



April 9, 2018

Via Hand Delivery

Ms. Lora W. Johnson, CMC
Clerk of Council
Room 1E09, City Hall
1300 Perdido Street
New Orleans, LA 70112

***Re: Entergy New Orleans' Application for Approval to Construct New Orleans Power Station and Request for Cost Recovery and Timely Relief
Docket No. UD-16-02***

Petition for Rehearing, filed by the Alliance for Affordable Energy, Deep South Center for Environmental Justice, 350 – New Orleans, and Sierra Club

Dear Ms. Johnson:

Undersigned counsel make this filing on behalf of the Alliance for Affordable Energy, Deep South Center for Environmental Justice, 350–New Orleans, and Sierra Club (collectively, “Public Interest Intervenors”). Please find the original and three copies of this letter and the enclosed Public Interest Intervenors’ Petition for Rehearing.

Please return one date-stamped copy to our courier for our records and file the remaining original and two copies into the docket in this matter.

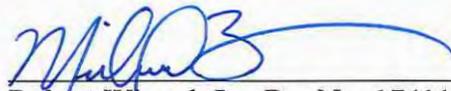
An electronic copy of this filing will be served by electronic mail on all parties to the distribution list for UD-16-02.

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Respectfully submitted,



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**BEFORE THE
COUNCIL OF THE CITY OF NEW ORLEANS**

APPLICATION OF ENTERGY NEW)	
ORLEANS, INC. FOR APPROVAL TO)	
CONSTRUCT NEW ORLEANS POWER)	DOCKET NO. UD-16-02
STATION AND REQUEST FOR COST)	
RECOVERY AND TIMELY RELIEF)	

PETITION FOR REHEARING

Pursuant to the New Orleans City Code § 158-485, the public interest organizations who are Intervenor in this docket, Alliance for Affordable Energy, Deep South Center for Environmental Justice, 350 New Orleans, and Sierra Club (“Public Interest Intervenor”), respectfully submit to the Council of the City of New Orleans this Petition for Rehearing on Council Resolution 18-65. In this resolution, the majority of the City Council voted to approve the application by Entergy New Orleans, Inc. (“ENO,” “Entergy,” or the “Company”), to construct a 128 megawatt peaking gas plant in New Orleans East known as the New Orleans Power Station.¹ As discussed below, the record for this proceeding demonstrates that there were substantial errors of procedure, exclusions of evidence, and omission of protective measures for the ratepayers of New Orleans, all of which make it impracticable to determine the case justly and fairly. These issues have not been considered, but ought to be examined in order to ensure that a proper decision is rendered in the public interest. Public Interest Intervenor

¹ The Council Utilities Regulatory Office distributed a certified copy of R-18-65 via electronic mail to the official service list for docket UD-16-02 on March 29, 2018. There is no provision in this resolution establishing a specific date for the effectiveness of the Council’s ruling.

request that the City Council grant this Petition for Rehearing and reopen the record to remedy the errors.

STANDARD OF REVIEW

The Council may grant rehearing of an order on its own motion or “on motion of any party provided said motion is received within ten days of the mailing of the order, rule, or other action complained of.” New Orleans City Code § 158-485. In this case, the Council Utilities Regulatory Office e-mailed the certified copy of the resolution and order approving the gas plant, Council Resolution 18-65, on March 29, 2018. Public Interest Intervenors timely filed this petition for rehearing on April 9, 2018.

The Council is empowered to grant rehearing when it “concludes that substantial errors of procedure or the exclusion of evidence or any other substantial factors have so affected the record as to render it impracticable to determine the case justly and fairly upon the record.” *Id.*

ARGUMENT

In this case, substantial errors of procedure, as well as the Council’s failure to consider lower cost alternatives to the gas plant or conditions to mitigate ratepayer risk from the gas plant, and the Council’s failure to fully vet social justice issues and flood risks warrant a rehearing.

I. Parties to Certificate of Need Proceedings Are Entitled to Procedural Protections, and the City Council Advisors’ Dual Role as Parties to the Proceeding and Advisors to the City Council Deprived the Parties of Those Protections.

As discussed more fully below, Advisors’ dual role as advocate and fact-finder in the Council proceeding on Entergy’s gas plant application violated the Public Interest Intervenors’ constitutional due process rights in several respects.

A. *The City Council Has the Fundamental Legal Obligation to Ensure That Its Proceedings Protect the Right to Due Process.*

Article 1, § 2 of the Louisiana Constitution, like the 14th Amendment to the United States Constitution, guarantees the right to due process, including the right to a fair trial. A fair trial in a fair tribunal is a basic requirement of due process. *Ga. Gulf Corp. v. Bd. of Ethics*, 694 So. 2d 173, 177 (La. 1997). As noted in each of their motions to intervene, Petitioners' members are residents of New Orleans who are ENO ratepayers. These members will be adversely affected not only by the significant increase in rates associated with approval of ENO's application but also by the pernicious environmental impacts resulting from the construction and operation of the fossil-fuel plant. The City Council has a duty to ensure that its proceedings protect the Petitioners' right to due process.

For governmental bodies, like the City Council, that are not subject directly to the Louisiana Administrative Procedure Act ("APA"), Louisiana courts nonetheless look to the Louisiana APA as a guide in determining whether a proceeding meets minimum requirements for due process. *La. Consumer's League v. La. Public Serv. Comm'n*, 351 So. 2d 128, 132 (La. 1977) ("Although we have concluded that the legislature may not constitutionally subject the Commission to the rule-making provisions of the Administrative Procedure Act, these provisions . . . do offer guidance as to what constitutes a reasonable procedure . . ."); *Gulf States Utils. Co. v. La. Public Serv. Comm'n*, 578 So. 2d 71, 84–85 (La. 1991). The Louisiana APA was enacted in 1966 in response to the concern that procedures used by governmental bodies fell short of compliance with due process.²

² *Note, Louisiana's "New" Administrative Procedure Act*, 35 LA. L. REV. 629, 630 n.6 (1974).

The City Council has the authority to administer proceedings that are legislative or adjudicative in nature. “Courts have recognized throughout the last century that legislative and judicial due process may require varying procedures.” *Lowenburg v. Council of the City of New Orleans*, 859 So. 2d 804, 812 (La. App. 4 Cir. 2003). The Louisiana APA is instructive on the differences between the process due in a legislative or a rulemaking proceeding (*see, e.g.*, La. Rev. Stat. Ann. § 49:953), and in an adjudicative proceeding (*see, e.g.*, La. Rev. Stat. Ann. § 49:955).

B. Certificate of Need Proceedings Are Adjudicative in Nature, not Legislative.

The Louisiana Supreme Court has held that public utility regulators, like the City Council in this case, cannot deprive private citizens of their due process rights in adjudicatory matters. *Bowie v. La. Pub. Serv. Comm’n*, 627 So. 2d 164, 169–170 (La. 1993). Moreover, parties to an adjudicative proceeding are entitled to a “fair trial in a fair tribunal” as a basic requirement of constitutional due process. *In the Matter of Rollins Env’tl. Servs., Inc.*, 481 So. 2d 113, 119 (La. 1985)(citing *In re Murchison*, 349 U.S. 133 (1955)). As organizations representing members who live in Entergy New Orleans’ service territory, and who will ultimately be required to pay for the cost of constructing and operating the proposed New Orleans Power Station, the Public Interest Intervenors have protectable property interests in the outcome of this proceeding. Moreover, members of the Public Interest Intervenor organizations live, work, and recreate in the area that will be affected by Entergy New Orleans’ proposed gas-burning power plant, and therefore have protectable health, recreational, and aesthetic interests

that will be adversely affected by air and water pollution caused by the construction and operation of a gas power plant.³

In contrast to power-plant certificate proceedings like this one, courts have determined that utility rate-making is a quasi-legislative action.⁴ This is because legislative proceedings, such as the establishment of an electricity rate or a rule, are prospective policy judgments that change existing conditions by making new rules to be applied to future conduct or persons subject to the legislative body's jurisdiction. *Lowenburg*, 859 So. 2d at 810. But where, as here, the Council investigates, declares, and enforces rights and liabilities as they stand on present or past facts and under laws supposed already to exist, the Council acts in a quasi-judicial capacity. *See id.*

Indeed, Louisiana courts view proceedings of the City Council that pertain to applications for the approval of construction projects as being adjudicative, not legislative. *Williamson v. Williams*, 543 So. 2d 1339, 1344 (La. App. 4 Cir. 1988)("[W]e agree, that the City Council, when considering the appeal of an individual property owner for a waiver of the restrictions of a temporary moratorium, is not acting in a legislative capacity but is acting in a quasi-judicial or administrative capacity."); *see also State, Dept. of Social Servs. v. City of New*

³ *See, e.g.*, Sierra Club Mot. to Intervene at 2 (filed Sept. 16, 2016); Alliance for Affordable Energy Mot. To Intervene at 1 (filed June 27, 2016); and 350 Louisiana – New Orleans Mot. to Intervene at 3 (filed Sept. 6, 2017)(subsequent to filing its Motion to intervene, 350 Louisiana – New Orleans changed its name to 350 New Orleans).

⁴ *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 369-70 (1989). In the early case of *McNeely v. Town of Vidalia*, 102 So. 422, 423 (1924), the Louisiana Court reasoned that "since public utilities are for all practical purposes public necessities, and virtual monopolies, it follows that the rates fixed for such necessities are in effect a *tax* upon the public for such public service The fixing of such rates is therefore essentially a *legislative* function" (Emphasis in original).

Orleans, 676 So. 2d 149, 151 (La. App. 4 Cir. 1996)(finding that the City Council sat in a “quasi-judicial capacity” when it reviewed an application for a building permit).

In many ways the City Council is unique in the nation, serving both as the City’s municipal legislative body and as its public utilities commission. The Council is required to abide by different rules when it is serving in its legislative and non-legislative capacities.⁵ Here, the Council’s proceeding on Entergy’s application for approval to construct a gas plant was quasi-judicial, not legislative. Entergy acknowledges that the Council’s decision on its application for a new gas plant does not include ratemaking or any such legislative action by the Council.⁶

In this proceeding, the Council had to decide whether evidence supported the conclusion that the construction of a new gas plant is in the public interest. To make this decision, the Council was required to build an evidentiary record, based on an adversarial proceeding that included discovery, extensive written testimony, and witness cross-examinations during five days of an evidentiary hearing that was presided over by an administrative law judge. Entergy’s application for a gas plant is a request for a certificate of need that opens a judicial inquiry to investigate, declare, and enforce, on present facts and under current laws, whether ratepayers, including Public Interest Intervenors, should be made liable for the construction costs of the gas plant. *See Lowenburg*, 859 So. 2d at 810. This proceeding was quasi-judicial in nature.

⁵ See, for example, City of New Orleans Inspector General, New Orleans Utilities Regulation: Final Report, June 17, 2015, available at: <http://www.nolaoig.gov/reports/new-orleans-utilities-regulation> [last visited 3/30/2017] [hereinafter “OIG Report”] (“This dual role can create tension in the regulatory process: activities related to the development of legislation, such as informal communications with stakeholders, are not always appropriate for contested regulatory matters such as rate cases.”).

⁶ Entergy New Orleans, Inc., *Supplemental and Amending Application to Construct New Orleans Power Station and Request for Cost Recovery and Timely Relief*, July 6, 2017, p. 24:par. XL.

C. The Advisors' Commingled Role as Advocate and Fact-finder Violated Due Process.

Given that the Council's proceeding was an adjudicative one, the parties were entitled to a fair hearing before a fair tribunal. This requires an impartial trier of fact. For example, a judge may be recused when he or she has a conflict arising from participation in an earlier proceeding. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). Due process concerns exist when a hearing officer charged with deciding an adversarial proceeding is compensated by a party to the proceeding. *Rand v. City of New Orleans*, No. 2012-C-0348, p.8 (La. App. 4 Cir. 12/13/12); 125 So. 3d 476, 481–82. Louisiana courts have recognized that while the dual roles of administrative officials may be permissible in the quasi-legislative context (like utility rate cases), it is not allowed in adjudicative proceedings. *All. for Affordable Energy v. Council of City of New Orleans*, 578 So. 2d 949, 968, (La. App. 4 Cir.), *vacated as moot on other grounds*, 588 So. 2d 89 (La. 1991). However, in this adjudication proceeding, the Council permitted the Advisors to perform the conflicting roles of advocate and fact-finder, and as those roles were exercised in this case, it clearly resulted in bias.

It is important here first to emphasize that the Public Interest Intervenors respect that the Advisors are well-qualified. But, the Advisors' expertise and ability to perform multiple roles for the Council does not justify infringement on the due process rights of the parties to the Council's proceeding on the Entergy gas plant application. The City Council has the ultimate responsibility for establishing a fair proceeding. As discussed below, the Council is not permitted to set up an adjudicative proceeding in which the same Advisors participate as an adversarial party with a view as to the appropriate outcome *and* as advisors to the Council, as the trier of fact, throughout the proceeding (even asking questions at Council meetings from the Council's dais), *and* as drafters of the ultimate decision that accepts or rejects other parties'

arguments and evidence. These commingled roles performed by the Advisors violate the other parties' due process and procedural rights and undermines the fundamental fairness, and the appearance of fairness, required for the proceeding.

One of the more striking acts by the Advisors that denies due process was their decision, prior to the evidentiary hearing, to advocate for Entergy to construct the 128 megawatt RICE facility, and against further consideration of the less expensive transmission alternative.⁷ In their opening statement, the Advisors openly sided with Entergy with respect to the purported need to build a gas-burning power plant in New Orleans East, and derided the Public Interest Intervenors as "putting all their eggs in one basket." This pre-determination of the critical issue in the case carried through into the order which the Advisors prepared for the Council, which as explained below rejected the transmission alternative without even requiring a full analysis. Moreover, as further explained below, this Advisors' pre-determined position was the continuation of a previous agreement negotiated between the Advisors and Entergy.

It is significant that no Council member or non-party member of Council staff participated in the evidentiary hearing, and the independent administrative law judge who presided did not make recommendations to the Council as to the merits of the case. Thus, the Advisors, with a predetermined position as to the outcome, were the only Council staff with the complete knowledge of the proceedings to assess matters of credibility and disputed issues of fact on the complete record. Advisors have acted prior to and throughout this matter as both advocates and as *de facto* triers of fact, a situation which is a violation of the right to a fair tribunal.

⁷ 12/15/2017 Hr'g Tr.at pp. 101–109.

This situation is like those that Louisiana courts have found violated due process. In *Allen v. Louisiana State Board of Dentistry*, 543 So.2d 908 (La. 1989), the Louisiana Supreme Court found that a party's ex parte drafting of the decision document violated due process. As in this proceeding, the party in *Allen* drafted the factual findings and conclusions which were then signed by the committee. The Court found that this process violated the other party's right to a fair hearing because the detailed findings and judgments which were offered in support of the committee's final decision, and which played such a critical role in meaningful judicial review, were simply not those of the neutral hearing committee, they were the product of an advocate. *Id.* at 913. The Court also found that if the committee thought the assistance of an attorney was desirable, it should have contracted an independent counsel. *Id.* The Court concluded that the party could not be considered a neutral party; his role was that of advocate, one who has developed the "will to win." *Id.* at 914 (citing *Grolier, Inc. v. Fed. Trade Comm'n*, 615 F.2d 1215 (9th Cir.1980)). On similar facts as *Allen*, in *Georgia Gulf Corp. v. Board of Ethics for Public Employees*, 694 So.2d 173, 177 (La. 1997), the Louisiana Supreme Court specifically rejected the Ethics Commission's defense that it was merely following the rule permitting comingling of functions in rate cases, stating that "the approved procedure in rate cases is inapplicable to the evaluation of procedural due process in other administrative law settings." *Id.* at 179.⁸

Importantly, for an adjudicative or quasi-judicial proceeding, the Louisiana APA restricts communication between members or employees of a governmental agency, who are

⁸ The Court in *Georgia Gulf* held that the findings of fact and opinion adopted by the Ethics Commission remained the work product of an advocate who had a stake in the outcome. *Id.* at 177. As such, according to the Court, the factual recitation and opinion was not the product of a neutral decision maker. *Id.*

assigned to render a decision or to make findings of fact and conclusions of law, and members or employees of the same agency, who are engaged in the performance of advocacy functions. La. Rev. Stat. Ann. § 49:959. In the absence of specific direction from the New Orleans City Code and the Home Rule Charter, the Louisiana APA provides persuasive guidance for the procedural safeguards required in an adjudicative proceeding by the City Council.⁹

Here, the Council allowed the Advisors to draft the Council's final resolution, which violates due process protections, and renders the Council's decision infirm on both statutory and due process grounds, for several reasons. First, as advocates and the ultimate finders of fact, the Advisors' repeated *ex parte* written communications with the City Council violated due process and the City Code § 158-322(e):

During the pendency of a proceeding under this article, no party of record shall engage in any *ex parte* written communications with regard to any matter pending, with any councilmember or designated agency of the council.

Advisors clearly were a party of record, filing testimony, conducting discovery and cross examining other parties' witnesses. However, Advisors also provided written information outside of the record to Council members. Ultimately, the Advisors produced a 188-page decision to the Council members. Public Interest Intervenors' statutory rights were prejudiced by this violation, as they had no ability to contest the representations made by the Advisors in private communications.¹⁰ City Code § 158-322(e) is designed to ensure that persons

⁹ The New Orleans City Council recognizes the effectiveness of the LA Administrative Procedure Act for adjudication proceedings and mandates by ordinance that this standard govern the adjudication proceedings of municipal agencies responsible for the enforcement of building codes (New Orleans City Code 6-36(g)), the Alcoholic Beverage Control Board (New Orleans City Code 10-77), the Taxi Cab and For-Hire Bureau (New Orleans City Code 162-98, 162-248(a), 162-1004), the Parking Division in the Department of Public Works (New Orleans City 154-696), etc.

¹⁰ It should be noted that the Advisors have no official role under City ordinances and cannot be viewed as an "agency" of the City.

participating in the administrative process receive a fair hearing before a neutral decision maker. This basic statutory purpose is defeated when an advocate performs the adjudicatory function of arriving at findings of fact and conclusions of law.

Second, the Advisors' knowledge of the contents of the draft decision gave them an unfair advantage during the proceedings. Giving one party advanced notice of the decision, as well as denying other parties a fair opportunity to review and object to the final decision document, is contrary to the Louisiana Administrative Procedure Act. *See* La. Rev. Stat. Ann. § 49:957 (requiring, in an adjudicative proceeding, that "the decision . . . shall not be made final until a proposed order is served upon the parties, and an opportunity is afforded to each party adversely affected to file exceptions and present briefs and oral argument to the officials who are to render the decision").

As noted above, the Advisors had predetermined the contents of the order, and had settled on their view as to the appropriate outcome of the proceedings, even before the evidentiary record was made. In addition, the Utility, Cable, Telecommunications and Technology Committee of the City Council held closing arguments in this proceeding on February 21, 2018, the very same day the Committee publicly released and debated the 188-page draft resolution prepared by the Advisors. While the Advisors had extensive knowledge of the contents of the draft (having written the document) and could craft their argument directly to the contents of the order, no other parties had advance knowledge regarding the contents of the document and other parties only received the lengthy document minutes before the hearing. Thus, the outcome of the proceedings—and in particular, the February 21, 2018 hearing—was

tilted in favor of the Advisors' preferred alternative, and the proceedings lacked fairness and the appearance of fairness.¹¹

Moreover, by drafting the Council's findings and conclusions, the Advisors put themselves in the position of the adjudicator. The Advisors have no adjudicatory authority under the City Ordinances, yet they not only supplied the factual findings that provide the essential support for the Council's conclusions, they provided the conclusions as well. Thus, Public Interest Intervenors' right to a neutral adjudicator was violated. Apart from the substantive unfairness caused by the Advisors' roles as both party and fact finder, this commingling of functions clearly created the appearance of impropriety.

In one poignant example of the unfairness that arises when staff are both adversarial parties to the proceeding and counsel to the decision-maker, the Advisors will be instructing the Council on how to rule on the Advisors' own motion. During the proceeding, the Advisors filed a motion to strike a portion of Public Interest Intervenor witness Dr. Beverly Wright's testimony from the record that focused on the Advisors' role. The Public Interest Intervenors filed a motion in opposition. The administrative law judge granted the Advisors' motion to strike from the record of evidence this portion of Dr. Wright's testimony. The Public Interest Intervenors appealed the administrative law judge's decision to the City Council. However, the City Council has taken no action on this appeal. If and when the Council rules on the Public Interest Intervenors' appeal, the Advisors are poised to draft the Council's ruling *on the Advisors' own motion*.

¹¹ As the Court stated in *In the Matter of Rollins Environmental Services, Inc.*, 481 So. 2d 113, 119 (La.1985), "Not only must there be impartiality on the part of a presiding officer in an administrative adjudicatory hearing, but there must also be in connection with the hearing the appearance of complete fairness."

The City Council failed to take any action to ensure due process by avoiding the dual and conflicting roles performed by the Advisors, who work for the Council on a contractual basis.¹² The Advisors acknowledge they performed the dual and conflicting roles of (1) negotiating a prior agreement with Entergy in which Entergy is to pursue the development of new peaking generation with a capacity of at least 120 megawatts in New Orleans with Michoud as a potential site¹³ and (2) recommending the Council approve Entergy's gas plant application that adheres to the prior agreement.¹⁴ Prior to the Council decision in this adjudication proceeding, the public was not made aware that the Advisors performed the dual role of negotiating the prior agreement, a function of a party to that proceeding, and recommending Council approval of Entergy's gas plant application, a function that involves findings of fact and conclusions of law in this proceeding. These dual and conflicting roles are exacerbated by the fact that the same Advisors prepared the Council's decision document, Resolution R-18-65, which approves Entergy's construction of a 128 megawatt gas plant on the Michoud site.¹⁵

¹² The history and nature of the Advisors contractual relationship with the City Council is examined in an in-depth report by the City of New Orleans Inspector General, New Orleans Utilities Regulation: Final Report, June 17, 2015, available at: <http://www.nolaoig.gov/reports/new-orleans-utilities-regulation> [last visited 3/30/2017].

¹³ Evidentiary Hearing Transcript, Dec. 21, 2017: Cross-Examination of Joseph Vumbaco, p. 120:line 23 – p. 121:line 16. Council Resolution R-18-65, pp. 4–5.

¹⁴ Direct Testimony of Joseph A. Vumbaco on behalf of the Advisors to the Council of the City of New Orleans, Docket UD-16-02, Nov. 20, 2017, p. 8:line 13 – p. 9:line 3.

¹⁵ The Advisors presented the resolution decision document to approve the Entergy gas plant application both to the UCTT Committee meeting on February 21, 2018 and, after approval by the Committee in a 4-1 vote, at the beginning of the City Council meeting on Mar. 8, 2018, which concluded with the Council voting 6-1 to approve.

The multiple functions performed by the Advisors violate due process, and, accordingly, it is not the practice of most Commissions.¹⁶ The OIG Report specifically recommended that the Council update its rules to bifurcate staff “with a clear role as either trial or advisory staff for each particular docket,” such that, “an attorney or analyst from trial staff who advocates a position during the hearing process would be prohibited from discussing the matter with the Council or members of their advisory staff.”¹⁷ The problem, otherwise, is that the “Advisors’ dual role can create an echo chamber in which their findings and recommendations go unchecked.”¹⁸

The combination of advocacy and adjudicative functions in the same person or persons is incompatible with due process. The dual and conflicting roles performed by the Advisors in this quasi-judicial proceeding constitutes a clear due process violation that the Constitution requires the City Council to avoid in order to ensure the fundamental guarantee of due process in an adjudication proceeding. Public Interest Intervenors request that the City Council grant a rehearing to consider whether the Advisors’ dual roles in this quasi-judicial proceeding violated due process.

¹⁶ OIG Report at 44 (“Individual staff members at regulatory commissions typically fulfill either a trial or an advisory role in a contested regulatory proceeding. Personnel assigned to the trial function serve as a party to the case and cross examine witnesses and submit testimony. Personnel assigned to the advisory function provide guidance and assistance to commissioners as they deliberate on contested matters. This approach is called staff bifurcation and is imposed to avoid ex parte violations and ensure that the advisory personnel provide an independent review and assessment of the position(s) developed by the trial personnel.”)

¹⁷ OIG Report at 64.

¹⁸ *Id.* at p. 55.

1. In Violation of Due Process, the Advisors, Who Drafted the Council’s Decision to Approve the Proposed Entergy Gas Plant, Also Negotiated a Prior Agreement with Entergy for the Development of a Gas Plant

The following facts are not in dispute:

- the Advisors and Entergy New Orleans, Inc. negotiated a deal in which Entergy is to pursue the development of new peaking generation of at least 120 megawatts in New Orleans with Michoud as a potential site; this deal was a single term made part of the August 14, 2015 *Settlement Agreement Terminating the Entergy System Agreement*, which involved 15 cases of wide-ranging disputes between Entergy New Orleans and other Entergy companies in four states that were filed with the Federal Energy Regulatory Commission (“FERC”);¹⁹
- the Advisors recommended the City Council approve this deal in a resolution, and the Council followed this recommendation by passing Council Resolution 15-524, which adopts the deal verbatim in Council dockets UD-13-03 and UD-13-04;²⁰

¹⁹ The terms of the deal negotiated between the Advisors and Entergy are as follows.

E. Agreements of Specified Parties with Respect to Certain Potential Future Generation in the City of New Orleans

ENO and CCNO agree as follows:

(1) ENO will use reasonable diligent efforts to pursue the development of at least 120 MW of new-build peaking generation capacity within the City of New Orleans. As part of this commitment, ENO will fully evaluate Michoud or Paterson, along with any other appropriate sites in the City of New Orleans, as the potential site for a combustion turbine (“CT”) or other peaking unit to be owned by ENO, or by a third party with an agreed-to PPA to ENO. This evaluation will take into consideration, among other material considerations, the results of the Michoud site analysis that was completed in connection with the Summer 2014 RFP.

(2) ENO commits to diligent efforts to have at least one future generation facility in New Orleans.

Entergy Arkansas, Inc., et al. Settlement Agreement Terminating the Entergy System Agreement, Federal Energy Regulatory Commission, Docket Nos. ER14-75-000, ER14-75-001, ER14-76-000, ER14-76-001, ER14-77-000, ER14-77-001, ER14-78-000, ER14-78-001, ER14-79-000, ER14-79-001, ER14-80-000, ER14-80-001, ER14-128-000, ER14-1328-000, and ER14-1329, Aug. 14, 2015, pp. 13–14.

²⁰ Evidentiary Hearing Transcript, Dec. 21, 2017: Cross-Examination of Joseph Vumbaco, p. 120:line 23 – p. 121:line 16. The City Council adopted the language in Section E of the agreement verbatim in Council Resolution 15-524, Nov. 5, 2015, p. 12.

- the deal occurred prior to Entergy's submissions of the 2015 Integrated Resource Plan recommending a new gas plant (filed with the Council on Feb. 1, 2016) and the application for a new gas plant (filed with the Council on June 20, 2016); and
- none of the Council resolutions drafted by the Advisors in the utility dockets for the 2015 Integrated Resource Plan (UD-08-02) and Entergy's gas plant application (UD-16-02) disclosed the fact that the Advisors and Entergy negotiated a prior deal for the development of a new gas plant.

The Advisors and Entergy crafted an agreement for the development of a new gas plant that was specific.²¹ The type of gas plant would be peaking generation. The capacity would be at least 120 megawatts. The location would be in New Orleans, with Michoud or Paterson as potential sites.

The prior agreement undermines the Council's rules for Integrated Resource Planning. This planning process requires extensive data collection for in-depth analysis, modeling, and forecasting on how energy will be generated and used over a 20-year horizon.²² This is a public process that involves a series of meetings by Entergy, stakeholders, and members of the public, as mandated by the Council's rules.²³ Before the Integrated Resource Plan was accepted by the Council in Docket UD-08-02 on February 23, 2017, the Council and Entergy negotiated an agreement for a new gas plant on August 14, 2015. Their agreement was documented as a single term buried in the *Settlement Agreement Terminating the Entergy System Agreement*.

The *Settlement Agreement* resolved the complex litigation in a proceeding before the FERC that involved six Entergy corporations in four states with fifteen different claims and disputes arising from the Entergy System Agreement. The Council opened dockets UD-16-03

²¹ *Supra* n. 20.

²² Council Resolution 17-429, Aug. 10, 2017, Attachment B.

²³ *Id.*

and 13-04 to review any aspects of the litigation before the FERC affecting New Orleans ratepayers.

It was not reasonably foreseeable that the FERC case would have anything to do with a new gas plant in New Orleans. For three years after the opening of the Council dockets UD-16-03-03 and 13-04, Entergy operated the Michoud Power Plant.

However, Council Resolution 18-65, drafted by the Advisors, attempts to place the blame on Public Interest Intervenors and the public who have participated in this adjudication proceeding for not also participating in the FERC case. According to the Council's Resolution:

that Settlement Agreement was the subject of not one but two open, public proceedings, one at FERC and one before the Council It is incumbent upon members of the public who have an interest in energy matters to follow the proceedings of the Council and other agencies that regulate such matters.²⁴

Strikingly, the Council places the unreasonably onerous burden on members of the public, including Public Interest Intervenors, to participate in all unrelated Council proceedings, as well as FERC proceedings in Washington, D.C., in order to have notice of and input on matters whose import may not be foreseeably relevant to their interests or concerns in other Council proceedings. The Advisors attempt to evade the due process issue of their roles in negotiating the prior agreement, advocating as a party in the proceeding for a pre-determined outcome that adheres to this agreement, and drafting the Council's decision document, Resolution 18-65, that approves a new gas plant resembling the terms of prior agreement.

Public Interest Intervenors have been denied a fair trial in a fair tribunal. As a party to the proceeding, the Advisors opposed the position taken by Public Interest Intervenors, who submitted the testimonies of expert witnesses on cheaper, safer, and sustainable alternatives to

²⁴ Council Resolution 18-65, Mar. 8, 2018, p. 139.

the proposed gas plant as well as the severely adverse health and environmental impacts the gas plant would have on predominantly African American and Vietnamese American residents living nearby. As the drafter of the decision document, Council Resolution 18-65, the Advisors reinforced their opposition by rejecting the Public Interest Intervenors' evidence as grounds for denial of the proposed Entergy gas plant. The Advisors commingled and conflicting roles violate due process and have a significantly prejudicial effect on Public Interest Intervenors.

D. The City Council's Failure to Act on the Public Interest Intervenors' Appeal of the Exclusion of Evidence Requires the Council to Grant Rehearing.

The City Council issued Resolution 18-65 without ruling on the exclusion of material evidence presented in the Supplemental Testimony of Dr. Beverly Wright in Docket UD-16-02. The Council is required to issue a ruling by New Orleans City Code § 158-481, as Public Interest Intervenors have filed an Offer of Proof that is an appeal to the City Council from a ruling by the administrative law judge to grant the Utility Advisors' motion to strike a portion of Dr. Wright's testimony from the record of evidence.²⁵

The New Orleans City Code § 158-485 allows for a rehearing when there has been an exclusion of evidence that affects the record so as to make it impracticable to determine the case justly and fairly. The exclusion of Dr. Wright's testimony has such a prejudicial influence. Dr. Wright is the only witness in this adjudication proceeding to submit written testimony about the prior agreement between the Council, its Advisors, and Entergy for the development of a gas plant. In her testimony, Dr. Wright discusses the dual and conflicting roles of the Advisors, and the impacts that the prior Settlement agreement has on undermining effective and

²⁵ Alliance for Affordable Energy, Deep South Center for Environmental Justice, and 350 New Orleans, *Offer of Proof of the Excluded Portion of the Pre-filed Supplemental Testimony of Beverly Wright, Ph.D.*, UD-16-02, Dec. 21, 2017.

meaningful public participation in the Council's proceeding on the Entergy gas plant application.²⁶ In this quasi-judicial proceeding, members of the public intervened as parties, provided public comments at two public hearings, and attended public information meetings that were convened on Council's instructions. Dr. Wright notes that these members of the public were not made aware by the Council of the connection between the Entergy's gas plant application and the prior agreement it had with Entergy to develop a gas plant that took place in a separate proceeding.²⁷ She explained that the prior Settlement agreement and conflict of interest issues created an unfair process that denied people, who would be the most impacted by the Council's decision, a meaningful and effective opportunity for input.

The Advisors filed a motion to strike Dr. Wright's testimony regarding the prior agreement and the conflict of interest issues,²⁸ which mischaracterized Dr. Wright's testimony as legal opinion. The Public Interest Intervenors filed a motion in opposition, which showed that Dr. Wright's testimony was based on her expertise in developing protocols for meaningful and effective public participation and advising administrative agencies, including the U.S. Environmental Protection Agency, on how to conduct decision-making processes with public input.²⁹ The administrative law judge granted the Advisors' motion to strike from the record of evidence the portion of Dr. Wright's testimony that pertained to the prior agreement and conflict of interest issues. Pursuant to New Orleans City Code § 158-485, the Public Interest

²⁶ *Id.* at p. 3.

²⁷ *Id.* at p. 4. Had members of the public known they could have formulated responses to the multiple and conflicting roles performed by the Council and its Advisors.

²⁸ *Advisors' Motion to Strike Portions of Supplemental Testimony of Beverly Wright, Ph.D.*, UD-16-02, Nov. 16, 2017.

²⁹ *Alliance for Affordable Energy, Deep South Center for Environmental Justice, and 350 New Orleans' Memorandum in Opposition to Advisors' Motion to Strike Portions of Supplemental Testimony of Beverly Wright, Ph.D.*, UD-16-02, Nov. 27, 2017.

Intervenors appealed the administrative law judge's decision to the City Council.³⁰ However, the Council has taken no action on this appeal even though urged to do so in the closing argument made on behalf of the Deep South Center for Environmental Justice, an intervenor in the adjudication proceeding.

When considered in light of the Council's failure to disclose its prior agreement with Entergy and its apparent conflict of interest, its inaction on the appeal of the exclusion of evidence provided by Dr. Wright on these issues, and now its evasive response to these same issues in Council Resolution 18-65, the violation of due process is clear. Public interest intervenors and participating members of the public in this adjudication proceeding have been denied the right to a fair trial in a fair tribunal.

II. The Council Should Reopen the Record to Require Entergy to Study Transmission Alternatives, the Apparent Least-Cost, Lowest Risk Choices to Meet New Orleans' Reliability Need.

As early as November 2016, the Council demanded that Entergy present the alternative of making transmission upgrades to resolve potential NERC contingencies, instead of building the gas plant.³¹ But Entergy never followed through. The Company instead took pains to avoid ever putting a viable transmission alternative, including a full cost and technical analysis of feasibility, into the record, despite the initial evidence that such options would cost a fraction of Entergy's preferred gas plants. This substantial omission has prevented the Council from

³⁰ Alliance for Affordable Energy, Deep South Center for Environmental Justice, and 350 New Orleans, *Offer of Proof of the Excluded Portion of the Pre-filed Supplemental Testimony of Beverly Wright, Ph.D.*, UD-16-02, Dec. 21, 2017.

³¹ In Resolution 16-506, the Council required ENO to evaluate four alternative resource portfolios to the gas plant, including a transmission option, as outlined in a communication from the Advisors to ENO. *See* Council Res. 16-506 at p. 9 (Nov. 3, 2016); Exhibit SC-5, Communication from Advisors to ENO, Sept. 19, 2016 (communication referenced in Res. 16-506 that contains four alternative portfolios to gas plant).

making a fully informed decision and discharging its duty to regulate in the public interest. To correct this error, the Council must grant rehearing and order Entergy to file a detailed cost and engineering study of transmission alternatives into the record, with opportunity for the parties to respond to Entergy's filing.

A. The Transmission Solutions are the Apparent Least-Cost and Lowest Risk Options to Meet New Orleans' Need, but the Council Failed to Study them in Violation of its Charge to Protect the Public Interest.

Even in voting in favor of approving Entergy's gas plant, Councilmember Stacy Head expressed well-founded concern about the Council's failure to consider appropriate alternatives, leaving the Council with only "one option":

I firmly believe there may have been other solutions to New Orleans' reliability issues, but those alternatives were not carefully and thoroughly considered by Entergy or our utility advisors. So we're left with one option the cost of which will be borne by every ratepayer in this city. . . .

. . . .

We, as a Council, did not demand that Entergy explore and analyze all viable solutions to the reliability problem. More cost-effective and environmentally friendly options that are now being discussed in the public realm, like some combination of transmission upgrades, demand side management, renewables with batteries, distributed generation, or other components or technologies, were never thoroughly considered by Entergy or the advisors.³²

Despite its regulatory obligation to consider alternatives, the Council never considered the lower cost, lower risk transmission solutions to the City's reliability need. The Council must take the opportunity to correct that error by granting rehearing.

The fundamental issue before the Council in this case is whether Entergy's gas-plant proposal is in the "public interest." The public-interest test is meant "to assure the furnishing of

³² Exhibit A, Statement from Councilmember Stacy Head, "My Vote on the New Orleans Power Station," March 8, 2018.

adequate service [to] all public utility patrons at the lowest reasonable rates consistent with the interest both of the public and of the utilities.” *City of Plaquemine v. La. Pub. Serv. Comm’n*, 282 So. 2d 440, 443 (La. 1973).

The more than \$200 million gas plant selected by the Council is *not* the lowest reasonable cost option. Nor is it necessary to serve the public’s interest. As the Advisors’ witnesses concluded, transmission-focused solutions, not the gas plant, are the “economically preferred alternative.”³³ Advisors’ witness Joseph Rogers testified that the transmission options “compare[] favorably under a significant range of capacity market price forecasts,”³⁴ indicating that they would also provide a hedge against market uncertainty that could raise the total costs of the gas plant alternatives. The transmission solutions, not Entergy’s proposed gas units, are the least-cost options, will reliably serve the public’s need for utility service, and pose relatively low financial risk.

Once completed, the transmission solutions would allow ENO to provide reliable service in compliance with North American Electric Reliability Corporation (“NERC”) standards, just as the gas plant would.³⁵ In particular, transmission upgrades also would resolve the risk of cascading outages in a P6 contingency that was cited by the Council as a primary justification for approving the gas plant.³⁶

³³ Rogers-2 at 45:10–11; *see also id.* at 43:9–12 (showing both transmission-dependent alternatives, Case 2 and Case 4A, as the least-cost portfolios under Advisors’ MISO capacity price sensitivity).

³⁴ Rogers-2 at 45:10–11.

³⁵ See C. Long-2 at 10-11, Table 1; ENO Resp. to Advisors’ RFI 8-6d; Movish-1 at 22:1-3; C. Long-2 at 22-23; Dec. 21, 2017 Tr. 188:10–16.

³⁶ See, for example, City Council of N.O., Res. 18-65, at pp. 71–73, Mar. 8, 2018 (focusing on the risk of a P6 contingency and associated “cascading outages” in the absence of corrective action).

Moreover, the transmission solutions would not create any of the environmental, health, and social-justice impacts that necessarily accompany siting a gas-burning plant in the middle of a FEMA high-risk flood hazard area, and in a predominately African-American and Vietnamese-American community of New Orleanians. The parties dispute how significantly the gas plant will contribute to air pollution and groundwater extraction. It is clear, however, that the gas plant would result in greater localized emissions of air pollutants and risk of groundwater-withdrawal-induced subsidence than exists at present—when no gas plant is operating in Michoud.³⁷ The gas plant also would emit an estimated 358,561 tons of greenhouse gases every year, for its thirty year lifespan.³⁸ That would undercut the City’s climate action plan, which calls for New Orleans to move to 100 percent low-carbon electricity by 2030.³⁹ And the gas plant would be located in a FEMA-designated “high-risk flood hazard area,” in which FEMA advises against locating critical facilities, like power plants.⁴⁰ The prior

³⁷ ENO estimates that the RICE Units will emit annually a total of 886,340 pounds (443.17 tons) of air pollutants per year. Higgins-1 at 19, Table 2. ENO estimates that the RICE Units could pump up to 3.9 gallons per minute of groundwater. Losonsky-1, Ex. GL-2 at p.2.

³⁸ ENO Application for Renewal and Modification of the Part 70 Operating Permit Acid Rain Permit Michoud Electric Generating Plant (August 18, 2017) App. G - RICE Scenario at G-7.

³⁹ See City of New Orleans, *Climate Action for a Resilient New Orleans*, p.26, 28 (setting a goal for the City of 100 percent low-carbon electricity, and showing natural gas as second most carbon-intensive fuel source); Cert. N.O. Council Res. 17-303 (June 2017) (committing Council to “continue its efforts to mitigate carbon emissions through promoting and adopting achievable increased energy efficiency measures and use of alternative energy sources” as well as its “commitment to the principles of the Paris agreement”); Cert. N.O. Council Res. 17-428 (Aug. 2017)(committing to work with the Mayor on developing the strategies in the City’s Climate Action Plan).

⁴⁰ See FEMA Flood Insurance Rate Map for Orleans Parish, panel no. 22011C0143F, which shows the high-risk flood hazard areas on the Michoud site that include the locations for the proposed RICE unit. See also J. Long-5 at 11, Figure 3 (aerial map of proposed RICE unit on Michoud site); FEMA-Flood Insurance and Mitigation Administration, Critical Facilities and Higher Standards, available at <https://www.fema.gov/media-library-data/1436818953164->

Michoud units were severely damaged by flooding. Transmission improvements, by contrast, would pose little or no such environmental, health, and safety risks.

Despite this evidence and the Council's request for alternatives, Entergy steadfastly refused to fully evaluate the costs, technical feasibility, or construction timeline for any transmission solutions. The Company claims that the transmission solutions are not worthy of further study, because transmission-line upgrades could be subject to cost overruns and may not be completed as soon as the gas plants. But Entergy never offered any study supporting these assertions. Certainly, Entergy had no self-interest in developing transmission solutions into viable alternatives, when the Company believed it could win approval of the more costly gas plant. As Entergy witness Charles Long admitted, Entergy's Transmission Group never developed complete studies of the transmission options, because Entergy committed to building the gas plant instead.⁴¹

Even if the Council were to accept Entergy's claims about the near-term difficulties in constructing transmission solutions, the Company still failed to study other, lower cost options that would have deferred transmission upgrades. For instance, as more fully explained in Subsection B below, Entergy found that it would resolve its reliability constraints by upgrading

4f8f6fc191d26a924f67911c5eaa6848/FPM_1_Page_CriticalFacilities.pdf (defining "critical care facilities" to include power plants and specifying that if at all possible, such facilities should be located outside of high-risk critical flood hazard areas).

⁴¹ 12/15/17 Hr'g Tr. at p. 198 (statement of Charles Long: "That's correct. It would not make sense to go spend the time and money to develop estimates if NOPS is the choice."); *see also* C. Long-2 at 16:20-17:9 (asserting that the No NOPS alternatives present "significant constructability issues" but admitting that the Company "has not conducted detailed planning-level cost estimates for the transmission upgrades"); *see also* Dec. 21, 2017 Tr. 81: 21-82:18 (Mr. Lanzalotta concluding that the transmission option has not been "sufficiently studied," and recommending that a detailed study include a "physical inspection," study of the "operating history . . . what kind of outages the line has had, . . . the history of repairs and all on the line," none of which has been done.).

just two of its transmission lines before 2027, installing 70 MW of effective generation at Michoud, and meeting the Council's 2 percent energy savings goal.⁴² Entergy cannot credibly claim that "constructability issues" would prevent the Company from upgrading two of its transmission lines with nearly a decade of lead time. In fact, when discussing the exact same line upgrades, which also would be required after building the RICE units, Entergy stated that because the "overloading in 2027 is relatively marginal and occurs approximately ten years in the future, the Company would propose to wait to determine if any transmission upgrades are necessary once [the RICE unit] is constructed."⁴³ Entergy's refusal to study a cheaper, 70-MW option with the same line upgrades as the RICE Units, is arbitrary and inconsistent with the public's interest.

Finally, Entergy's preferred option in this docket was always to build the combustion turbine, a unit that required at least three years to construct.⁴⁴ Entergy would not have consistently sought approval of the CT had it seriously believed that immediate improvements were necessary.

⁴² C. Long-2, Ex. CWL-6, pp. 10, 13–14 (Case B2). Advisors' witness Joseph Rogers found this option the cheapest of any centered on meeting the Council's 2 percent energy efficiency goal. Rogers-2 at 43:9–12, p. 44, Table 7 (Case 4A).

⁴³ C. Long-2 at 11:12-14. As noted, the 70-MW unit would require the *same* line upgrades as the larger, more expensive, 128-MW RICE Units. *Compare* C. Long-2 at Ex. CWL-6, p.8 of 17 (under the RICE proxy scenario, requiring reinforcement of Almonaster and Southport segments in 2027 with a cost of approximately \$23.2 million) *with* p. 15 of 17 (requiring upgrade of same segments at same cost under the "No NOPS-Solar" alternative).

⁴⁴ Dec. 15, 2017 Tr. 125:4-10 and 126:20-25 (noting that proposed NOPS RICE and CT units cannot be installed until 2020, and 2021, respectively, and as a "practical matter" cannot mitigate any of the modeled NERC violations until then).

For their part, the Council’s Advisors noted Entergy’s failure to prepare a transmission alternative that the Council could consider.⁴⁵ Advisor witness Joseph Vumbaco drew attention to the fact that the Council would need a great deal more information from Entergy first, if the Council wanted to choose the cheaper transmission options.⁴⁶ Despite advertizing to these flaws in Entergy’s case, the Advisors simply accepted Entergy’s reasons for failing to do further transmission analysis at face value. None of the Advisor witnesses performed an independent study of the feasibility or cost of transmission solutions.⁴⁷ The Advisors chose merely to adopt Entergy’s conclusory assertions, without making additional, critical studies.

Transmission solutions could meet New Orleans’ reliability need at lower cost and with fewer risks than a gas plant. Failing to fully evaluate these solutions prevents the Council from making a reasoned decision whether to choose the least-cost options in this case. The Council has the power and the obligation to order Entergy to study these options. To make an informed decision, it must do so now.

⁴⁵ Dec. 21, 2017 Tr. 85:13–17 (testimony of Advisor witness Joseph Vumbaco)(“Q. And ENO has not quantified those constructability risks that you reference there by assigning them a dollar value; is that correct? A. To my knowledge, they have not”); Dec. 21, 2017 Tr. 182:19–20 (testimony of Advisor witness Philip Movish)(“Q. And ENO did not provide any firm cost estimates for those upgrades? A. No.”); Dec. 21, 2017 Tr. 182:5–9 (Movish testimony)(Q. ENO “did not attempt to document how many months exactly or any other interval it would take to conduct those reinforcements in 2027, did they? A. No, they did not.”).

⁴⁶ See Vumbaco-1 at 7:1–8, p. 23; Dec. 21, 2017 Tr. at pp. 86-87.

⁴⁷ Dec. 21, 2017 Tr. 157:15–158:23(testimony of Philip Movish, explaining that he did not build or run any models in this case, but merely reviewed the results of ENO’s load flow studies); *id.* at 181:7–182:21(Movish, specifying he has not studied the feasibility of taking outages to construct line upgrades); *id.* at 86:8–9(Vumbaco, explaining that he did not attempt to quantify any of the constructability risks associated with the transmission upgrades that ENO asserted).

B. *The Council Should Grant Re-Hearing and Require ENO to Study the Following Three Transmission Solutions Raised in this Case as Alternatives.*

Rather than accept the failings in Entergy's case for the gas plant, the Council should re-open the record for Entergy to file detailed engineering and cost studies on at least the following three transmission solutions already identified as lower cost means to address the City's reliability need, with the opportunity for the Advisors (in a clearly defined role that avoids conflict, as discussed in section I. C. herein) and intervenors to respond.

First, Entergy must fully study immediate transmission upgrades that would avoid the need for any expensive, new gas-fired capacity. In the course of this case, Entergy conducted a preliminary analysis of making five transmission-line upgrades at a cost of \$57 million that would bring New Orleans into compliance with NERC standards without building a gas plant.⁴⁸ This alternative was the lowest cost option of any considered by Entergy, as the Advisors' analysis makes clear.⁴⁹ In fact, the Advisors concluded that New Orleans residents would save nearly 75 percent on their monthly energy bills with this portfolio as compared to the RICE units.⁵⁰

Second, to address Entergy's concern about the immediate constructability of transmission upgrades, Entergy must also fully review options that would defer the upgrades at lower cost than the RICE Units. For example, Entergy did a preliminary review of an option that would delay any necessary transmission upgrades until 2027, when the Company would only have to upgrade two transmission lines at a cost of \$23 million to comply with NERC.⁵¹

⁴⁸ C. Long-2 at 10-11; ENO Resp. to Advisors 8-6.d.

⁴⁹ Rogers-2 at 44, Tables 6–7 (Case 2); *id.* at 45:4 (“Of the cases modeled, the economically preferred alternative appears to be, Case 2.”)

⁵⁰ See Watson-2 at 21, Table 7 (showing estimated bill impacts of various portfolios).

⁵¹ C. Long-2, Ex. CWL-6, p.14 of 17.

To accomplish this, the Company would only need to add 70 MW of effective, new capacity at Michoud and work to meet the Council’s existing 2 percent DSM target.⁵² The Advisors’ witness Joseph Rogers concluded that this option is the least-cost of all of the portfolios designed around the Council’s 2 percent DSM goal.⁵³

Finally, Entergy must study off-the-shelf solutions to prevent a P6 contingency, such as installing two additional autotransformers in the City. Entergy witness Charles Long admitted that installing additional autotransformers could provide redundancy to avoid an incident that severs the connections between higher and lower voltage transmission lines, the root cause of the cascading outages in a P6 contingency.⁵⁴ Developing an auto-transformer solution would be far less costly than building a new gas plant, which is perhaps why Entergy has not studied the option in detail. In a recent letter, a Houston-based transmission development firm, CleanLine Energy Partners LLC, estimated that it would cost just \$30-60 million to install two auto-transformers in New Orleans, and that the project could be completed in just 12-18 months.⁵⁵

⁵² In ENO’s load-flow analysis, this option contained a nominal “200 MW” of solar PV installed at or near Michoud. But as Mr. Movish explains, using ENO’s assumed 35 percent dispatch factor for solar, that alternative “effectively” only assumes 70 MW of generation support at Michoud. Dec. 21, 2017 Tr. 187:19-188:16. Even if the Council were to question solar’s ability to supply dependable power at peak, ENO could study other 70 MW resources that would be less expensive than the 128-MW, 7 RICE units, such as energy storage or the option of installing just 4 RICE units (72 MW).

⁵³ See Rogers-2 at 43:9–12, p. 44, Table 7 (Case 4A).

⁵⁴ See, e.g., Dec. 15, 2017 Tr. 155:23-156:3-4; 157:7-11 (C. Long, acknowledging that a second autotransformer at Michoud “would allow more flow” between the 230 kV and 115 kV systems, but dismissing it out of hand, and without any analysis or study, because it is not a “constructable” upgrade).

⁵⁵ Exhibit B, Letter from CleanLine Energy Partners LLC to Dr. Myron Katz; See also Fagan-1 at Ex. RMF-4 at p.34 (showing the cost and estimated installation time for installing autotransformer at Entergy Louisiana substation near New Orleans as part of a MISO MTEP project).

The evidence indicates that a gas plant is not the cheapest or fastest way to meet the City's reliability need. Rather, the record makes glaring the need to study cheaper transmission alternatives on rehearing.

III. The Council Should Grant Rehearing to Consider Cost-Control Conditions to Protect Ratepayers from the Financial Risks Associated with the Gas Plant.

Unfortunately, the Council's resolution and order approving the gas plant contains no specific, immediate conditions to protect ratepayers from the gravest financial risks associated with the plant.⁵⁶ To discharge its commitment to regulate in the public interest, the Council should grant rehearing and put in place conditions to protect New Orleanians from the speculative bets that Entergy wishes to make with ratepayer money. The Council must act now, when its authority is at its zenith, rather than postponing the issue to a prudency proceeding, when its authority will be limited.⁵⁷

A. The Council Has the Authority and the Obligation to Grant Rehearing to Condition Its Approval on Shielding Ratepayers from Undue Risks Associated with Entergy's Proposal.

The Council has "extremely broad authority to condition certificates of public convenience and necessity," so long as the conditions are "reasonable." *Transcon. Gas Pipe Line Corp. v. FERC*, 589 F.2d 186, 190 (5th Cir. 1979). A rationally self-interested utility may wish to transfer the substantial risks of a project from its shareholders to its ratepayers, particularly when the utility will get a fixed return. Accordingly, one situation in which a Commission will need to impose cost conditions is to divide a project's risk more equitably

⁵⁶ See Res. 18-65, pp. 187–88.

⁵⁷ See *Gulf States Utilities Co. v. La. Public Serv. Comm'n*, 578 So. 2d 71, 84–85 (La. 1991) (explaining "prudent investment standard," which, as described further below, is highly deferential to a utility's decisions).

between shareholders and ratepayers. *Transw. Pipeline Co. v. FERC*, 784 F.2d 609, 614 (5th Cir. 1986).

Cost conditions are necessary in this case because Entergy has sought to place nearly all of the financial risks of the gas plant on the shoulders of New Orleanians, and those risks are considerable. Entergy is claiming that New Orleanians should spend more than \$200 million on a gas plant that would provide the City with more power than it needs, because Entergy is betting heavily that the gas plant can generate off-setting sales of power or energy on MISO markets. But to make the gas plant appear economical, Entergy is assuming that, in four years, MISO capacity prices will rise over **16,000 percent**, from \$0.55 per kW-year to more than \$92 per kW-year, and remain at that unprecedented level indefinitely.⁵⁸ Meanwhile, Public Interest Intervenor witnesses, the Advisors' witness Joseph Rogers, and the capacity market's own independent monitor all believe that capacity prices are at least as likely to remain very low.⁵⁹

Entergy's assumption that MISO market prices will rise 16,000 percent and remain at that level is significant to the Company's economic case to build the gas plant. As the Advisors' witnesses determined, if instead the market price "only" increased ten-fold to \$6 per kW-year—which is itself optimistic given that current prices are \$0.55 per kW-year—the gas plants would cost ratepayers about 4 times more per month than transmission-focused solutions.⁶⁰

Commissions have rightly rejected similar efforts by utilities to shift the financial risks of a power plant's market revenues entirely onto the shoulders of ratepayers. Earlier this year,

⁵⁸ Cureington-4, SEC-12, p. 8; Rogers-2 at 33, Table 3.

⁵⁹ Fagan-2 at 4:4-5:9; Rogers-2 at 33:7-11; 36:6-37:1, 38:7-15; Cureington-8 SEC 15 at 15 (MISO IMM report).

⁶⁰ Watson-2 at 21, Table 7.

the West Virginia Commission reviewed two utilities' application to move a large coal plant into rate base, in which the utilities claimed that ratepayers would benefit from large sales of surplus capacity. *See* Comm'n Order, Case No. 17-0296-E-PC, *Monongahela Power Co. & Potomac Edison Co. Pet. for Approval of Generation Resource Transaction* (W.V. P.S.C. Jan. 26, 2018). The Commission was rightly concerned that, contrary to the companies' claims, "Capacity Prices tend to move irregularly, but the trend has definitely turned down." *Id.* at 55. The Commission approved the transaction, but conditioned its approval on the utilities compensating customers if the utilities' rosy projected sales revenues fall short in a given year. *See id.* at pp. 55–56 (stating that the Commission "conclude[s] that the proposed acquisition of Pleasants is contrary to the public interest unless the Companies and FirstEnergy agree to shoulder the responsibility of the excess cost of Pleasants, vis-a-vis the market, if their projections are significantly in error."). New Orleanians are entitled to at least the same protection as West Virginians from Entergy's analogous bet on the gas plant achieving large market revenues.

Entergy has also asked ratepayers to assume the risk that the capital costs to build the gas plant will remain at or below budget. But Entergy did not conduct a competitive, all-source solicitation to ensure that the \$210 million RICE Units were the lowest cost, appropriate resource.⁶¹ Instead, Entergy selected the RICE Units, as well as a construction contractor, from among a handful of vendors in a closed, private process.⁶² Entergy also did not build substantial

⁶¹ See Henderson-1 at 7:3-10:2 (describing competitive all-source procurement process).

⁶² Dec. 18, 2017 Tr. at 45-46; J. Long-5 at 6, 10.

room into its construction cost estimates, providing a contingency budget only meant to cover 50 percent of potential cost overruns.⁶³

The Hawaii Public Service Commission, in approving Hawaii Electric Company's application to build a 50 MW RICE unit project, set a recoverable-costs cap at the utility's estimate of \$167 million in capital costs. Comm'n Order, No. 2014-0113, *In re App. of Haw. Elec. Co. for Schofield Gen. Station Proj.*, at 54–57 (Haw. P.U.C. Sep. 29, 2015). The Commission explained that the cap would protect consumers from any additional rate increases if, for example, the plant could not make power sales as projected to a nearby military base, or if the dollar-to-euro exchange rate rose making the European-built plant more expensive. *Id.* Given the relatively high likelihood, 50 percent, that Entergy's project could go over budget, as well as the fact that Entergy entered into its construction contract without the benefit of market competition, the Council must ensure that New Orleanians are just as well protected as Hawaiians. The Council should impose a cost recovery cap on Entergy consistent with the Company's figures used in the gas plant application.

Contrary to the Advisors' and Entergy's argument, the decision whether to address cost risks cannot wait until prudence review of Entergy's expenditures. The prudent investment standard that would apply then is far more deferential to the utility than the public-interest standard that applies now. Prudence is "essentially . . . an analog of the common law negligence standard for determining whether to exclude value from rate base." *Gulf States Utilities Co. v. La. Public Serv. Comm'n*, 578 So. 2d 71, 84–85 (La. 1991) (internal citations omitted). So long as the utility's investment was reasonable at the time it was made, the utility will be compensated for its costs, "irrespective of whether they are deemed necessary or

⁶³ Dec. 18, 2017 Tr. at 28:18–24.

beneficial in hindsight.” *Id.* at 85. It would be difficult for a future Council to argue that decisions Entergy makes pursuant to the Company’s capacity-price forecast and construction-costs budget were imprudent, when the present Council approved Entergy’s application relying on those estimates as reasonable and in the public interest.

As it currently stands, ratepayers will unfairly bear a substantial financial risk from Entergy’s gas plant. The Council must grant rehearing to condition approval of the gas plant on common-sense ratepayer protections.

B. The Council Should Consider Re-Opening the Record to Elicit Further Evidence on Appropriate Cost Conditions and to Address Unsupported Claims Made by Entergy.

In granting rehearing, the Council should consider re-opening the record to ensure it has complete and accurate information on which to base cost conditions. Public Interest Intervenors addressed the issue of cost conditions in their January 19, 2018, post-hearing brief and again in closing argument on February 21, 2018.⁶⁴ For the first time on March 5, 2018, three days before the full Council’s vote on the gas plant, ENO CEO Charles Rice sent a public letter to Chairman Jason Williams, expressing his concern that any conditional approval of the gas plant that guaranteed the Company’s own construction-costs or MISO-market-revenue estimates would be “draconian” and could “kill” the proposal.⁶⁵ Mr. Rice’s alarm about being held to his own Company’s estimates should alone raise questions about how reasonable Entergy’s assumptions are in the first place.

In addition, Mr. Rice also made several uncited, material assertions about the likely ratepayer impacts from the gas plant, each of which warrants further evidentiary scrutiny. Mr.

⁶⁴ See PII Post-Hearing Br. at 104–107.

⁶⁵ Letter from Charles Rice to Councilmember Jason Williams, March 5, 2018, p.1.

Rice suggested that the Company estimates it will seek a \$5.99 monthly bill increase for the average residential customer for the RICE Units, even if the gas plant earned no MISO revenue.⁶⁶ The \$5.99 figure, for which Mr. Rice provided no citation, is significantly below the \$7.19 per month residential bill increase that Entergy estimated in its response to discovery and that Advisors' witness Byron Watson quoted without dispute in his testimony.⁶⁷ Mr. Rice's assertion that "any MISO capacity or energy market revenues that NOPS earns will only serve to reduce estimated customer bill impacts" from the estimated \$5.99 increase, is also offered without citation.⁶⁸ That statement runs directly contrary to the data provided by the Advisors' witnesses, showing that the total costs, as well as rate increases, of the gas plant will depend on how much MISO revenue the plant generates.⁶⁹ Far from providing ratepayers an extra "bonus," as Mr. Rice seems to suggest, large MISO sales revenues are necessary for the gas plant to make any economic sense compared to the alternatives.

Most astonishingly, Mr. Rice then stated in his letter that the Council must build the gas plant "regardless of expected market prices," suggesting that because the City has a reliability need that Entergy believes the gas plant will address, the Council must approve the project, "whether the MISO capacity price in 2023 is one cent per kW year or \$1000 per kW year."⁷⁰

⁶⁶ *Id.* p. 2.

⁶⁷ See Watson-2 at 13:1–4.

⁶⁸ Rice Letter, *supra*, p. 2.

⁶⁹ For example, compare Watson-2 at 13:3–4 (Table showing ENO's estimated rate impacts using its projections), with *id.* at 15, Table 5 (showing rate increases with Advisors' \$6.00 per kW-year MISO capacity price sensitivity). As Mr. Watson summarizes, as compared to ENO's MISO capacity forecast, "[i]ncorporating Mr. Rogers's PRA MCP value changes the relative economic ranking among the Cases in favor of the transmission-based scenarios (*i.e.*, Cases 2 and 4A)." Watson-2 at 12:4–6.

⁷⁰ Rice Letter, *supra*, p. 2.

While ENO surely has an obligation to provide reliable electric service, the Council has a basic regulatory obligation to ensure that Entergy is providing that service for “the lowest reasonable rates consistent with the interest both of the public and of the utilities.” *City of Plaquemine*, 282 So. 2d at 443. The Council always must protect the public from the monopoly utility’s rent-seeking behavior.

It appears from his statements that Mr. Rice believes Entergy is entitled to a blank check whenever it raises the specter of a reliability issue. That simply is not the case, and it is precisely why the Council must grant rehearing to impose cost conditions on approving Entergy’s gas plant to ensure that City’s reliability need can be met at the lowest reasonable cost.

IV. The Failure of the Department of Finance to Participate in This Proceeding Violates the City Code and Renders the Actions Taken Void.

The City Council also must grant rehearing to remedy a consequential error of procedure in failing to secure the participation of the City’s Department of Finance in this proceeding. The City of New Orleans is not only a major ENO customer with a financial stake, but also has a significant role to play in developing the City’s energy and environmental policies.

City Code Section 158-286(b) provides:

The department of finance through the director of the department of finance, **shall** be, ex officio, a party to all matters governed under this article, in which capacity he **shall** represent and **shall** make recommendations as to the best interests of the city as a municipal corporation, e.g., to assert the city’s interest as an energy consumer. (Emphasis added).

This creates a mandatory duty to include the participation of the Director of the Department of Finance. The rules of interpretation are set forth in Louisiana statutes. Louisiana Revised Statute 1:3 provides:

Words and phrases shall be read with their context and shall be construed according to the common and approved usage of the language. Technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.

The word “*shall*” is *mandatory* and the word “may” is permissive. (Emphasis added)

Similarly, Louisiana Code of Civil Procedure Article 5053 provides:

Words and phrases are to be read in their context, and are to be construed according to the common and approved usage of the language employed. The word “*shall*” is *mandatory*, and the word “may” is permissive. (Emphasis added)

The courts also have declared that the word shall is mandatory. In *D’Agostino v. City of Baton Rouge*, 504 So. 2d 1082, 1084 (La. App. 1 Cir.1987), the Court found that “the word ‘shall’ in a statute or ordinance generally denotes a mandatory duty” and “it is presumed that every word, sentence or provision in the law was intended to serve some useful purpose, that some effect is to be given to each such provision, and that no unnecessary words or provisions were used.” (Citations omitted). Statutory requisites are deemed directory only when they relate to some immaterial matter where compliance is a matter of convenience rather than substance. *Orleans Levee Dist. v. Glenn*, 577 So. 2d 336, 338 (La. App. 1 Cir. 1991).

The Department of Finance did not participate in any manner in this proceeding. Certainly, the Department did not make any “recommendations” or “assert the city’s interest as an energy consumer.” See City Code Section 158-286(b). This proceeding has resulted in a decision which will cost ratepayers, including the City, over a quarter of a billion dollars. The Department of Finance’s participation in a proceeding which could lead and has led to the potential to increase energy costs for the City by thousands of dollars cannot be viewed as an immaterial matter. The failure of the Department of Finance to participate in this proceeding defeats the purpose of the ordinance, which is to protect the City, and therefore City taxpayers,

from unwarranted increases in energy costs. The City has taken a forceful stand on energy policy issues that affect it both as a consumer and as a representative of the people of New Orleans. At almost the same time ENO filed its revised application to build the gas plant, in July 2017, the Mayor released the City's Climate Action Plan.⁷¹ The Climate Action Plan sets a goal of securing 100 percent low-carbon electricity for the City by 2030, and requiring ratepayers to make a 30-year investment in a new gas plant, that runs on fracked natural gas, would undermine that goal.⁷²

The Department of Finance's absence from this proceeding is analogous to the absence of an indispensable party at trial. Here, as at trial, the appropriate remedy is to set aside the decision. *See, e.g., Terrebonne Parish Sch. Bd. v. Bass Enter. Prod. Co.*, 852 So. 2d 541, 546 (La. App. 1 Cir. 2003), *writs denied*, 862 So. 2d 984, 985 (La. 2004).

V. Entergy's Failure to Consider and Address the Industry Standard for Construction in a High Risk Flood Hazard Zone Warrants Granting Rehearing.

The New Orleans City Code § 158-485 allows for the rehearing of a decision when critical evidence has been excluded. The Louisiana Administrative Procedure Act, La. Rev. Stat. Ann. § 49:959, provides that decisions are subject to rehearing when issues not previously considered ought to be examined in order to properly dispose of the matter. One of these issues and evidence not included in the record is the industry standard for utility companies to ensure reliable service by locating new power plants away from sites designated by FEMA as high-risk flood hazard areas.

⁷¹ *See* City of New Orleans, *Climate Action for a Resilient New Orleans* (July 2017).

⁷² *Id.* at pp. 26, 28.

The New Orleans City Code § 158-1045 establishes the right of ratepayers to “safe and reliable service in accordance with industry standards.” In this proceeding, Entergy has not produced any evidence that its plan to build a new gas plant at the Michoud site in New Orleans East, which is located in a high-risk flood hazard area on the FEMA flood map,⁷³ is in keeping with the industry standard. In fact, the evidence is to the contrary. With increasingly damaging hurricanes and storms, utility companies are avoiding areas with a high risk for storm surge and flooding.⁷⁴ The utility industry recognizes that electric generation is vulnerable to hurricanes and storms. The U.S. Department of Energy explains the actions that utility companies are doing to avoid flooding of their facilities:

Common hardening activities reported by utilities to protect against flood damage include elevating substations and relocating facilities to areas less subject to flooding. . . . Utilities report that a number of substations along the Gulf have been elevated as much as 25 feet based on predictions for a category 3 storm. . . . Other common hardening activities include relocating facilities away from flood prone areas.⁷⁵

It is a contradiction for Entergy to claim that the gas plant is needed to ensure reliability, but to locate the gas plant in an area that is designated by FEMA as a high-risk flood hazard area.⁷⁶ FEMA policy also cautions against building a power plant in high-risk flood hazard

⁷³ See FEMA Flood Insurance Rate Map for Orleans Parish, panel no. 22011C0143F, which shows the high-risk flood hazard areas on the Michoud site that include the locations for the proposed CT unit and RICE Unit. See also J. Long-1, JEL-1 (aerial map of proposed CT unit on Michoud site); J. Long-5 at 11, Figure 3 (aerial map of proposed RICE unit on Michoud site). See also *Post-Hearing Brief by the Alliance for Affordable Energy, Deep South Center for Environmental Justice, 350 New Orleans, and Sierra Club*, UD-16-02. Jan. 22, 2018, pp. 87 - 88 (discussing the siting of the proposed Entergy gas plant in a high-risk flood hazard area).

⁷⁴ U.S. Department of Energy, Hardening and Resiliency: U.S. Energy Industry Response to Recent Hurricane Seasons, Aug. 2010.

⁷⁵ *Id.* at p. ix.

⁷⁶ See FEMA Flood Insurance Rate Map for Orleans Parish, panel no. 22011C0143F, which shows the high-risk flood hazard areas on the Michoud site that include the locations for the

areas because of the risk the plant will be put of service.⁷⁷ Entergy’s proposal for building a gas plant in such a precarious area is contrary to FEMA policy and outside of the industry standard.

Council Resolution R-18-65 entirely fails to address evidence in the record that both regional and federal governmental agencies responsible for flood protection in New Orleans recognize the flood risks that are inherent to the location and part of the operation of Entergy’s proposed gas plant. As explained, FEMA has produced the national flood map, which shows that Entergy has chosen a location for the gas plant that is designated as “Zone AE,” a high-risk flood hazard area.⁷⁸ FEMA policy cautions against locating a power plant in such an area because it could be inundated with storm surge and made inoperable for service when it would be needed the most.⁷⁹ The South Louisiana Flood Protection Authority –East (“SLFPA-E”) has raised the concern that Entergy’s plan to re-start groundwater withdrawal to operate the proposed gas plant has the potential for damaging a floodwall that is part of the New Orleans levee system.⁸⁰ Contrary to the stated assurance provided in Council Resolution R-18-65 regarding “flood protection measures being taken by SLFPA-E,” the clear concern expressed by the Board of SLFPA-E is that the gas plant would undermine the measures they take to maintain

proposed RICE unit. *See also* J. Long-5 at 11, Figure 3 (aerial map of proposed RICE unit on Michoud site).

⁷⁷ FEMA-Flood Insurance and Mitigation Administration, Critical Facilities and Higher Standards, *available at* https://www.fema.gov/media-library-data/1436818953164-4f8f6fc191d26a924f67911c5eaa6848/FPM_1_Page_CriticalFacilities.pdf (defining “critical care facilities” to include power plants and specifying that if at all possible, such facilities should be located outside of high-risk critical flood hazard areas).

⁷⁸ *Post-Hearing Brief by the Alliance for Affordable Energy, Deep South Center for Environmental Justice, 350 New Orleans, and Sierra Club*, UD-16-02. Jan. 22, 2018, p. 87.

⁷⁹ *Id.*

⁸⁰ *Id.* at p. 74.

the floodwall.⁸¹ A damaged flood wall can cause significant flooding of the gas plant and endanger the lives of nearby residents. Excluded from Council Resolution R-18-65 are the flood risks presented by both FEMA and SLFPA-East. Their expertise on these flood risks indicate that Entergy's gas plant is not a reliable option.

Central to an industry standard is compliance with all applicable laws and regulations. However, Council Resolution R-18-65 approves the gas plant, despite Entergy's failure to comply with the Flood Damage Prevention Ordinance (New Orleans City Code 78-1 *et seq.*). The resolution makes the following improper assertion:

Whereas, the Advisors are also persuaded by ENO's evidence that . . . ENO has determined the appropriate Top of Concrete level to be 3.5 feet above sea level, which is 2.5 feet higher than the FEMA Advisory recommendation and one foot higher than the observed Hurricane Katrina flooding⁸²

Entergy has not determined the appropriate level for construction of the proposed gas plant. The record of evidence shows that Entergy and the Utility Advisors were at the time of the evidentiary hearing not aware of the Flood Damage Prevention Ordinance which establishes the legal requirement for measuring the appropriate level for new construction.⁸³ The ordinance was enacted prior to Entergy's original gas plant application and adopts FEMA's federal standard, which similarly has been adopted by municipal governments across the nation. The ordinance specifically applies to areas on the FEMA flood map that include the location of the

⁸¹ *Id.*

⁸² City Council Resolution R-18-65, March 8, 2018, p. 159.

⁸³ *Post-Hearing Brief by the Alliance for Affordable Energy, Deep South Center for Environmental Justice, 350 New Orleans, and Sierra Club*, UD-16-02. Jan. 22, 2018, p. 88, footnote 308.

proposed Entergy gas plant.⁸⁴ For new construction projects, the ordinance establishes a minimum requirement for elevation that is the higher of either one foot above the base flood elevation or three feet above the highest adjacent roadway (New Orleans City Code 78-81(a)). The record of evidence shows that Entergy did not measure the highest adjacent roadway to determine the elevation for construction of the gas plant; instead, Entergy measured the top of concrete (“TOC”) at its administration building on the Michoud site.⁸⁵ Entergy’s flood elevation plan fails to comply with the city ordinance, and should not have been approved by the Council in Resolution R-18-65. Additionally, given that the ordinance applies generally to all new construction projects, both residential and non-residential, it does not preclude the application of more stringent standards for power plants, which are supported by FEMA policy and utility industry practice and include locating a power plant away from a high-risk flood hazard area.

Petitioners request that the Council grant this Petition for Rehearing, in part, to re-open the record for considering whether locating a gas plant in a high-risk flood hazard is in keeping with the industry standard for reliable service, as required by New Orleans Code 158-1045. Furthermore, Petitioners recommend that the re-opening of the record allows for the engagement of FEMA and SLFPA-E officials in the Council’s consideration of the flood risks associated with the location and operation of the proposed Entergy gas plant.

⁸⁴ See New Orleans City Code 78-53(b) (listing of flood prone areas on the FEMA flood map that includes the Michoud site in the area numbered as 22071C0139F, where Entergy plans to locate the proposed gas plant).

⁸⁵ *Supplemental Direct Testimony of Jonathan E. Long on behalf of Entergy New Orleans, Inc.*, UD-16-02. Nov. 2016, p. 18:lines 3–13.

VI. The Council Should Grant Rehearing to Fully Examine the Social Justice Impacts of Siting the Gas Plant in a People-of-Color Community, as it Largely Deferred to ENO or other Agencies on Resolving these issues in Resolution 18-65.

The City Council assured the public that the Entergy gas plant would be fully vetted on social justice issues and other concerns.⁸⁶ The Council made this commitment with good reason, as addressing the direct impacts of the gas plant on New Orleans residents is a core part of the Council's job in determining whether the gas plant would be in the public interest. These social justice issues include the racially disproportionate pollution burden that the proposed Entergy gas plant would have on predominantly African American and Vietnamese American residents living near the site and the cost burden of a new gas plant on low income households in New Orleans. However, as shown in Council Resolution R-18-65, these social justice issues were not properly considered.

The City Council determined that, because it will require the proposed Entergy gas plant to meet environmental regulations set by the U.S. Environmental Protection Agency (EPA) and the Louisiana Department of Environmental Quality (LDEQ), "there is no potential for a disproportionate adverse impact on minority neighborhoods in New Orleans East."⁸⁷ In other words, if Entergy receives an environmental permit for its proposed gas plant, then there are no racially disproportionate adverse impacts. The Council's theory has no basis in reality. Federal policies, such as the *Executive Order on Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, are based on the overwhelming evidence that, notwithstanding environmental laws and regulations like those implemented by EPA and

⁸⁶ City Council Resolution R-17-100, Feb. 23, 2017, p. 94.

⁸⁷ City Council Resolution R-18-65, Mar. 8, 2018, p. 171.

LDEQ, people of color and poor people are disproportionately exposed to toxic pollution.⁸⁸ The Executive Order recognizes that the environmental permitting regime under laws including the Clean Air Act has proven insufficient to ensure protections against the injustice of exposure to pollution that threatens health and wellbeing. This problem is so persistent that EPA itself, since 1994, when the executive order was issued, is continuing to struggle to find a solution and to ask the same question to a federal advisory group: how can environmental permitting decisions be made to ensure environmental justice?⁸⁹

The Council has not addressed the EPA report, EJ Screening Report for the Clean Power Plan, which finds that power plants in the United States are disproportionately located near communities that are predominantly people of color and/or poor. Entergy's Michoud Power Plant was in operation at the time of this report and is included in the EPA's finding.

To make matters worse, the Council's Utility Advisors endorsed the flawed approach employed by Entergy's expert witness of using EPA's EJ Screening Tool to look for population

⁸⁸ Exec. Order No. 12,893, 59 Fed. Reg. 4233 (Jan. 31, 1994).

⁸⁹ See, e.g., National Environmental Justice Advisory Council, Enhancing Environmental Justice in EPA Permitting Programs: a Report of Advice and Recommendations, April 2011, p. 1, available at <https://www.epa.gov/sites/production/files/2015-02/documents/ej-in-permitting-report-2011.pdf> [last visited Apr. 6, 2018] (explaining that the U.S. Environmental Protection Agency (EPA) asked the Council for advice about how to enhance environmental justice throughout its permitting programs, as well as permitting programs delegated by the EPA to state and tribal environmental regulatory agencies); see also US EPA Office of Environmental Justice, Environmental Justice in the Permitting Process: A Report on the Public Meeting Convened by the National Environmental Justice Advisory Council, July 20, 2000, p. 5, available at <https://www.epa.gov/sites/production/files/2015-02/documents/permit-recom-report-0700.pdf> [last visited Apr. 6, 2018] (explaining that the EPA asked the Council to provide advice and recommendations on what factors should be considered by a federal permitting authority, as well as state or local agencies with delegated permitting responsibilities, in the decision-making process on a proposed pollution-generating facility that would operate in a minority and/or low-income community).

data within a one-mile radius that starts from the midpoint of Entergy’s proposed site.⁹⁰ This was an obvious attempt to deny the fact that people of color are located near the site that Entergy selected for the proposed gas plant. Not surprisingly, Entergy’s witness concluded “no people live within a one mile radius of the *center* of the Michoud site.”⁹¹

However, the EPA explains in its report that the adopted analytical standard applies a three-mile radius, not a one-mile radius.⁹² For the report, EPA employs its own EJ Screening Tool to analyze population data within three miles of power plant sites and documented that 78 percent of power plants in the US operate near communities that are predominantly people of color and/or low income.⁹³ The EPA’s data show that this percentage rises in Louisiana, where 92 percent of the power plants, including Entergy’s Michoud Power Plant, operate near predominantly African American communities.⁹⁴

Council Resolution R-18-65 mischaracterizes the position of Public Interest Intervenors, which is not “to disregard the expertise of the EPA and LDEQ,”⁹⁵ but to recognize the limitations in those agencies’ standard permitting regimes to ensure health and safety. The

⁹⁰ City Council Resolution R-18-65, May 8, 2018, p. 163.

⁹¹ *Post-Hearing Brief by the Alliance for Affordable Energy, Deep South Center for Environmental Justice, 350 New Orleans, and Sierra Club*, UD-16-02, Jan. 22, 2018, p. 69.

⁹² US Environmental Protection Agency (EPA), EJ Screening Report for the Clean Power Plan, July 30, 2015, p. 10. This EPA report is discussed in the *Pre-filed Direct Testimony of Dr. Beverly Wright on behalf of the Alliance for Affordable Energy, Deep South Center for Environmental Justice, 350 New Orleans, and Sierra Club*, UD-16-02, Oct. 13, 2017, p. 22:lines 6–12.

⁹³ US Environmental Protection Agency (EPA), EJ Screening Report for the Clean Power Plan, July 30, 2015, p. 113.

⁹⁴ *Id.* at pp. 85–86.

⁹⁵ City Council Resolution R-18-65, Mar. 8, 2018, p. 171.

Public Interest Intervenors echo what Louisiana courts have long recognized that “a regulatory standard and a guarantee of safety are not synonymous.”⁹⁶

The Council strays from its unanimous decision in Resolution R-15-323, which opposed a federal plan to re-locate a route for hazardous freight trains from Jefferson Parish to neighborhoods in New Orleans.⁹⁷ Although this plan, like the proposed Entergy gas plant, would be subject to environmental laws and regulations, the Council stated it was opposed to the plan. The Council based its opposition, in part, on the findings that:

freight rail traffic produces increased levels of nitrous [sic] oxide and particle pollutants known to contribute to serious health conditions, including respiratory and cardiovascular disease, asthma, and bronchitis . . . [and concerns by neighborhood organizations] about the impact of the derailment of toxic or combustible freight, the loss of residential, business, and public property, and air pollution, noise pollution and vibrations, which will adversely affect health, will prevent the quiet enjoyment of their neighborhoods and will diminish their property values and quality of life.⁹⁸

Similar to and in significantly greater quantities than freight trains, the Entergy gas plant would release nitrogen oxide and particle pollutants that are scientifically known to cause health problems. Entergy has applied to the LDEQ for permits that would allow the proposed gas plant to annually release approximately 500,000 pounds of nitrogen oxide (NOx) and particle pollutants (PM₁₀ and PM_{2.5}) into the air near predominantly African American and Vietnamese American neighborhoods.⁹⁹ The EPA recognizes that “a causal relationship exists between

⁹⁶ *Johnson v. Orleans Parish Sch. Bd.*, 975 So. 2d 678, 711 (La. App. 4 Cir. 2008).

⁹⁷ City Council Resolution R-15-323, July 13, 2015.

⁹⁸ *Id.* at pp. 2 – 3.

⁹⁹ See the *Post-Hearing Brief by the Alliance for Affordable Energy, Deep South Center for Environmental Justice, 350 New Orleans, and Sierra Club*, UD-16-02, Jan. 22, 2018, p. 76 (listing the types and amounts of pollutants that Entergy seeks permission from the LDEQ to release into the air).

short term exposures to PM_{2.5} and cardiovascular effects . . . and mortality.”¹⁰⁰ The medical community has concluded that, based on the scientific evidence, premature deaths occur from exposure to these pollutants at concentrations below environmental regulatory standards.¹⁰¹

Council Resolution R-18-65 argues that *North Baton Rouge Environmental Association v. LDEQ*, 805 So. 2d 255 (La. App. 1 Cir. 2001), supports the contention that “there is no perpetuation of racial injustice.”¹⁰² However, the appellate court in Baton Rouge determined the issue of whether a company *intentionally* discriminated against an African-American community by seeking environmental permits from the LDEQ.¹⁰³ In the Entergy gas plant proceeding, there is no allegation of intentional discrimination. Instead, the issue is whether the proposed Entergy gas plant would have a discriminatory effect, also referred to as the disproportionate impact, on predominantly African American and Vietnamese American neighborhoods. There is no doubt that such a discriminatory effect would occur even when considered using EPA’s analysis in its report documenting the fact that power plants, including Entergy’s Michoud Power Plant, are disproportionately located and releasing pollution near communities of color and poor communities. Thus, the *North Baton Rouge Environmental Association* case is inapposite. Any comparison of pollution by the proposed Entergy gas plant

¹⁰⁰ *Pre-filed Supplemental Testimony of Dr. George Thurston on behalf of the Alliance for Affordable Energy, Deep South Center for Environmental Justice, 350 New Orleans, and Sierra Club*, UD-16-02, Oct. 13, 2017, p. 1:line 21 – p. 2:line 4.

¹⁰¹ *Air Pollution and Mortality in the Medicare Population*, THE NEW ENGLAND JOURNAL OF MEDICINE, 2017; 3762513-2522 (“In the entire Medicare population, there was significant evidence of adverse effects related to exposure to PM_{2.5} and ozone at concentrations below current national standards. This effect was most pronounced among self-identified racial minorities and people with low income.”).

¹⁰² Council Resolution R-18-65, Mar. 8, 2018, p. 171.

¹⁰³ *North Baton Rouge Environmental Association v. LDEQ*, 805 So. 2d 255, 263 (La. App. 1 Cir. 2001).

and the now decommissioned Michoud Power Plant does not change the fact that people of color would be disproportionately burdened by the pollution.

The City Council has not acknowledged much less analyzed or fully vetted the adverse impacts that the proposed Entergy gas plant would have on nearby neighborhoods. Instead, the City Council contends that such impacts will not exist by mere compliance with environmental regulations, which is contrary to the reality faced by communities located in close geographic proximity to polluting facilities. As discussed above, the EPA and LDEQ acknowledge this reality in their attempts to implement environmental justice policies. The City Council has also had to contend with this reality and reached a different conclusion in Resolution R-15-323, which protected neighborhoods from the same types of pollutants that would be released by the proposed Entergy gas plant.

Although Council Resolution R-18-65 notes the social justice issue of the cost burden of a new gas plant on low income households,¹⁰⁴ it does not provide any analysis or full vetting of this burden. According to a report by the American Council for an Energy Efficient Economy, New Orleans holds the ignominious distinction for having the second highest “energy-burden” among U.S cities; low-income New Orleans’ households pay as much as 18 percent of their income on electric utility bills.¹⁰⁵ This is more than five times higher than the national average of 3.5 percent.¹⁰⁶ The issue of the added cost burden of the proposed Entergy gas plant’s construction and operation on low-income households was raised during the public hearings on

¹⁰⁴ Council Resolution R-18-65, Mar. 8, 2018, p. 29.

¹⁰⁵ ACEEE, Lifting the High Energy Burden, April 2016, p. 17. The ACEEE report is cited in the record in this case at Stanton-2 at p. 23–24 & n.25.

¹⁰⁶ *Id.*

the Entergy gas plant application and in the briefing and evidentiary record.¹⁰⁷ However, the Council did not address these comments in its decision document.

Public interest intervenors request that the City Council grant this Petition for Rehearing to consider, in part, the social justice issues of (1) the racially disproportionate and adverse impacts of the gas plant on nearby residents, who are predominantly African American and Vietnamese American, and (2) the added cost burden of a new gas plant on low-income households, who struggle to pay their current Entergy bills.

CONCLUSION

As outlined, the record in this docket contains substantial omissions and procedural failures that harmed the procedural rights of the Public Interest Intervenors and prevented the Council from discharging its duty adequately to protect the public interest. Simply put, the structure of this proceeding permitted ENO to put forward but one false choice: a blank check to develop one of its gas plants or do-nothing. That is simply not the way public-interest review is intended to function. The Council should grant rehearing to ensure a fair process, decided by a neutral decision-maker, rather than one in which a party in the adversarial process crafts the final outcome in a prior settlement agreement that was separate from this adjudication proceeding. The Council should grant rehearing to review the lower cost and lower risk transmission alternatives that it simply did not have a chance to consider in this case. And it should grant rehearing to ensure that, even if it ultimately chooses to approve the gas plant, that it imposes sensible ratepayer-protective conditions to safeguard New Orleanians against the high financial risks that ENO wishes to transfer from Entergy shareholders to the public.

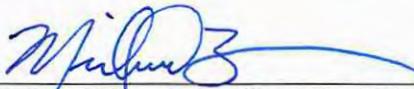
¹⁰⁷ Council Utility Regulatory Office, Public Hearing Transcript, UD-16-02, Dec. 12, 2016, p. 39:line 22 – p. 40: line 8; p. 69:line 24 – p. 70:line 6; p. 95:line 6 – p. 95:line 11.

REQUEST FOR RELIEF

Public Interest Intervenors pray that the Council grant relief on this petition, as follows:

- 1) Grant the instant petition and allow rehearing;
- 2) Vacate or Suspend Resolution 18-65;
- 3) Recuse the Advisors from acting as fact-finders, adjudicators, or otherwise assisting the City Council in rendering a decision on this Petition for Rehearing and Entergy's application in this docket, UD-16-02;
- 4) Reopen the evidentiary record to take additional evidence on the issues of:
 - a. transmission reliability solutions,
 - b. cost calculations and conditions to protect ratepayers from financial risk,
 - c. flood risk associated with building the plant in a flood zone,
 - d. the public's interest in avoiding harms to disadvantaged communities,
 - e. the environmental impacts of the proposed plant on the surrounding community,
 - f. the admissibility of the portion of Dr. Beverly Wright's testimony excluded by the Advisors' motion to strike,
 - g. The City's Department of Finance's position on the docket, UD-16-02,
 - h. and any other issue necessary to render fair and just decision on the entire record.

Respectfully submitted,



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March 8, 2018

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My Vote on the New Orleans Power Station

I believe the proper vote within our highly regulated utility system is to heed the advice of our advisors that the only rational solution to our current transmission reliability issues is to allow Entergy to build the RICE plant at the former Michoud site. That said, I firmly believe there may have been other solutions to New Orleans' reliability issues, but those alternatives were not carefully and thoroughly considered by Entergy or our utility advisors. So we're left with one option the cost of which will be borne by every ratepayer in this city, and this is a prime example of why the regulatory system in New Orleans needs to be changed.

Put most basically, Entergy was faced with a real problem – the need to satisfy federal system-reliability regulations in the wake of the decommissioning of the Michoud power plant. In response, Entergy simply proposed a traditional solution: a power plant in the same location - first in the form of a large CT plant and more recently a smaller RICE plant. We, as a Council, did not demand that Entergy explore and analyze all viable solutions to the reliability problem. More cost-effective and environmentally friendly options that are now being discussed in the public realm, like some combination of transmission upgrades, demand side management, renewables with batteries, distributed generation, or other components or technologies, were never thoroughly considered by Entergy or the advisors.

Public outcry and media attention at this stage in the process is not as effective as some would have you believe. The Council must change its regulatory system in order to ensure that the Council and Entergy give full consideration to more progressive options. But the last two years have shown that the Council will not

The more timely opportunities to affect change were [when the advisor contracts came up for review](#), [when the advisors' billing guidelines were written](#), and when the [Inspector General advised us to make structural changes to our regulatory scheme](#). Yet this Council only paid lip service to the Inspector General's scathing rebuke of our regulatory system. Recommendations to increase the capacity of our in-house staff, restructure the Council-advisor relationships, and force the work flow in a traditional fashion from client to consultant were effectively ignored. A majority of the Council chose to maintain the perverse regulatory scheme we have had for 30 years and to keep the same advisors to whom the ratepayers have paid \$14 million over the two-plus years since Entergy proposed new power generation in the city. During this time, there has been no real effort by the Council or its advisors to reduce the ratepayer impact AND solve the transmission reliability problem by seriously considering cost effective and environmentally friendly options. We very well could have ended up with a combination of options that included a much smaller RICE plant at the Michoud site combined with batteries, more aggressive demand side management, and smaller generation placed strategically throughout the city. But we will never know.

Our reality: we have a transmission reliability problem that must be addressed, the system must be brought into compliance with a federal mandate, and our advisors and experts tell us that the only currently viable solution is a 128MW RICE plant. My vote reflected those realities.

Approving this RICE plant does not mean that New Orleans doesn't have the ability to rely more heavily on solar or other renewable sources of energy. It also doesn't mean that we cannot force Entergy to accept more demand side management as part of the Integrated Resource Plan as we move forward. That is where your voice will continue to be important. I hope to see the same level of public outcry the next time opportunities for change in the Council's regulatory structure present themselves. If the Council and its advisors are not progressive enough for our city in the 21st century, we must identify the opportunities for change and act when they are upon us again, demanding 21st century solutions to 21st century problems.

Further Reading:

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VIA ELECTRONIC MAIL

Dear Dr. Katz:

Clean Line Energy Partners LLC (“Clean Line”) is in receipt of your request for a high-level cost estimate for engineering, procuring, and constructing/installing (“EPC”) an autotransformer. In review of the direct testimony of Mr. Philip Movish on behalf of the Advisors to the Council of the City of New Orleans, specifically pages 13-14, the Entergy New Orleans transmission system would benefit from additional interconnections between the 230 kV and 115 kV systems to better integrate the Entergy New Orleans demand center with the broader transmission system under the Functional Control of the Midcontinent Independent System Operator (“MISO”). The additional interconnection(s) between the 230 kV and 115 kV systems may also help address low frequency, high impact contingencies such as those discussed by Mr. Movish (i.e. NERC Category P6 events).

Clean Line supports transmission solutions that provide greater access to renewables in a cost-effective and reliable manner and we applaud the ratepayers and citizens of New Orleans for advocating for more progressive solutions to this end. For example, there are 1,160 MW of solar-photovoltaic projects under active development in Louisiana alone. Implementing transmission solutions that provide customers with access to these projects is a cost-effective and reliable means to maintaining resource adequacy, reducing emissions, and reducing energy costs well into the future.

Substation Expansion Assumption: \$20 - \$40 million

230kV/115kV Auto-transformer installed: \$10 million (each)

Total: \$30 - \$60 million

Timeline: 12 – 18 months

*This range of costs depends on the number and location of substation expansions

EPC estimates for any given project are input-specific and thus these estimates should be considered “general” in nature given that no specific details were made available to Clean Line related to site location.

Although Entergy New Orleans is quite capable of implementing such projects within their service territory, Clean Line welcomes the opportunity to be involved in any way that we can.

Sincerely,

Michael Skelly
President
Clean Line Energy Partners LLC