue decoupling. Harris stated, "He just wouldn't let up. The entire meeting – just on and on, just to see if I would budge." Mitnick was "visibly angry and annoyed," Harris

said, but he never threatened her. Although Mitnick was “annoying” to her, Harris said, he never gave her an ultimatum and conducted himself “professionally.”

Harris did feel 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 DPS Acting General Counsel Peter 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.’ ” Curry agreed with his fellow commissioners that while Mitnick was impolitic and strikingly direct in his dealings with PSC officials and DPS staff, he never threatened Curry or committed any improper or unethical act.

Deputy Secretary Enck worked closely with Mitnick, and she held a more senior position than Mitnick, who was an assistant secretary. Enck testified that Mitnick “was not interested in being supervised.” Nonetheless, on April 16, 2007 she tried to advise him, “You don’t have to be that rough with getting your ideas through and the way you interact with people, and I think you need to dial it back a bit.” Enck said that at the time, she “was concerned that he was being a little too aggressive in pursuing his ideas with the PSC and with others.” Enck told the Inspector General, “Him coming from the private sector...and state government moves very, very slowly...I think he was impatient.”

Mitnick’s own assessment of his actions and approach to his job differ significantly from the descriptions of many witnesses. In explaining why Buley’s allegations were false, Mitnick testified, “I know what I can do and I can’t do. I’m

extremely circumspect.” He characterized his mention to Buley of § 4-b as “careful and oblique.” After learning that Buley had threatened to tape their future phone calls, Mitnick e-mailed Francine James on March 5, 2007, writing, “Needless to say, I could not have been more prudent and sensitive in my two telephone conversations with Commissioner Buley.” His version of an “initiative of mine to raise the morale and get the intellectual juices running” was perceived by his audience as arrogant and intimidating. The contrasts between Mitnick’s characterizations of his own behavior and what was perceived by nearly everyone else lends some doubt to his account of events.

Cheryl Buley

While DPS Director Michael Corso, former DPS Executive Deputy John Reese, and James Crane spoke positively about Cheryl Buley, a number of PSC and DPS officials, including the other PSC commissioners, expressed doubts about Buley’s abilities, and were highly critical of her and her credibility.

Corso testified that he and Buley were friendly and that he had developed a good relationship with her. He stated that, “She is very focused on her work. She’s really trying to do a good job, and I’ve been advising her as best I can on a number of matters.”

Reese said of Buley, “She was very inquisitive . . . She tried very hard . . . [and] put a lot of effort into the subject [of PSC business].” Like the other PSC commissioners, Reese said, Buley “showed a level of determination.”

In contrast, other PSC and DPS officials, including all of Buley's fellow commissioners at the time, spoke critically of Buley's conduct or judgment. Commissioner Harris testified that when Buley made her allegations against Mitnick, she [Harris] "just sort of dismissed it as: She's playing her game and causing problems so she gets a better job."

Though Mitnick was pushy to Harris as well, she testified that she was shocked by Buley's allegation that Mitnick coerced her to vote a certain way. Harris said:

I do not believe she's pure with her interests and with her allegations. Do I believe he probably crossed the line? Absolutely . . . but I think it's a two-fer. I think they're both out of line.

Diane Burman, Buley's then-assistant, testified that she generally doubted Buley's veracity and that Buley liked to "stir the pot." Specifically in relation to Mitnick, Burman testified that Buley vacillated in her comments to Burman, stating:

[Buley] said that Mitnick felt that he was...helping her because he thought she was nice, that he liked her; he thought she was competent and was not a hack and he was happy to see that... according to Cheryl, that he was happy with her and her role as a commissioner and what areas she wanted to delve into...But then, that would be one day and the next day she would say he's threatening me...I didn't put much stock in what she said.

Then-PSC Chairperson Acampora similarly testified that Buley "likes playing the victim role" and "blows up things out of proportion." Acampora concluded that given their personalities, Mitnick and Buley were doomed to mis-communicate from the start. Said Acampora, "It's an unfortunate situation. It's a real he said, she said thing and unfortunately I think these two people are both nuclear, basically."

Conclusions of the Inspector General

There is no doubt that the interactions between Assistant Secretary for Energy and Telecommunications Steven Mitnick and PSC Commissioner Cheryl Buley were contentious and upsetting to Buley. Mitnick's clear wish for Buley's departure from the PSC and his ill-advised reference to the administration's power to remove Buley as commissioner made her fearful of losing her position. In his dealings with Buley (and others) Mitnick was pressuring and overbearing. However, due to the contradictory testimony of Mitnick and Buley; the absence of third-party witnesses to the conversations of significance; the ambiguous nature of the extrinsic evidence; and the testimony of numerous witnesses as to the credibility of the primary parties, the Inspector General cannot conclude that Mitnick committed any criminal or ethical violations under New York law.

Although some of Mitnick's actions were offensive to Buley, these same actions were clearly within his authority. It is undisputed that Mitnick urged Buley to resign, urgings which included a reference to Public Service Law § 4-b. It is also undisputed that policy issues, including the possibility of a prudence investigation of Con Ed, were mentioned between Mitnick and Buley. On their own, neither of these actions constitutes wrongdoing.

The Inspector General considered whether Mitnick, in mentioning § 4-b in the context of requesting Buley's resignation, violated any provision of law. Although it is now evident that the administration never planned to remove Buley pursuant to § 4-b, Buley did not know that fact at the time. Mitnick's mention of the statute could have been interpreted by Buley as an indication that she would be the subject of

such a proceeding if she did not resign. In both Buley's and Mitnick's accounts, his mention of § 4-b was a response to Buley's stated intention to fulfill her term, not in relation to any specific policy before the PSC. A mere reference to a lawful procedure, even in the context of a request for a resignation, is permissible, regardless of whether the recipient of the statement finds it alarming. This is true even if Mitnick mentioned § 4-b knowing that the statute would not be invoked.

The actual misconduct alleged is that Mitnick expressly or implicitly linked Buley's continued employment in state government with her willingness to comply with his specific directives regarding the prudence investigation. Unlike other agency heads serving at the pleasure of the governor, commissioners of the PSC serve fixed terms of six years, allowing them to make independent judgments on the matters before them. A removal statute such as § 4-b is not to be used as a means to control the policies of the commission. Although Mitnick was permitted to convey the administration's wishes to a PSC commissioner, he could not compel compliance with those wishes through a threat of removal. Such an action would have undermined the essential purpose of a commission such as the PSC and would be an abuse of the executive's powers under § 4-b. The conclusions set forth below focus primarily on whether the evidence can establish such a link.

The testimony of multiple witnesses indicates that Buley may have believed that Mitnick's actions were improper. Even if, in Mitnick's eyes, the discussions regarding policy issues and Buley's resignation were unrelated, Buley might have drawn a connection. This is supported by Buley's conversations with three colleagues, to whom she complained about Mitnick's alleged threats, at or near the

time they purportedly occurred. In addition, reportedly contemporaneous notes that Buley made during a telephone call on April 17 indicate that Mitnick acknowledged having engaged in some form of inappropriate behavior. Buley's interpretation is also supported by the testimony of a former DPS official who said that Mitnick told him that commissioners who did not vote as he wished would be asked to leave. PSC and DPS staff who dealt with Mitnick also described him as aggressive and overbearing. Commissioner Harris testified that Mitnick was so intimidating to DPS staff that she was concerned that they were afraid to offer their honest opinions.

However, the evidence gathered in this case does not support the allegation that Mitnick improperly worked to stop or delay the Con Ed prudence investigation from going forward. To the contrary, the governor himself was a strong critic of Con Ed and the PSC itself in regard to the blackout of 2006. Mitnick had no obvious motivation to push Buley to vote against the 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. All of the other commissioners stated in public and testified in this investigation that they did not receive such a request from Mitnick, including Commissioner Curry who, like Buley, had been asked by Mitnick to resign.

The delay from February to April in the PSC's voting to initiate the prudence investigation was to allow for a comment period on the DPS report. Acampora made the decision to delay the vote for a comment period, after consulting with DPS staff. In fact, Buley stated in the PSC's public session on February 27, 2007, that she

recognized the need for a comment period. Later, Buley, herself made an emotional plea to then-PSC Chairperson Patricia Acampora and others to ensure that the prudence investigation would not be addressed at the next PSC meeting in March because she would be unable to attend due to her scheduled vacation.

Similarly, there is no evidence to show that Mitnick delayed the prudence investigation by pulling it from the February or March agenda, as alleged by Buley.

It is plausible, as cited by Buley in her public statement, that Mitnick asked her to “refrain from any public support for the Assembly petition filed months ago to commence [the prudence] investigation immediately.” Mitnick allegedly made this statement during a call to Buley on February 26, the same day as the Assembly hearing on the Con Ed matter and the day before the next scheduled session of the PSC. It is possible that Mitnick could have asked Buley to “hold off” on speaking about the prudence investigation “for a few months,” as Acampora was telling the Assembly hearing that very day that the PSC most likely would not vote on the prudence hearing until its April meeting, two months later. Mitnick supported Acampora’s decision to delay the vote for a comment period.

It is also plausible that, during the February 26 call, Buley asked Mitnick what to say at the PSC meeting. Mitnick testified that during this conversation Buley was “fishing for something I would like about her.” He claimed that she went on to ask him what to do regarding the prudence investigation and said, “I’ll do whatever you say.” Given Buley’s ongoing attempts to return to the Racing and Wagering Board and her fear of being removed from the PSC, it is possible that Buley tried to curry favor with Mitnick by asking what to say or do at the next day’s PSC session.

Even if, as Buley claims, Mitnick did instruct Buley not to make public comments, the central issue remains to be whether Mitnick's support for Buley's continued employment was conditioned on her following his instructions. The investigation could not establish this link.

When directly asked by the Inspector General whether she perceived Mitnick's reference to § 4-b as a threat, Buley said, "I guess it's subjective . . . I don't know if that's a threat." She continued, "It was just a phone call . . . I hung up feeling as though he was trying to get a sense of how committed I was to serving on the Public Service Commission."

Moreover, in her testimony about the April 17, 2007 conversation with Mitnick, Buley stated that the threat from Mitnick changed; no longer was it linked solely to her position on the prudence investigation, but now also on how she behaved toward Mitnick.

In her dealings with Mitnick and the PSC, Buley did not act as if she was concerned that the integrity of her office had been compromised. After the February 26 call, in which Mitnick allegedly first linked his desire for her departure to her actions regarding the prudence investigation, Buley continued to have contact with him to explore other job prospects for another five weeks.

Their subsequent interactions included a friendly meeting, initiated by Mitnick, about a possible job for Buley at NYSERDA. Also, Buley addressed a cordial letter to Mitnick suggesting that the lieutenant governor meet with a group of renewable energy experts. At neither the February nor March PSC sessions, both of which took place after the alleged threats, did Buley make any mention of Mitnick or

his alleged improper conduct. It was not until April 18, 2007, after Buley had told Mitnick that she would not be resigning from the PSC, that Buley decided that “the public had a right to know” about Mitnick’s actions.

Mitnick denied threatening Buley or attempting to influence her on the prudence investigation. Mitnick made clear in his sworn testimony that he considered her unqualified for the PSC and that his only goal was for her to resign. With that aim in mind, Mitnick stated, he had no reason to discuss with her any PSC policy matter. Mitnick testified that Buley’s position on the prudence investigation was irrelevant to him and that there was no reason for him to request her silence on the matter. PSC Commissioners Acampora, Harris, and Curry all stated publicly on April 18, and subsequently testified during this investigation, that Mitnick never threatened them or attempted to improperly influence their positions on the prudence investigation.

Testimony gathered during this investigation sheds doubt on the credibility of both Mitnick’s and Buley’s version of events. Mitnick’s characterization of his behavior in general differs markedly from that of nearly all other witnesses. While Mitnick used the words “careful,” “circumspect,” and “sensitive” to describe his actions, others called him overbearing and bullying. On the other hand, a number of witnesses, including Buley’s fellow commissioners, expressed doubt about her credibility.

In the end, there is insufficient proof that Mitnick intended to link Buley’s continued employment to any official action that she might take. Mitnick had clear authority to request resignations and advocate policy to the PSC. Based on the lack

of credible evidence, no criminality was found. Similarly, no ethics violations under the Public Officers Law, which require a lower level of proof, were substantiated.

The record is clear, however, that Mitnick's conduct exacerbated the understandable anxieties experienced by state officials, including Buley, during a time of flux affecting both state employees and the policies they implement. As knowledgeable and capable as Mitnick may have been in his field, he proved a poor fit for his position.

Former PSC Chairperson and current Commissioner Acampora aptly summed up the dispute between Mitnick and Buley, saying, "It's a real he said, she said thing and, unfortunately, I think these two people are both nuclear, basically."

Mitnick resigned his state position on August 3, 2007.

ALLEGATIONS REGARDING STEVEN MITNICK, ANGELA BEDDOE, AND EMPLOYEES OF THE DEPARTMENT OF PUBLIC SERVICE

On May 4, 2007, a DPS employee requesting confidentiality called the Inspector General's Office and voiced concerns that Angela Beddoe, the governor's nominee for chairperson of the PSC, was unduly influencing the agency while still on the payroll at Energy East, an electricity and gas provider regulated by the PSC. In addition, the complainant alleged that Mitnick had been acting as "de-facto Vice Chairman of the PSC" and was rumored to be responsible for personnel changes at the agency. Since an investigation of Buley's allegations against Mitnick was underway, the scope of the inquiry was expanded.

In the course of the investigation, the following allegations of possible ethical violations emerged:

- Mitnick had participated in and facilitated the allegedly improper contact between Beddoe and the DPS;
- Several DPS officials attended meetings with PSC-nominee Beddoe while she was still employed by Energy East;
- Personnel matters were discussed and personnel decisions were made by Beddoe, usurping the authority of the chair;
- Beddoe interviewed current DPS employees and offered them promotions contingent on her confirmation;
- Confidential documents and information were shared with Beddoe; and
- Beddoe directed other administrative changes.

Nomination of Angela Beddoe

On January 24, 2007, Governor Spitzer announced the nomination of Beddoe as chairperson of the PSC. At the time of her nomination, Beddoe was the Vice President for Public Affairs at Energy East Management Corporation (Energy East). Energy East transmits and distributes electricity in upstate New York and Maine. It also transports, stores, and distributes regulated natural gas in upstate New York, Connecticut, Maine, and Massachusetts, with approximately two million electricity customers and one million natural gas customers. Energy East has two subsidiaries in New York – New York State Energy & Gas (NYSEG) and Rochester Gas & Electric (RG&E) – both of which are regulated by the PSC. Beddoe served as Director of Government Affairs for NYSEG before going to work for the parent company. In total, Beddoe has worked for Energy East or a subsidiary for more than 16 years. While Beddoe’s confirmation was pending before the Senate, Energy East and its affiliates were involved in at least 38 cases pending before the PSC.

From the beginning, Beddoe’s nomination met with some opposition. Her current employment with Energy East was the subject of concern. A State Senator expressed that Beddoe’s nomination was “troublesome” because her point-of-view was oriented in favor of energy companies rather than consumers.³² A spokesman for Senate Majority Leader Joseph Bruno, John McArdle, stated that there was “concern” over Beddoe’s nomination. One article on the nomination said that “environmentalists [had] raised questions” about Beddoe.³³ Beddoe’s confirmation

³² Editorial, “Governor’s Inside Out Logic,” (*Syracuse Post-Standard*, Feb. 1, 2007).

³³ Elizabeth Benjamin, “Egan among Spitzer’s Selections,” (*Albany Times Union*, Feb. 15, 2007).

was pending for the entire 2007 legislative session. Beddoe's confirmation hearing was ultimately scheduled for April 24, 2007, only to be canceled when Commissioner Buley made her public accusations against Mitnick. State Senator James Wright, chairman of the Senate Energy Committee, stated at an energy conference that the confirmation was postponed pending the investigation into Buley's allegations.³⁴ When Beddoe withdrew as a candidate for PSC chairperson following the end of the legislative session, Senator Bruno described the nomination as "controversial from the start" and said that the Senate postponed her confirmation hearing pending the outcome of the Inspector General's investigation into the Buley matter. On June 29, 2007, Beddoe withdrew her nomination.³⁵

Relationship Between Energy East and the Department of Public Service

Beddoe conceded to the Inspector General's Office that Energy East had had a "rocky" relationship with the PSC for many years. At one point, the company offended then-PSC Chairman William Flynn by requesting that he recuse himself from discussions regarding a requested rate hike, accusing him of bias against the company. The acrimony peaked in March 2006, when, in response to an adverse ruling in a rate-setting procedure, NYSEG purchased a full-page advertisement in several New York newspapers criticizing DPS auditors. The ad labeled the auditors "junior accounting staff," impugning the work of two senior DPS employees involved

³⁴ Larry Rulison, "PSC Controversy Fuels Debate at Power Summit," *Albany Times Union*, May 17, 2007.

³⁵ Elizabeth Benjamin, "The Daily Politics: Spitzer's PSC Nominee Withdraws," *Daily News*, June 29, 2007, online edition.

in the determination. Beddoe, in her capacity as Vice President for Public Affairs at Energy East, was viewed within the PSC and DPS as having “led the publicity charge” against the PSC. During this investigation, Beddoe testified that she did not know who authored the advertisement, but admitted that as Vice President for Public Affairs at Energy East, she was aware of it. She further characterized her involvement in the publication as a “business decision” which she “had” to support.

Advisory Opinion from the Ethics Commission

Within the DPS, the agency’s ethics officer testified that she was concerned about Beddoe’s nomination, citing “the reverse revolving door opinion” issued by the New York State Ethics Commission.³⁶ This seminal Ethics Commission opinion, Advisory Opinion Number 98-09, recognizes that

“[h]iring an outstanding individual from the private sector and bringing that person into State service is considered a success in the State’s never-ending efforts to obtain top quality employees” and that such recruitment efforts should be encouraged. But the fact that these recruited individuals will have to interact with their former private industry colleagues creates a tension between the benefits to the State and the dictates of the Public Officers Law § 74, the state’s code of ethics. Therefore, it finds, while its standards shouldn’t preclude private sector individuals from joining the state workforce, those standards must be maintained, to give the public confidence that the hires will act in “the public interest and not in the interest of their previous employer or business associates.”

Under this rule, a state employee must consider recusing herself on matters involving a prior employer or business relationship from the past two years. Soon after Beddoe’s nomination, the DPS ethics officer relayed her concerns about Beddoe’s possible conflict of interest to a senior official at the governor’s office.

³⁶ Effective September 2007, a new Commission on Public Integrity has subsumed the State Ethics Commission and the Temporary State Commission on Lobbying.

Prompted by the governor's office, Beddoe requested an informal advisory opinion from the Ethics Commission. If she were to be confirmed, the law requires Beddoe to divest herself of her financial interests in Energy East, including her pension. Beddoe informed the Ethics Commission that she planned to divest her assets as required, and that she would recuse herself for two years from all proceedings in which the PSC was asked to rule on issues directly related to Energy East, NYSEG or RG&E. She asked the Ethics Commission whether she should also recuse herself from: (1) proceedings before the PSC which apply to all energy companies regulated by the PSC (including NYSEG and RG&E); and (2) proceedings which are specifically directed to energy companies other than NYSEG and RG&E, in which NYSEG and RG&E have appeared and/or will presumably will appear.

In April 2007, the Ethics Commission responded to Beddoe's request, advising her that there is no absolute ban on her participation in future general energy company matters if she were to be confirmed, but that she must consider recusal in a matter involving Energy East, NYSEG or RG&E within the next two years, applying the standards contained in the "reverse revolving door opinion."

Meetings Between Beddoe and Department of Public Service Employees

During the early months of a new administration, nominees throughout the government work to familiarize themselves with their new responsibilities. Nominees who are waiting for confirmation by the Senate may be temporarily appointed acting commissioners by the governor so that they may begin their roles as agency heads immediately. Beddoe chose not to assume an acting position with PSC

or DPS, and continued to serve as an executive at Energy East while her nomination was pending. Because of her financial interest in the company, including a pension, Beddoe decided to wait until she was confirmed before severing all ties with her employer.

Despite her continued financial interest in and employment with Energy East, Beddoe did take early steps to acquaint herself with the PSC and DPS, and began to formulate plans about management of the agency. In anticipation of her expected leadership of the agency, Mitnick requested that DPS staff participate in meetings with Beddoe. As might be expected, the content of these meetings was the subject of much speculation and discussion among DPS employees. Unsurprisingly, rumors of Beddoe's intentions for the agency began to circulate, including Beddoe's plans for hirings, firings, and demotions.

In addition to the general worry and speculation that is expected among employees anticipating a new boss, several DPS employees said that they were concerned that the meetings violated the state's code of ethics, given Beddoe's continued employment at Energy East. Even DPS officials who attended the meetings noted that the meetings increasingly left them feeling uncomfortable or "awkward" and became a major concern for all involved from the agency as the confirmation process lasted longer than initially anticipated. According to the DPS ethics officer, she received numerous complaints from DPS employees concerned with the ethical implications of Beddoe's meetings with staff.

Beddoe participated in at least five meetings with senior DPS officials. The first meeting took place in February 2007 and the last on May 3, 2007. None of the

sitting PSC commissioners were a part of these meetings. The DPS attendees testified that they thought the meetings were held to learn Beddoe's vision for the future of the PSC and DPS; to prepare for her confirmation hearing; and to educate her for her transition to chairperson.

The first meeting attended by Beddoe was reportedly a conversation between Mitnick and Judith Lee, who held the dual titles of DPS Chief Administrative Law Judge and Acting Executive Deputy to the PSC Chairperson. Beddoe did not participate in the conversation. The meeting was held in early February 2007, and topics covered included energy efficiency, the PSC and DPS budget, and office locations. The subsequent meetings took place between March and May 3, 2007.

According to Beddoe, she discussed the next meeting with Lee, who arranged for Beddoe to meet with her, Deborah Renner, DPS Director of the Office of Administration, and Sorelle Brauth, DPS Director of Finance and Budget, at the DPS office building at the Empire State Plaza in Albany. The meeting was held in early March and was Beddoe's only visit to the DPS office. Beddoe said this meeting gave her an opportunity to prepare for confirmation hearings, learn about the agency's budget, discuss practical items such as parking, and generally become more knowledgeable about "how the place really works." Beddoe said that she did not see any ethical problems with the meeting because there was no discussion of policy. Beddoe added that she assumed that Lee would have alerted her if the meeting was inappropriate.

According to Lee, the subsequent meetings were held at the request of Mitnick and his assistant, Thomas Congdon. These meetings were also held in

Albany, in a Capitol conference room arranged for by Mitnick or Congdon; in Mitnick's office, in a nearby cafeteria; and in an Agency Building in the Empire State Plaza. Besides Beddoe, Mitnick, or Congdon, others in attendance at various times during these ensuing meetings included the following DPS executives: Lee; Renner; Brauth; then-Chief of Policy and Program Management Michael Corso; Director of Human Resources Barbara Herbert; Administrative Law Judge Eleanor Stein; and Acting General Counsel Peter McGowan. The meetings were led by Mitnick or Congdon, when present, or Beddoe in their absence. Although informal in structure, Herbert kept track of "action items" and assignments for the next meeting.

Attendees testified consistently that they discussed a new DPS organizational structure, personnel decisions, office locations, protocols, and the agency budget. The DPS staff provided Beddoe with organizational charts; personnel reports that included employees' names, titles and salaries (but not confidential information, such as Social Security numbers); budget documents; and a schematic diagram of the rate-setting process. Participants testified they intentionally steered clear of discussing specific policy or actual cases pending before the PSC.

Beddoe testified that she wanted to be prepared when she came to the PSC so, for example, if there were a blackout upon her arrival, she would be ready to respond. Herbert viewed Beddoe's presence and input at these meetings to be a "very thoughtful way to do things," and stated that Beddoe did not want to do "things that would adversely impact" PSC or DPS employees.

Beddoe said that she discussed these meetings with Administrative Law Judge Stein and believed that Stein would have advised her against attending the meetings if

it had been inappropriate. Stein concurred with Beddoe's testimony and stated that the meetings were appropriate and served to ease Beddoe's transition to chairperson of the PSC.

The purposes of these meetings, as described above, are not improper. Beddoe is entitled to access any information that is available to the public, including information about the agency budget, structure, and personnel. However, Mitnick had a larger purpose in mind for the meetings. Mitnick testified that, rather than simply wanting to provide general information to Beddoe, he requested the meetings to discuss a reorganization concept for the agency. Mitnick hoped to create a special DPS policy group "totally dedicated to the commissioners" in order to "re-empower the commissioners to drive policy and provide some balance with [DPS] staff recommendations." Mitnick wanted to begin plans for the reorganization before Beddoe's confirmation, and brought Beddoe and DPS staff together because he didn't want the nominee "totally isolated" from the DPS staff who were "wondering what direction" the PSC was heading.

In general, the initial actions taken by DPS staff members to orient Beddoe, as well as Beddoe's receipt of the agency orientation information provided, are permissible. However, as the meetings progressed, they became planning sessions for the future of the agency, as Mitnick had wanted. These plans were not in the abstract, but rather included specifics such as office locations and personnel assignments. This shift in focus to particulars was problematic, as Beddoe was still employed by Energy East, and the current chairperson had no part in the discussions.

Although the attendee's recollections differed on the exact number of meetings held, they testified consistently that Mitnick was not present for the majority of DPS staff's meetings with Beddoe and that he ceased attending these meeting early in the process. However, Mitnick encouraged both Beddoe and DPS staff to engage in conversations that contributed to an overall appearance of improper influence by Beddoe over the agency. By facilitating a discussion regarding the future organization of the agency, Mitnick placed all parties in potentially ethically compromising positions.

Corso testified that Mitnick expressly wished to make structural changes within the DPS before Beddoe's confirmation and engaged in a "give and take" with the DPS officials who urged him to wait. In one early meeting where changes to the organizational structure of the DPS were discussed, one attendee stated that she believed that any proposed alterations should not be implemented until Beddoe was confirmed. Mitnick imprudently encouraged immediate action and, according to one witness, responded that "it's nice to be able to make changes all at once and sometimes you just have to go forward and make changes." Mitnick's response prompted Beddoe to signal that she needed to speak to Mitnick, and the two left the room. Beddoe testified that she urged Mitnick to not take "these actions so quickly and so boldly." She cautioned, "Let's just wait until I get there and give it a week." Beddoe then returned to the meeting room and told the group that the changes would wait until after she was confirmed. Mitnick recalled this incident, explaining that Beddoe, was "the PSC person," and that she should "drive this," as opposed to himself, the representative of the governor's office. He added, "[Beddoe] was right.

I thought that I was being too nose, too overbearing . . . If this was going to be her group, I should let her do that.” Consequently, he did not return to the meeting; nor did he attend any subsequent meetings.

The fact that so many meetings were held, as well as some of the specific topics discussed, led many DPS staff members, both participants and non-participants, to wonder whether engaging in such conversation with a senior executive of a regulated entity was proper.

The sections below discuss the specific allegations regarding personnel decisions, administrative changes, and confidential documents.

Promotions of Senior Personnel

One of the topics at the meetings between Beddoe and DPS officials was agency staffing. Participants discussed Mitnick’s idea of a policy research and advisory group devoted to the commissioners, along with plans for staffing that office. Beddoe discussed plans to promote individuals to lead that office, as well as promotions of others to senior positions at DPS. Several of the promotions were to be awarded to participants at the meetings. Lee was to direct the new policy office. Corso was to be the deputy director of the office. Beddoe intended to make Stein the Counsel to the PSC, and McGowan the DPS Managing Director of Policy.

Beddoe’s offers to promote persons of significant responsibility at the agency created the appearance of impropriety. 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 DPS 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.

While Mitnick encouraged Beddoe to act quickly, he stated that he was not involved in, or aware of, her conversations with Stein, Lee, and McGowan about possible promotions. Mitnick testified that he discussed “ambiguously” with Beddoe about a new structure for the DPS and staff who could head new departments. He said he was unaware of the details of the conversations between Beddoe and people identified for possible promotion and would have been “surprised” to learn she was conducting job interviews of these individuals. Mitnick further testified that if he had known Beddoe was engaged in actual interviews, he “would not have been comfortable with that.”

Eleanor Stein

Administrative Law Judge Eleanor Stein’s interview with Beddoe presents an apparent conflict of interest. Stein conceded that she “essentially” had a “job interview” with Beddoe for a promotion to general counsel. Stein testified that in late March 2007 she met Beddoe at the Fort Orange Club in Albany, where Beddoe is a member. During this meeting, Stein said, Beddoe informed her that she “was interested in [Stein] being her general counsel if she were to be confirmed. And [Stein] told her that [she] would like to do that.”

Stein is one of the administrative judges assigned to the high-profile prudence hearing regarding the Queens blackout of 2006. The two subsidiaries of Energy East,

NYSEG and RG&E, are so-called “active parties” to that action.³⁷ Although the matter primarily concerns Con Ed, by accepting their petition to join the matter as active parties, the PSC has formally recognized that NYSEG and RG&E have an interest in the proceeding, as it could potentially impact those companies.³⁸ Stein was aware of Energy East’s interest in the matter, since the Energy East affiliates had submitted their applications to join the Con Ed matter directly to Stein on August 23, 2006. Stein is also the judge assigned to a PSC initiative to set energy efficiency goals for the state. RG&E and NYSEG are also parties in this action as of May 2007. Stein made two procedural rulings during May and June 2007 on the matter of the energy efficiency goals.³⁹

Questioned by the Inspector General about the meeting with Stein, Beddoe praised Stein and explained that upon confirmation she wanted Stein to consider accepting a position as general counsel and secretary. Beddoe maintained to the Inspector General that this meeting with Stein was not a job interview “by any stretch of the imagination.” However, in addition to Stein’s testimony, an e-mail from Beddoe to Mitnick sent within weeks of her meeting with Stein contradicts this testimony. On April 13, 2007, Beddoe wrote that she was “still awaiting Eleanor Stein’s resume, under separate cover, I will forward to you. She [Stein] will fulfill

³⁷ PSC Case Number 06-E-0894. Stein was the sole judge assigned to this matter until April 2007 when she was assigned to aid in the potential settlement of the matter and another judge was assigned to the litigation aspect of the case.

³⁸ According to several PSC written decisions and as confirmed by sources within DPS “being listed as an Active Party in the proceeding, allows a person, a grouping of parties with similar interests, or an organization to fully participate in the proceeding, including, for example: issuing discovery requests, making motions, submitting pre-filed testimony, participating in formal pre-trial conferences, presenting direct and redirect testimony, undertaking cross-examination at evidentiary hearings, and filing briefs.”

³⁹ PSC Case Number 07-M-0548.

the position of general counsel and secretary. I also need to get you Judy Lee's and Mike Corso's [resumes]." Beddoe continued, "It would be my intention upon [my] arrival to announce the key positions of senior advisor, executive deputy, general counsel/secretary [Stein] in addition to my assistant on Day 1. On Day 5, I intend to announce the new re-org with the new managing directors."⁴⁰ In addition, one of the participants of these meetings described Beddoe's plans for Stein's promotion as "very clear."

Stein is subject to ethics standards regarding conflicts of interest that are applicable to all state employees. In addition, DPS 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.

Judith Lee and Peter McGowan

In mid-April 2007, Beddoe met with Lee, Corso, Stein, and McGowan in a cafeteria at the Empire State Plaza. McGowan said that the group discussed transition to the new DPS structure. In addition, McGowan and Beddoe discussed a potential new position for McGowan as Managing Director of Policy. Corso characterized this as "like a job interview," except somewhat more informal. Though the meeting bore the traditional stamp of an employment interview process – describing the position,

⁴⁰ As discussed above, Mitnick was not involved in and testified that he had no knowledge of Beddoe's interviews of DPS staff for promotion. This e-mail with its ambiguous references to obtaining resumes, is the first evidence of any indication to Mitnick of Beddoe's interactions with staff slated for promotion.

discussing qualifications, making an offer and requesting a resume – McGowan denied that the meeting was actually a “job interview.”

At a separate meeting, Corso added, Beddoe spoke of positions on her team which could be filled by Corso, Lee and others. Corso said Beddoe told him and Lee that they would be placed – in effect, promoted – in a new office that had yet to be named.⁴¹ Though the witnesses said that no definitive decisions were made at the meetings, the April 13, 2007, e-mail from Beddoe to Mitnick describing the staff changes indicates that her plans were final.

McGowan admitted that he “struggled with” the ethical implications of discussing promotional opportunities with Beddoe, an official employed by a regulated entity. He said he was aware that people could question whether his and other officials’ “loyalties [were] still the same,” but said he believed that no ethical rules were breached. In support of this notion, he argued that he hadn’t actually accepted the position. Nor, he claimed, could the offer be “concrete” because only the chairperson could offer such a position and Beddoe had not yet been confirmed.

McGowan added that, at the time, the confirmation process was not expected to last long. He testified that he alleviated any “tension” created by the Beddoe meetings by discontinuing the meetings once confirmation stalled towards the end of April 2007. McGowan testified that he could have recused himself on “important matters,” involving Energy East, but as counsel to the agency McGowan was

⁴¹ Corso was in fact promoted to a Director’s position in May 2007, by Chairwoman Acampora.

responsible for representing the agency in “all actions and proceedings.”⁴² Even if he, himself, did not directly represent the agency in those proceedings, he would have supervised other attorneys who did.

Like McGowan, Lee filled a supervisory role, both as acting executive deputy to the PSC chairperson and chief administrative law judge. Lee testified that as chief administrative law judge she must “oversee all the cases that are in front of the judges.” Although Lee characterized her proposed promotion as “a continuation of the job I do now,” the job discussed for her would have involved a higher pay grade.

Even if McGowan or Lee had actually recused themselves from any matters potentially impacting Energy East, their positions within the agency may be such that recusal would not remedy the appearance of impropriety.⁴³

Any or all of the participants of these meetings should have identified the potential conflicts at hand. In particular, Mitnick, Beddoe, Lee, Stein, and McGowan were each in a position to recognize the problem. Any one of these individuals could and should have suggested that the meetings not include personnel discussions, or that the discussions be suspended until Beddoe was confirmed and severed all financial ties to Energy East.

⁴² Section 12 of the Public Service Law describes the duties of the Counsel to the Commission as follows: It shall be the duty of counsel to the commission, subject to the direction of the chairman, to represent and appear for the people of the state and the commission in all actions and proceedings involving any question under this chapter, or within the jurisdiction of the commission, and, if directed to do so to intervene, if possible, in any action or proceeding in which any such question is involved; to commence and prosecute all actions and proceedings directed or authorized, and to expedite in every way possible final determination of all such actions and proceedings; and generally to perform all duties and services delegated to or required of him.

⁴³ Compare *Speers v. Ethics Comm’n*, 209 A.D.2d 919 (3d Dept. 1994) with *Hancox v. Bress*, 208 A.D.2d 1031 (3d Dept. 1994); see also Ethics Comm’n Advisory Opinion 96-3.

Demotions or Firings

During the meetings in which Beddoe participated as nominee for the PSC chairperson, four long-tenured DPS officials, including the agency's ethics officer and two directors, were specifically identified by Beddoe for negative personnel action upon her confirmation. While Beddoe insisted to the Inspector General that no one was "identified for termination," merely reassignment, several DPS officials present for these discussions contradicted her, claiming that Beddoe initially wanted to fire all four. In response, the DPS officials highlighted the targeted employees' strengths. They "made some headway," one said, persuading Beddoe to change her plans from firing all to demotions for three and dismissal for one. Another DPS employee not present at the meetings testified to seeing documents naming all four identified to be "eliminated" upon Beddoe's arrival. Questioned about this documentation, Beddoe said that it "would be wrong" for anyone to "create" any documents indicating personnel changes after the meetings. Particularly troubling is the identity of two of the four employees Beddoe allegedly sought to fire or demote.

Director and Ethics Officer

One of the directors Beddoe had initially identified for negative personnel action had played a central role in NYSEG's dispute with the PSC and DPS that led Beddoe's company to take out a full-page advertisement in several newspapers attacking the DPS. This director was one of the signatories on a DPS letter responding to the energy company's advertisement. Although Beddoe acknowledged that she knew that this employee was involved in the quarrel between NYSEG and the DPS, she stated that she respected him. Nevertheless, Beddoe still intended to

transfer him to another unit because she supposedly thought that his “experience” was limited and that “he’s not director material.”

Notably, in addition to potential job action against this employee who had locked horns with NYSEG, according to one witness present at the meetings, Beddoe was also not receptive to the promotion proposed by Lee and Corso of another well-respected DPS official who was criticized by NYSEG during this same disagreement with the PSC and the DPS. He was the other author of the DPS letter responding to the energy company’s advertisement.

Equally problematic, another employee allegedly targeted by Beddoe for dismissal was the DPS 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. This resulted in Beddoe’s request for an advisory opinion from the Ethics Commission. Beddoe denies that she intended to dismiss the ethics officer.

According to one meeting attendee, Beddoe expressed “vehemence” toward the ethics officer and said she intended to fire her if confirmed. In particular, Beddoe was angry that the ethics officer left a voice mail message for Beddoe’s 82-year-old mother (a former DPS employee) supposedly mentioning the ethics issues. While the ethics officer admitted to leaving a voice mail message for Beddoe’s mother, she claimed that the message pertained to a volunteer seamstress arrangement.

Beddoe believed the ethics officer tried to thwart her nomination. She later claimed to the Inspector General that she was therefore “ultra sensitive” to not terminating the ethics officer because it would appear to be retaliatory. Testimony

from other individuals indicating that Beddoe initially wanted to fire the ethics officer contradicts Beddoe's assertion, as does an April 13, 2007 e-mail from Beddoe to Mitnick, which reveals that Beddoe planned to give the position held by the ethics officer to a different employee.

Mitnick's Involvement in Two Other Personnel Decisions

Although the Inspector General's investigation did not find any evidence that Mitnick was involved in the personnel decisions discussed above that were planned by Beddoe, he did make recommendations to then-PSC Chairperson Acampora regarding two other senior-level employees who were adversely impacted. One individual was demoted and the other was dismissed. Both decisions were ultimately made and carried out by Acampora, who testified that she took action because she agreed with Mitnick's assessments of these employees. While Mitnick's obvious involvement in these personnel decisions was upsetting to many DPS staff members, Mitnick violated no law in making these recommendations to the chairperson as the chairperson has testified that she agreed with Mitnick's recommendations and ultimately made the decisions herself. Even though Mitnick was permitted to suggest personnel changes to the chairperson, he should have been more diplomatic about revealing his role in the personnel actions.

While some of the witnesses speculated that Beddoe was aware of the two personnel actions recommended by Mitnick, none claimed or had any proof that she had orchestrated or directed them. In fact, Acampora said she was uncertain whether Beddoe even had knowledge about the one termination and the other demotion.

When questioned by the Inspector General about when she became aware of the personnel actions suggested by Mitnick, Beddoe testified that it was “after the fact.”

Beddoe’s Influence on Minor Administrative Changes

Among the complaints against Beddoe was an allegation that she directed administrative changes at the agency as a nominee, even though she was still employed by a regulated entity. Although trivial, several witnesses complained to the Inspector General about Beddoe’s influence over the installation of voice mail at the DPS. Specifically, it was alleged that at an April 2007 meeting, Beddoe asked about the DPS voice mail system and expressed desire that all DPS personnel have voice mail. Witnesses said this immediately prompted Deborah Renner, the DPS Director of Administration, to have it installed throughout the agency. Voice mail was ultimately installed, at a relatively small expense, on several DPS telephones that previously did not have it. During the preparatory stages, Renner revealed to her assistant, who later passed it on to at least one other, that installation of voicemail was at Beddoe’s request.

Beddoe stated that she explored the agency’s voice mail system with some of the DPS officials. However, she insisted that she did not instruct anyone to have voice mail installed at the DPS and if it did occur, it was because of someone else’s eagerness, not her own. In fact, Lee felt strongly that all DPS employees should have voice mail. Lee recalled that, although both she and Beddoe agreed on the subject, Lee was the one who directed that voice mail be provided to all DSP employees. Lee described it as a “no brainer” that all staff members have voice mail. Lee also believed that, as acting executive deputy, such a matter was within her purview.

Acampora, then the statutory head of the DPS, was not aware that there was a recent change to the DPS voice mail system.⁴⁴

In one other instance, Beddoe's interest in an administrative change apparently led to its completion. Beddoe had asked Renner to look for office space for a new unit and approved relocating staff between the DPS Albany office in Agency Building 3 and a satellite office in Delmar. Staff members have since been relocated according to this plan.

The fact that Beddoe's expression of interest in these minor administrative changes led to their completion, and that their completion raised ethics concerns within the agency, demonstrates why the meeting participants should have been aware of the inherent difficulties in meetings with Beddoe and should have exercised extreme caution.

Alleged Disclosure of Confidential Information

It was alleged that DPS employees improperly shared confidential information with Beddoe at one or more of the meetings discussed in this report. Although Beddoe had been nominated to be the chairperson of the PSC, she chose not to take an official status at the PSC and was therefore not entitled to confidential or non-public agency information.

⁴⁴ While the installation of a voice mail system appears unremarkable and commonplace, it was a sensitive issue to some DPS employees. One individual testified that voice mail is a means of reducing public service. For instance, citizens who call the PSC seeking documents under the Freedom of Information Law (FOIL) should be able to speak to an employee, rather than have to leave a more indirect voice mail message.

Attendees at the meetings with Beddoe stated that only “public information” or information that was accessible to the public under the state’s Freedom of Information Law (FOIL) was shared with Beddoe and Mitnick. Neither Beddoe nor Mitnick were given confidential information regarding personnel histories of DPS employees, witnesses said. However, several of the documents given to Beddoe during her meetings with DPS officials bore the word “confidential” across the top. Two of these documents were works in progress that were prepared in conjunction with the planning sessions in which Beddoe took part. The plans in question were to be implemented upon Beddoe’s confirmation by the Senate. One document concerned a proposed new DPS Office of Policy Review. Another related to proposed changes to the duties of administrative law judges.

Witnesses agreed that the planning documents were labeled as confidential because they were not yet to be shared with other DPS employees and because they involved plans for restructuring and adjustments to duties that were not yet finalized. These items are not “confidential” as the term is used in the state’s Public Officers Law, Public Service Law or DPS policy since they were not agency materials, contained no non-public information, and were created as part of a planning process that involved Beddoe.

Beddoe was provided with one document that does merit some discussion. Unlike the other documents, this document contained internal agency information that, as every PSC and DPS official questioned testified, is not generally provided to the public. Three pages long, the document is entitled “Confidential, Based on Current Working Schedules Anticipated Commission Session Items, From Office of

Hearings and Alternative Dispute Resolution.” It lists matters pending before the PSC, including case names, case numbers, case classification numbers, the name of the administrative law judge, and the dates when the matter was scheduled to come before the PSC.

Beddoe could not specifically recall, but speculated that this document was given to her by Lee at a cafeteria meeting at the Empire State Plaza in Albany with McGowan, Corso and Lee. When asked, Lee said of the document, “I guess I must have given it to her.” Beddoe did not believe that this document was confidential because it concerned “public things.” Lee identified the document as her list of pending cases for the coming months. Lee recalled being asked by either Mitnick or Beddoe about the types of cases scheduled, to help Beddoe structure the new policy office. Lee said, “So that if that new office was going to handle the cases coming at the June session, the July sessions — at that point she thought she was going to get confirmed any day — so she would have a sense of how to staff that office, how to have that office present cases to the commissioners.”

Lee further testified that the document constituted a “rough list of what’s coming up, and we don’t publish it anywhere.” Such information was “internal” and not for “public consumption,” Lee said. However, the only non-public information in the document she drafted for Beddoe was the specific dates of when a matter would be heard. “[T]he fact that these cases are pending before the Commission is not confidential. That’s a matter of public record,” Lee stated. Lee repeatedly stated that she, in general, refused to discuss the details of pending matters with Beddoe for reasons of confidentiality.

DPS Secretary Jaclyn Brillling, who is responsible for approving the release of any internal DPS information, agreed that the tentative dates that cases are scheduled to be reviewed by the PSC is “absolutely” not “release[d] . . . to anybody” outside of the DPS as it is confidential and an “internal document only.” Brillling elaborated that it is only on the Fridays before the PSC public sessions that the agenda is made available to the public. Brillling explained that early knowledge of the dates that matters are scheduled to be heard could give one party an advantage in their lobbying efforts and “subject the commission to charges of pre-decisional bias.” She also emphasized that dates are frequently subject to change until the last minute.

Other high-ranking PSC and DPS officials, including Commissioner Harris, agreed that the proposed dates are not made available to the public. Harris stated that she had numerous conversations with Lee and McGowan about the impropriety of Beddoe, as a private citizen, receiving confidential information from PSC employees. Harris reported that both Lee and McGowan denied sharing confidential information with Beddoe.

Confidentiality Under New York State Law

The mere designation of a document as “confidential” by an agency such as DPS does not make that document absolutely barred from disclosure under the law. To the contrary, the Freedom of Information Law requires agencies to “make available for public inspection all records” that do not fall within certain exceptions listed in the statute. Even if the document does fall under one of the exceptions in the

statute, the agency may still reveal the document if it chooses.⁴⁵ Under state and federal law, a document is only truly confidential if a statute “specifically confers or requires confidentiality.”⁴⁶ Neither the Public Officers Law nor the Public Service Law renders draft PSC agendas or tentative hearing dates confidential; therefore, the disclosure of this information is not legally prohibited.⁴⁷

Confidentiality Under Agency Policy

The question remaining is whether the participants violated DPS policy by disclosing the draft agenda to Beddoe. As stated above, DPS and PSC officials considered the draft agenda “confidential” under agency policy.

The PSC and DPS’s agency policies⁴⁸ recognize the following categories of “confidential information”:

- Internal memoranda;
- Commission deliberations and pre-decision analyses; and
- Information protected from disclosure under the Freedom of Information Law.

The DPS manual further “prohibits the discussion or disclosure of pre-decisional analyses, intra/interoffice memoranda, session items and internal discussions relating to Commission deliberations to anyone outside the agency unless

⁴⁵ See Committee on Open Gov’t Adv. Op. 12558.

⁴⁶ See Committee on Open Gov’t Adv. Op. 12558; see also *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 567 (1986). “Although we have never held that a State statute must expressly state it is intended to establish a FOIL exemption, we have required a showing of clear legislative intent to establish and preserve that confidentiality which one resisting a FOIL disclosure claims as protection.”

⁴⁷ In fact, a good argument could be made that the agency would be required to release the document if confronted with a request pursuant to the Freedom of Information Law. See *Professional Standards Review Council of America Inc. v. New York State Dept. of Health*, 193 A.D.2d 937 (3d Dpt. 1993).

⁴⁸ This policy is discussed in a published decision of the PSC. See 228 P.U.R.4th 561 (2003).

the Secretary to the Commission indicates otherwise.”

Of the categories above, the only two into which the draft agenda document could fall are: internal or interoffice memoranda or session items. Certainly, it is the practice at DPS not to publish or reveal proposed hearing dates, and witnesses agreed that the document with the dates was confidential under the agency’s policies. In this regard, Lee’s revelation of the dates to Beddoe without authorization by the PSC secretary may have violated the agency’s procedures for release of certain types of documents.

Applicable Law Regarding Ethical Conduct

No general prohibitions exist to prevent a nominee for public office from meeting with current employees to understand the agency or the leadership role she will be expected to play, or from receiving information available to the public. Nor is there a ban preventing members of a regulated industry from being nominated for a post within the PSC or DPS. In fact, as recognized by the Ethics Commission, an administration may recruit staff from the regulated industry. However, as the laws discussed below reveal, both the Legislature and the PSC have taken measures to ensure that the private companies regulated by the PSC do not appear to have improper influence over the agency or the commissioners. Employees must take care, not just to avoid improper influence, but also to avoid the appearance of such influence.

Public Officers Law

Public Officers Law § 74, entitled “code of ethics,” is the primary statute governing the ethical conduct of state employees. Under this section, a state employee is prohibited from accepting “other employment which will impair his independence of judgment in the exercise of his official duties.” The law further provides that a state employee “should not by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is affected by the kinship, rank, position or influence of any party or any person.” In addition to these specific ethical guideposts, the law also mandates that a state employee “should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of the public trust.” The Ethics Commission has repeatedly emphasized that under these sections “[a] public servant’s actions and affiliations must be above reproach, even if no conflict of interest is present. Any associations that give rise to the suspicion of favoritism, self-dealing or personal private gain by State officers and employees shake the public’s confidence.”⁴⁹

Since Beddoe’s nomination was not confirmed by the state Senate prior to her withdrawing her name from consideration, she remained a private citizen throughout the relevant period of this report and was not and is not subject to the Public Officers

⁴⁹ New York State Ethics Commission Advisory Opinion No. 96-29.

Law. However, Mitnick and DPS employees were and are subject to the Public Officers Law.⁵⁰

Public Service Law

The laws governing the PSC strictly prohibit PSC commissioners and DPS employees from having any interest in a regulated entity, meaning that a nominee from the private sector must terminate her employment with the regulated entity, as well as divest herself of any financial interest in the entity, prior to assuming any role in the agency.⁵¹

Since the PSC and DPS are mandated to render decisions that directly affect the profit margin and financial viability of regulated entities, limitations are in place to prevent even the appearance of a financial conflict of interest by PSC and DPS officials. These limitations go beyond the general ethics rules that apply to all state employees, and even include a bar on a member of an official's family from holding investments or engaging in financial activities related to regulated entities. These stringent rules were affirmed by the New York Court of Appeals to assure the public of the impartiality of PSC and DPS determinations.⁵²

⁵⁰ The jurisdiction of the New York Commission on Public Integrity extends to employees who have left state service, as long as the commission notifies the former employee within one year of the employee's departure from state service. Executive Law §94(12)(c).

⁵¹ Public Service Law § 9 states: "No person shall be eligible for appointment or shall hold the office of commissioner or be appointed to, or hold, any office or position under the commission, who, holds any official relation to any person or corporation subject to the supervision of the commission, or who owns any stocks or bonds of any such corporation."

⁵² *Nicholas v. Kahn*, 47 N.Y.2d 24, 30 (1979).

The Legislature has further recognized the potential for conflicts of interest in Public Service Law § 15. Under this section, PSC commissioners or DPS employees are prohibited from making recommendations to regulated entities regarding the employment or appointment of any person to any position. Likewise, employees of regulated entities are prohibited from offering jobs or any form of gratuity to PSC commissioners and DPS employees. The commissioners and employees are prohibited from accepting any job or gratuity if offered. The Legislature most likely did not contemplate the novel situation presented here where the official from the regulated entity is a nominee for the PSC and is engaged in discussions about employment opportunities within the DPS as opposed to the utility. The statute has never been applied in this manner, and as a result, the law cannot provide any clear guidance with regard to the issue raised here.

Notably, the DPS, as discussed above, is substantially exempted from general prohibitions on private, or *ex parte*, contact by interested parties that apply to other agencies.⁵³

Conclusions of the Inspector General

This report has reviewed evidence relating to the conduct of Steven Mitnick, Assistant Secretary to the Governor for Energy and Telecommunications; Angela Beddoe, nominee for chairperson of the PSC; and various employees of the DPS during the period in which Beddoe's nomination was pending before the Senate. The complaint received by the Inspector General alleged that Beddoe and Mitnick were

⁵³ New York State Administrative Procedure Act § 307(2).

exerting improper influence over the DPS. These allegations arose as a result of personnel actions taken while Beddoe's nomination was pending, and as a result of meetings between Beddoe, various senior DPS officials, and Mitnick or his assistant during this period. The Inspector General finds that the behavior of some of the meeting participants does raise ethical concerns, in that the meetings gave the appearance that an official from a regulated entity possessed undue influence over the DPS.

Meetings attended by agency employees and an incoming agency head are typical and reasonable when a new leader is expected to take over an agency shortly. During such a transition, the proposed new leader is expected to be briefed on agency staffing, structure, policies, and upcoming matters. However, Beddoe was in an unusual situation in that she was employed by a regulated entity.

In this case, because of financial concerns, Beddoe declined to assume formally the role of acting commissioner, instead choosing to retain her position at Energy East while her nomination was pending. Beddoe's choice to retain her private sector employment at an entity that is regulated by the agency she hoped to chair is the primary source of the ethical conflicts that emerged during this period. As the meetings progressed, Mitnick encouraged the meeting participants to discuss topics that created ethical problems for all parties involved. Beddoe's actions during this period were further complicated by a recent conflict between her employer and the DPS, as well as the fact that her employer had matters pending currently before the PSC.

It is clear that the DPS employees who participated in discussions with Beddoe were aware of the conflict presented by her status as an executive at Energy East and took some care to avoid discussion of cases before the commission. However, all parties involved, Mitnick, Beddoe, and the senior DPS officials, contributed to a situation that increasingly gave the appearance of impropriety. A senior official at a regulated entity appeared to have powers of influence over agency management and staffing at a time when she should have had none whatsoever.

The allegations regarding Mitnick's influence over the PSC were thoroughly explored during this investigation. As discussed in the introduction to this report, both historically and statutorily, the governor is permitted wide latitude in expressing his policy goals to the commissioners and employees of the PSC and DPS. Mitnick openly lobbied the commissioners regarding policies and recommended personnel changes to the chairperson; these actions were within his realm of responsibilities. There is no clear law preventing the governor's office from expressing their views of the performance of DPS staff or extolling the virtues of individuals they feel would serve the public if hired or promoted. Although Mitnick's personnel recommendations and lack of discretion created consternation at DPS, he committed no violations in recommending personnel changes to the PSC chairperson, who under Public Service Law §§ 7 and 8, has the authority to organize DPS offices, assign employees to divisions or bureaus and oversee performance.

Angela Beddoe

Beddoe's personnel decision-making was inappropriate given her ongoing employment at Energy East. The fact that an employee of a utility with matters under

review by the PSC and DPS is discussing potential promotions with individuals with direct or indirect involvement in those matters gives the appearance of undue influence.

Regarding the specific personnel actions contemplated by Beddoe, some of them appear to be related to the DPS's past conflicts with Energy East or Beddoe herself. 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.

Beddoe's actions are not subject to review under ethical rules because she was not a state employee at the time of these meetings.

Mitnick and Employees of the Department of Public Service

Mitnick and the DPS staff were state officials and were bound by the state's code of ethics. The New York State Ethics Commission has repeatedly emphasized that a public servant's "actions and affiliations must be above reproach" even if no conflict of interest exists. Public employees should not take part in any associations that give the appearance of favoritism, private gain or which "shake the public's confidence."⁵⁴

It is completely understandable for employees lacking any civil service protection from termination or demotion to agree to meet with a person assumed to imminently become their boss and to assist her in her transition to a new role. It is also understandable for them, when asked, to state whether they are interested in

⁵⁴ Ethics Commission Advisory Opinion No. 96-29

assuming a promotion upon her confirmation and provide her a resume if requested. On the other hand, the public confidence could be affected by the knowledge that senior DPS officers met with an official of a regulated utility to discuss promotions contingent on her confirmation and continued favor. This is especially true 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.

Eleanor Stein

The most likely appearance of conflict of interest is that of Administrative Judge Eleanor Stein. Stein's actions in presiding over matters involving Energy East as an "active party" while effectively accepting a promotion dependent on Beddoe's continuing favor could be viewed as violating ethical standards under the Public Officers Law.

Judith Lee and Peter McGowan

The appearance of a conflict of interest by Acting Executive Deputy and Chief Administrative Law Judge Judith Lee and General Counsel Peter McGowan, in violation of the Public Officers Law is not as clear cut. They participated in meetings that could be considered job interviews while holding executive management positions in the DPS. But, in contrast to Stein, their "interviews" were less formal and their positions did not involve direct oversight of Energy East matters but, rather, supervisory responsibility over those directly involved.

Steven Mitnick

Mitnick's involvement with the personnel decisions is yet another issue. He was overeager in pushing senior members of the DPS staff to meet with Beddoe to discuss plans for agency restructuring. While the staff members merely expected to prepare Beddoe for her confirmation and her new role as chair, Mitnick asked them to engage with Beddoe in a way that put them in an extremely difficult ethical position. DPS meeting participants had to choose between having inappropriate discussions with Beddoe or advising the governor's representative and an expected future boss against their intended course of action. Even Beddoe testified that she urged Mitnick to not take "these actions so quickly and so boldly." Mitnick acknowledged that Beddoe's admonishment made him aware that he was "being too noseey, too overbearing." In doing so, Mitnick created a climate that facilitated Beddoe's premature forays into managing the DPS. Although Mitnick was obviously eager to initiate changes at the PSC and DPS, he should have identified the difficulty of the situation and proceeded carefully and thoughtfully, encouraging Beddoe to do the same.

Beddoe's Initiation of Administrative Changes

According to witnesses interviewed, Beddoe did not direct any administrative changes to be made within the DPS prior to her confirmation. Employees, upon hearing her wishes during the preparatory meetings, took it upon themselves to initiate the actions. The Inspector General finds no specific violation by Beddoe regarding the administrative changes. On the other hand, the employees who initiated the changes contemplated by Beddoe erred in taking action prematurely on her

requests and, by such actions, giving the appearance that Beddoe had assumed some of the responsibilities statutorily allotted to the chairperson.

Disclosure of Confidential Material

In general, the DPS officials who met with Beddoe were aware that they should not be disclosing confidential information to Beddoe prior to her confirmation and took care not to discuss any matters under consideration by the PSC. Although Beddoe was provided with a number of documents labeled “confidential,” the Inspector General could not establish that any of these documents is considered confidential under the law. Nonetheless, agency procedures regarding the disclosure of certain types of information may have been violated.

Recommendations

Beddoe’s actions, although inappropriate, cannot be found to violate the state’s code of ethics contained in the Public Officers Law because Beddoe was not employed by the state at the time and, therefore, is not subject to this law. The Public Officers Law does apply to the state employees who interacted with Beddoe, namely Mitnick and the DPS officials who participated in these meetings and interviews. Given the novelty of the situation presented, there is little direct guidance in the law to conclusively determine whether the actions of Mitnick and the DPS staff violated governing ethical standards.⁵⁵

The Inspector General asks the Commission on Public Integrity to assess whether Stein, in interviewing for a promotion with Beddoe while presiding over

⁵⁵ Public Officers Law § 73(1)(i).

matters affecting Energy East, violated Public Officers Law § 74. Additionally, the Inspector General requests that the Commission on Public Integrity review the actions of Lee and McGowan in relation to Public Officers Law § 74.

It was permissible for Mitnick to discuss his ideas for a reorganization of the DPS with Beddoe and DPS officials. It was further permissible for Mitnick to generally arrange for meetings between Beddoe and DPS staff to educate Beddoe about the agency. Although Mitnick encouraged immediate action and created the environment in which Beddoe precipitously engaged in interviews and offered promotions to DPS officials, Mitnick said he was not aware of the details of these conversations. While Mitnick should have recognized the ethical conflicts which could arise and exercised caution, Mitnick's mere fostering of an atmosphere in which DPS officials may have transgressed ethical limitations probably is not sufficient to violate the Public Officers Law.

As it is reasonable to assume that professionals from within the regulated industries may be nominated to the PSC in the future, the question of permissible contact between such nominees and DPS employees may arise again. Therefore the Inspector General invites the Commission on Public Integrity to examine this topic and consider establishing parameters for future interactions.

The Inspector General refers the employees who participated in employment negotiations with Beddoe, who made administrative changes at Beddoe's request, and who provided Beddoe with the purported confidential draft agenda to PSC Chairman Garry Brown for his assessment regarding potential violations of agency policy and Public Service Law § 15.