CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

CASE NO. 18-3471 DIVISION "I" SECTION 14

ALLIANCE FOR AFFORDABLE ENERGY, THE SOUTHERN CENTER FOR ENVIRONMENTAL JUSTICE D/B/A DEEP SOUTH CENTER FOR ENVIRONMENTAL JUSTICE, 350-NEW ORLEANS, AND SIERRA CLUB

VERSUS

THE COUNCIL OF THE CITY OF NEW ORLEANS

REPLY BRIEF OF PETITIONERS

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MAY IT PLEASE THE COURT:

The Alliance for Affordable Energy, the Southern Center for Environmental Justice d/b/a Deep South Center for Environmental Justice, 350-New Orleans, and Sierra Club (collectively "Petitioners"), through undersigned counsel, submit this Reply Brief in response to the Opposition Briefs filed by the Council of the City of New Orleans ("City Council" or "Council") and Entergy New Orleans ("ENO," "Entergy," or "Company") (collectively, "Defendants") on September 26, 2018.

INTRODUCTION

This case is about protecting the right of New Orleanians to a fair proceeding and reasonable decision by the City Council on Entergy's application for approval to construct a gas plant in New Orleans East and recover the costs from New Orleans ratepayers. Under section 3-130 of the City of New Orleans Home Rule Charter, the City Council has regulatory authority over Entergy's operations. With this authority comes the responsibility of ensuring basic guarantees of due process as established by the 14th Amendment to the United States Constitution and Article 1, Section 2 of the Louisiana Constitution. Petitioners have shown in their *Amended Initial Brief* and also makes evident in the discussion below, that the City Council has failed in this responsibility in two ways.

First, the City Council appointed advisors to serve commingled roles in the adjudicative proceeding on Entergy's gas plant application. The advisors performed the roles of both advocates in favor of the proposed Entergy gas plant and adjudicator, who advised the Council regarding its decision and drafted the Council resolution and order approving the proposed Entergy gas plant. Although the City Council had the duty to be the neutral arbiter of the adjudicative proceeding, the Council struck a deal with Entergy for the development of a generation facility in New Orleans that included binding terms which constrained the Council from rendering a neutral decision. Through these actions, the City Council denied Petitioners their right to due process.

The Council does not provide the Court with any justification for its actions that resulted in denying Petitioners their right to due process. The Council acknowledges that its advisors performed the commingled roles of both advocate and adjudicator, but relies on inapposite case

law pertaining to legislative proceedings to argue that the commingled roles are permissible. As discussed in detail below, the Council entirely disregards the case law on adjudicative proceedings which require more stringent due process protections than those for legislative proceedings and prohibit an advocate also serving as adjudicator.

Secondly, the right of Petitioners to a reasonable decision was denied by the City Council in rendering one that is arbitrary and capricious. Petitioners have shown that the City Council based its decision on a record of evidence that does not comply with the public interest doctrine as well as several city ordinances and resolution orders. For example, alternatives to the proposed Entergy gas plant were not analyzed, and social justice impacts of the gas plant were not fully vetted.

To these and several other errors of the Council's decision raised by Petitioners, the Council would have this Court accept an interpretation of the ordinances and resolution orders that are different from their plain meaning. As discussed below, Petitioners reply to the Council's defensive claims and show the grounds for finding that its decision is arbitrary and capricious.

On the basis of law and fact, Petitioners respectfully request that this Court uphold the constitutional right of Petitioners to due process and reverse the decision rendered by the City Council for being unlawful as well as arbitrary and capricious.

ARGUMENT

A. The Court Should Reverse the City Council's Decision Because the Council's Advisors Had the Commingled Roles of Both Advocate and Adjudicator in an Adjudicative Proceeding, which Violated Petitioners' Right to Due Process.

The City Council designated its Advisors as "a party" to the adjudicative proceeding on Entergy's gas plant application. Council Resolution 16-332 (Aug. 11, 2016). In their written testimony submitted prior to the evidentiary hearing, the Advisors took the position of recommending the Council approve the alternative gas plant proposed by Entergy that consisted of reciprocating internal combustion engines ("RICE") with a combined generating capacity of 128 megawatts of electricity. Vumbaco-1 at 8:18-9:3 ("the RICE Alternative . . . is the Advisors' collective recommendation to the Council for approval"). The Advisors advocated for the Council to adopt their recommendation in their closing argument following the evidentiary

hearing. City Council Utility, Cable, Telecommunications and Technology Committee, Transcript of Public Hearing at 100:4-6 (Feb. 21, 2018). The Advisors also drafted and presented to the City Council the resolution and order adopting the Advisors' recommendation, which the Council passed by a 6-1 decision as Council Resolution 18-65 on March 8, 2018.

Petitioners have shown that, in the adjudicative proceeding at issue, the City Council's failure to separate the functions of advocate and adjudicator which were commingled by its Advisors violated their right to due process. Petitioners' Amended Initial Brief at 13-23. The City Council concedes that, under Louisiana law, the "commingling of functions" is prohibited and that a "'separation of functions' is required in adjudicative proceedings." City Council Opposition Brief at 7 (*quoting Alliance for Affordable Energy, Inc. v. Council of City of New Orleans*, 578 So. 2d 949, 968 (La. App. 4th Cir. 1991)). In this case, it is uncontested that there was no such separation. However, the City Council claims that the proceeding on Entergy's gas plant application was not adjudicative, but legislative which allows the commingling of functions. The City Council is wrong. The proceeding was adjudicative to determine Entergy's application for approval to construct a gas plant. As demonstrated by Petitioners, Louisiana courts have consistently found that requests for authority to construct are reviewed and decided through adjudicative proceedings requiring full due process protections that prohibit the commingling of functions. *See* Petitioners' Amended Initial Brief at 14 (citing *Williamson v. Williams*, 543 So. 2d 1339 (La. App. 4th Cir. 1988) (the City Council does not act in a legislative capacity, but an adjudicative capacity when considering an application for a waiver to allow proposed building construction) and *State Department of Social Services v. City of New Orleans*, 676 So. 2d 149 (La. App. 4th Cir. 1996) (the City Council sits in an adjudicative capacity when it reviews an application for a construction project).

The City Council erroneously argues that the proceeding on the Entergy gas plant application is in the same category as utility ratemaking cases. The Council provides no legal authority that supports its position. Instead, the Council cites to two cases that identify a utility ratemaking proceeding -- not a proceeding on a construction project -- as legislative and not requiring a separation of functions. City Council Opposition Brief at 7-9. First, the City Council relies on *Gulf States Utilities Co. v. Louisiana Public Service Commission*, 578 So. 2d 71, 82

(La. 1991), where the Louisiana Supreme Court found that the *ratemaking process* is legislative and, as a result, did not require a separation of functions between consultants who authored the majority opinion on ratemaking and also advocated a position during hearings.[1] The Louisiana Supreme Court later explained that "the approved procedure in rate cases is inapplicable to the evaluation of procedural due process in other administrative law settings." *Georgia Gulf Corp. v. Board of Ethics for Public Employees*, 694 So. 2d 173, 179 (La. 1997). Thus, legislative proceedings, in contrast to adjudicative proceedings, have limited due process protections that do not prohibit commingled functions. However, the City Council does not present -- nor can it -- any case law in Lousiana that determined a proceeding by the City Council or the Louisiana Public Service Commission on an application for a construction project to be legislative.

Similarly, the City Council misstates the decision in *Alliance for Affordable Energy v. Council of City of New Orleans*, 578 So. 2d 949 (La. App. 4th Cir. 1991), which does not reject Petitioners' contention that authority to construct proceedings are adjudicative in nature, as the City Council suggests. City Council Opposition Brief at 7. The *Alliance* court did not even address this issue. Instead, the court analyzed whether Council procedures in its *ratemaking process* were adjudicative or legislative. The court concluded that "[t]he procedures implemented by the Council in its *ratemaking process* in the instant case were not adjudicative but legislative." *Id.* at 968 (emphasis added).

Thus, the City Council has failed to present any case law that found due process is protected in an adjudicative proceeding where there was a commingling of functions. City

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[1] The Court should note that in *Gulf States Utilities Co.*, the Louisiana Public Service Commission provided due process protections that were not instituted by the City Council in the proceeding on the Entergy gas plant application. These protections included that 1) the summaries of the testimonies prepared by the Commission Counsel were provided to the parties for their review prior to being submitted to the Commissioners; 2) after the Report of Special Counsel, which contained recommendations to the Commissioners and was principally written by the Commission's consultants and special counsel, was presented to the Commission, the parties were granted a full day hearing to argue against the recommendations; and 3) one Commissioner and several Commissioners' assistants actually attending and observing the evidentiary hearings. In contrast, Petitioners were electronically served a copy of the Advisors' prepared resolution five minutes before the start of the UCTT Committee hearing and were never given the opportunity to present arguments regarding the content of that resolution prior to the committee's majority vote in favor of it. (This resolution 18-65 was passed onto the full City Council, which voted 6 - 1 to approve it.) Additionally, not one member of the Council attended the evidentiary hearing.

Council Opposition Brief at 6-9. In fact, the two cases relied on by the City Council did not even involve adjudicative proceedings. None of the cases relied upon by the City Council address the issue raised by Petitioners--that the NOPS proceeding, which involved a request for authority to construct, was an adjudication rather than a legislative style proceeding and, therefore, the commingling of functions violated due process.

Similarly, ENO's argument that the Petitioners do not have a due process right to a fair hearing is based on the erroneous contention that the City Council was acting in a legislative capacity. Entergy Opposition Brief at 20-22. As explained above, the City Council's proceeding was an adjudicative proceeding designed to determine whether ENO should be authorized to construct a gas plant. Thus, ENO's argument alleging that due process rights do not attach to a legislative proceeding is simply irrelevant to the issue raised by Petitioners.

This Court should also reject ENO's assertion that the Petitioners lack a property right protected by due process. ENO wrongly asserts that Petitioners participation in the NOPS proceedings was based on their status as ratepayers. ENO Opposition Brief at 20. However, in their Amended Complaint, Petitioners expressly state that "members of the Public Interest Intervenor organizations live, work, and recreate in the area that will be affected by ENO's proposed gas-burning power plant" Amended Petition at ¶ 8. Thus, Petitioners property interest is not based merely on the rate impact of the gas plant.

Moreover, ENO's assertion is inconsistent with Louisana law. In both *Alliance for Affordable Energy v. Council of City of New Orleans,* 578 So.2d 949, (La. App. 4th Cir 1991), *vacated as moot on other grounds, Alliance for Affordable Energy v. Council of City of New Orleans,* 588 So.2d 89 (La. 1991) and *Lowenburg v. Council of the City of New Orleans*, 859 So. 2d 804 (La. App. 4th Cir. 2003) the Fourth Circuit considered due process claims raised by ratepayers. In neither case did the Court find that the ratepayers lacked a property interest. To the contrary, the Courts' assessed whether the process provided was sufficient. ENO's claim that Petitioners lack the necessary property interest is factually wrong and contrary to Louisiana case law.

The City Council also asserts that this Court should ignore Louisiana case law which establishes that proceedings to decide whether to authorize requests to construct are adjudicative

proceedings. City Council Opposition Brief at 8. This case law includes *Williamson v. Williams*, 543 So. 2d 1339 (La. App. 4th Cir. 1988) (ruling that the City Council does not act in a legislative capacity, but an adjudicative capacity when considering an application for a waiver to allow proposed building construction) and *State Department of Social Services v. City of New Orleans*, 676 So. 2d 149 (La. App. 4th Cir. 1996) (determining that the City Council sits in an adjudicative capacity when it reviews an application for a construction project). The City Council attempts to narrowly distinguish these cases on the basis they do not involve a utility company applying for approval to construct a power plant. However, the City Council fails to cite any precedent or offer any explanation regarding why an administrative decisionmaker's consideration of an application to construct would be treated as an adjudicative proceeding for some parties but not for others.

The City Council has no legal authority for its contention that the Council's proceeding on the application by Entergy for approval to construct a gas plant was legislative. The Fourth Circuit Court of Appeals is clear that Council proceedings on applications for construction projects are adjudicative. *Williamson*, 543 So. 2d at 1344; *State Department of Social Services*, 676 So. 2d at 151. The appellate court explained that when the Council "investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist", the Council acts in a quasi-judicial capacity. *Lowenburg v. Council of the City of New Orleans*, 859 So. 2d 804, 810 (La. App. 4th Cir. 2003). In contrast, the Council acts in a legislative capacity when it enacts 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." *Id.* The proceeding at issue does not involve the Council making a new rule or setting a new utility rate, but instead rendering a decision on whether to approve Entergy's application to construct a new gas plant based on the facts and existing laws. For these reasons, the Court should find that the proceeding at issue was adjudicative, not legislative.

The City Council also argues that if the NOPS proceeding was an adjudication, Petitioners should be disqualified based on *ex parte* verbal communications with Councilmembers. City Council Opposition Brief at 7. This argument is without merit. The

New Orleans City Code § 158-322(e) only prohibits *ex parte* written communications and provides:

> 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 (emphasis added).

The City Council's assertion that Petitioners violated the *ex parte* rules is patently false.[2] Moreover, even if inappropriate *ex parte* communications occurred, the remedy would be for those Councilmembers who participated in such communications to recuse themselves. *Johnson v. Louisiana Department of Labor*, 737 So. 2d 898, 901 (La. App. 1st Cir. 1999).

The City Council also asserts that the Advisors were not adjudicators or "fact-finders." But that argument is foreclosed by Louisiana courts. For example, in *Miller v. Smith*, 391 So. 2d 1263 (La. App. 1st Cir. 1980), the Louisiana First Circuit Court of Appeals found:

> When reasons are provided, a reviewing court must be assured that the thinking process was that of the judge and not an advocate in the lawsuit. It is one thing for victorious counsel to prepare a judgment comprised of the stark, final determinations of a case. It is quite another for counsel to present as the inner thoughts of a judge what amounts to a well-written brief.
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> In the present case, the reasons for judgment are counsel's, not the judge's. Counsel, in brief, repeatedly cites his own written reasons, a highly self-serving act. Contrary to our general practice, we cannot place any real value on the written reasons presented. *Id.* at 1265.

In administrative agency determinations, the Louisiana Supreme Court found that the right to a neutral decisionmaker is denied when the "findings of fact and opinion adopted . . . remained *the work product of* . . . an advocate who had a stake in the factual determination." *Georgia Gulf Corp.*, 694 So.2d. at 177 (emphasis added). Thus, the Louisiana Supreme Court ruled that the factual recitation and opinion set forth in the opinion "was not the product of a neutral decision maker," but that of the advocate who impermissibly crossed into the role of an adjudicator. *Id.*

In this instance, the Advisors crossed into the role of adjudicator with the approval of the City Council. On March 8, 2018, the City Council convened a public meeting in which the Advisors presented their draft 188-page decision document which was a resolution and order that the City Council adopted verbatim and passed in a 6-1 vote as Council Resolution 18-65. New

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[2] Moreover, the City Council fails to inform the Court that the Advisors, a party to the adjudicative proceeding, attended meetings with Councilmembers and Petitioners and also took part in the ex parte verbal communications.

Orleans City Council Meeting Transcript (Excerpts) at 4:20-8:17 (Mar. 8, 2018). In this decision document, the Advisors set forth their findings of fact and opinion that supported the recommendation they made as an adversarial party to the adjudicative proceeding, which was for the approval of the alternative gas plant proposed by Entergy (the RICE 128 MW facility). Vumbaco-1 at 8:18-9:3. The Advisors also provided criticisms of the evidence submitted by other parties. As in *Georgia Gulf Corp.*, this Court should find that the factual determinations and conclusions adopted by the City Council remained those of the Advisors, an advocate in the adjudicative proceeding, and were not the articulation of the City Council. The Court should also find that because the City Council adopted the Advisors' draft in its entirety, there is no way for the Court to discern what factual findings and conclusions the City Council made, thus leaving this Court, like the Louisiana Supreme Court in *Georgia Gulf Corp.*, with a record lacking independent factual findings.

For the reasons set forth above and in the Petitioners' Amended Initial Brief at 13-23, the Court should find that the City Council's commingling of the functions of advocate and adjudicator violated Petitioners' due process right to a fair proceeding. The Court should reverse Council Resolution 18-65 and remand the proceeding to the City Council with instructions to conduct the evidentiary hearings in a manner that protects the due process rights of the parties.

B. The Court Should Reverse the City Council's Decision Because the Council Was Constrained by a Prior Agreement with Entergy from Being a Neutral Decision Maker, Which Denied Petitioners Their Right to Due Process.

The record shows that the City Council entered into a binding agreement with Entergy concerning the future development of a new generation facility in New Orleans prior to approving Entergy's application for it. Public Interest Intervenors Post-Hearing Brief at 5, 88-92; *see also* Dec. 21, 2017 Tr. 120:23-132:4 (regarding the existence and terms of the FERC Settlement Agreement). This agreement locked the City Council into supporting Entergy in carrying out the development of a facility with detailed specifications as to its size of approximately 120 MW, its possible location on the Michoud or Paterson site in New Orleans East, and its function as a peaking plant that can be turned on and off based on customer demand. *Settlement Agreement of Entergy Services*, Federal Energy Regulatory Commission, Docket Nos. ER14-75 *et al.* at 13 (Aug. 14, 2015) ("FERC Settlement Agreement").

The Council's prior agreement with Entergy constrains it from being a neutral decision maker. Under the terms of this agreement, the Council is compelled to find "mutually satisfactory resolution" with Entergy on all matters involving a new generation facility in New Orleans, including "affordability for ENO customers," "economic feasibility in comparison to other potential projects, locations, or alternatives," and "consistency with sound utility practice and planning principles." FERC Settlement Agreement at 14.[3] The Council agreed to make these and all other considerations "without limitation." *Id.* This term makes all decisions by the Council subject to agreement by Entergy. *Id.* at 14. Furthermore, the Council is obliged by the terms of this agreement in any "future negotiation or proceedings whatsoever," that involves "the honoring, enforcement, or construction of this Settlement Agreement" or "the future application of [its] terms and conditions." *Id.* at 18. The terms "future . . . proceedings" apply to the Council's adjudicative proceeding on Entergy's gas plant application. *Id.*

The City Council now attempts to downplay the clear meaning of the terms of the deal it struck with Entergy. However, the purpose of this prior agreement was not for Entergy to merely "explore the possibility of developing peaking generation in New Orleans," as the City Council argues. City Council Opposition Brief at 11. To the contrary, "Entergy commits to use diligent efforts to have at least one future generation facility located in the City of New Orleans," clearly." FERC Settlement at 13.

Incredulously, the Council argues that the prior agreement had no bearing on the adjudicative proceeding at issue. City Council Opposition Brief at 11. However, the prior agreement and Council resolution approving it were the *raison d'etre* for Entergy filing the gas plant application. ENO First Application at 8. The City Council omits the glaring fact that it concluded the adjudicative proceeding by approving the same gas plant as described in the prior agreement. Council Resolution 18-65 at 187; FERC Settlement Agreement at 13.

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[3] Section II.E(3) states "The commitments set forth in this Section II.E are subject to mutually satisfactory resolution of all material considerations, including, without limitation: (a) financial feasibility for ENO; (b) affordability for ENO customers; (c) economic feasibility in comparison to other potential projects, locations, or alternatives; (d) timely rate recovery; (e) regulatory jurisdiction over such facility(ies) to the extent not owned by ENO; and (f) consistency with sound utility practice and planning principles." FERC Settlement Agreement at 14.

Petitioners' right to due process to a neutral decision maker is denied by the fact that the City Council was constrained by its prior agreement with Entergy to commit to having a generation facility in New Orleans and making its decisions on all matters involving the facility subject to agreement by Entergy.

1. *The City Council Offers a Rationale for Its Prior Agreement with Entergy that Is Beyond the Scope of Judicial Review as It Is Not Part of the Administrative Record.*

The City Council offers a rationale for entering into the prior agreement with Entergy that was purportedly based on "the Council's very real concern about the deactivation of Michoud." City Council Opposition Brief at 10-12. However, the Council failed to make this rationale for the prior agreement part of the administrative record before this Court. Thus, the City Council impermissibly presents extraneous allegations that are beyond the scope of the appellate jurisdiction of this Court. The Court's review of this appeal is bound by the administrative record alone. *See, e.g.*, *Herman v. City of New Orleans*, 158 So. 3d. 911, 915 (La. App. 4th Cir. 2015) (recognizing that judicial review of a decision by the City Council is bound to the administrative record).

To be sure, the City Council should have disclosed the existence of its prior agreement with Entergy along with its underlying rationale at the start of its adjudicative proceeding on the Entergy gas plant application. However, from June 2016 to March 2018, the City Council presided over the proceeding without any notice to the public of this prior agreement at any of the hearings, information meetings, or UCTT Committee meetings which addressed the NOPS proceeding. The City Council has no basis in law to ask this Court to consider its purported reasons for entering into the prior agreement with Entergy, as the Council decidedly withheld these reasons from the adjudicative proceeding and the administrative record.

2. *The Court Should Find that the Council Failed to Disclose the Binding Terms of the Prior Agreement in the Adjudicative Proceeding.*

Aggravating the denial of due process is the fact that at no point in the adjudicative proceeding prior to its decision did the Council disclose the binding terms of its prior agreement with Entergy. Petitioners' Amended Initial Brief at 23-30. The City Council does not refute this. Instead, the Council directs attention to the prior agreement being filed in a past proceeding at the Federal Energy Regulatory Commission in Washington, D. C. (ER14-75 et seq.). City

Council Opposition Brief at 10. Part of this prior agreement, which did not include the terms making all matters involving the gas plant subject to agreement by Entergy, was incorporated in Council Resolution 15-524 passed by the Council in past proceedings that tracked the FERC proceeding (UD13-03 and UD13-04). The Council's emphasis on the fact that these proceedings were public (City Council Opposition Brief at 10-13) makes its decision to not divulge the full agreement in the adjudicative proceeding on the Entergy gas plant more egregious as there would be no justification for doing so.

As Petitioners have shown, the Council routinely discloses events, records, and other relevant matters in the recitals of a resolution for the proceeding. Petitioners' Amended Petition at 26. In the adjudicative proceeding on the Entergy gas plant, the Council passed a resolution explaining how the proposed gas plant was impacted by its past Resolution 16-506 approving Entergy purchasing power. *Id.* The Council fails to explain why its prior agreement with Entergy in the FERC Settlement Agreement was not included in Council Resolution 18-65 or another resolution passed in the proceeding. Given the significant impact of this prior agreement on the Entergy gas plant application, and the Council's failure to provide any justification for withholding it from the adjudicative proceeding, the Court should find that the Council failed to disclose the agreement.

The City Council indirectly acknowledges the fact that it has produced an incomplete record, which omits the prior agreement. City Council Opposition Brief at 12-13.

C. The Court Should Reverse the City Council's Decision Because It Is Based on a Record that Shows Entergy Failed to Complete the Analysis of Alternatives as Required by Council Order and, Therefore, Is Arbitrary and Capricious.

The Council correctly directed ENO to specifically evaluate four resource alternatives to the proposed gas plant in its initial application. Council Resolution 16-506, Nov. 3, 2016. The alternatives were designed by the Advisors on behalf of the Council and previously provided to ENO in a September 19, 2016 communication. *Id.* The four alternatives were intended "to assist the Council in determining whether the construction of NOPS is necessary and in the public interest." *Id.* However, ENO did not comply with the Council's directive in Council Resolution 16-506. Simply put, ENO did not conduct the required modeling and analysis to determine whether any of the alternatives to its proposed gas plant, which were designed by the Council's

Advisors, could meet the capacity and reliability needs of New Orleans by (1) making transmission upgrades to maintain reliability, (2) addressing any capacity shortfall with new solar and/or battery storage, and (3) continuing to reduce load through energy efficiency programs. *See* Dec. 18, 2017 Tr. 139:16-140:8; 140:13-15; 172:9-175:15; 177:9 (confirming that ENO did not run the second alternative requested, or the transmission and energy efficiency portfolio requested). Similarly, even though ENO's claim of reliability need rested on the argument that the gas plant would assist in hurricane response, *see, e.g.*, Rice-3 at 6, the Company failed to conduct any system modeling for a hurricane. Dec. 15, 2017 Tr. at 204:18-25.

Petitioners show that the Council failed to enforce Resolution 16-506 directing ENO to conduct the modeling analysis of the four alternatives. Petitioners' Amended Initial Brief at 33-41. The City Council excerpts a quote from *State ex. Rel. Guste v. Council of the City of New Orleans*, 309 So. 2d 290, 295-296 (La. 1975), which found that the mere existence of an alternative does not preclude the reasonableness of making a determination to choose another option. However, in this case, the City Council has no basis for making a reasonable choice as ENO did not conduct a complete analysis of the four alternatives. The Council attempts to evade the issue with vague generalities that "ENO did consider a reasonable range of options" (Council Opposition Brief at 30) and attack Petitioners' expert witnesses who contributed information on the merits of the alternatives as though the burden is on them, not ENO, to conduct the required modeling of the four alternatives. (*Id.* at 33-38). The Council's tactics do not obscure the fact that it has no basis for making a decision without a complete analysis of the alternatives that it selected and directed ENO to analyze through modeling.

Thus, ENO failed to provide the Council with information necessary to determine whether the gas plant was necessary to maintain system reliability, and, as a result, the Company's application failed to meet its burden of proof. Indeed, the Company's assertions about system reliability, and in particular, the ability of transmission reinforcements and alternatives to meet any reliability needs, are impermissibly premised almost entirely on speculation and guesswork. C. Long-2 at 16:20-17:14 (admitting that the Company "has not conducted detailed planning-level cost estimates for the transmission upgrades"). The Company failed, for example, to conduct a detailed evaluation of transmission alternatives, including

available and off-the-shelf transmission reinforcements that could be installed within months. *See, e.g.*, Dec. 15, 2017 Tr. 156:3-4; 157:7-11 Although the Company makes the conclusory assertion that transmission upgrades will take too long, or are too difficult to implement, it admits that it failed to conduct an analysis of the cost, feasibility, or the time necessary to make those upgrades.[4] As Advisor witness Joseph Vumbaco highlights, to allow the Council to properly assess the transmission alternatives, ENO would first have to provide the Council with firm details or projections of the cost, timing, and reliability impacts of the proposal, that are simply lacking in the City Council's proceeding. Vumbaco-1 at 7:1-8.

It should be noted that the City Council's statement that "[t]ransmission experts provided uncontroverted testimony that it could take **eight to ten years** to complete these [transmission] upgrades and the ability to accomplish this type of construction is highly uncertain" is simply false.[5] *See, e.g.*, City Council Opposition Brief at 2 (emphasis in original). ENO's transmission experts admitted that they never analyzed how long the upgrades would take to complete. Thus, the timeframe cited by the City Council is nothing more than speculation that is refuted by ENO's failure to actually analyze the construction issue and present *evidence* concerning the constructability issues.

ENO was similarly uncooperative in regards to analyzing options other than transmission alternatives. ENO failed to evaluate the City Council's existing energy efficiency programs or even include in its modeling the level of energy efficiency proposed by its own study. The Company also admits that it did not evaluate the feasibility of securing the ability to shed or curtail additional industrial load.

Finally, the Company refused to conduct a thorough evaluation of whether some combination of additional solar generation, battery storage, DSM, reactive power support, or even smaller generating units could more cheaply and effectively mitigate any potential

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[4]Dec. 21, 2017 Tr. 85:13-17 (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. 182:18-20 ("Q. And Entergy did not provide any firm cost estimates for those upgrades? A. No."); Dec. 21, 2017 Tr. 182:5-9 (Q. Entergy 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.").

[5] Tellingly, when the City Council makes this assertion, it provides no citation to the record evidence it is relying on.

reliability concerns in the New Orleans area. Dec. 15, 2017 Tr. 216:9 (C. Long: "We did not explore batteries"); *Id.* at 218:22-219:1 (C. Long: did not look at a combination of solar and batteries). ENO brushed aside these options, asserting that there is insufficient space available in East New Orleans to install sufficient solar capacity. But the Company admits that it did not even evaluate whether there was additional space available on commercial rooftops, or otherwise, that could be interconnected to Michoud. *See,* Dec. 21, 2017 Tr. 192:16-24. Moreover, the Company conducted no analysis of the ability of batteries to provide voltage support and dispatchable real power to help mitigate any reliability concerns, even though the Council specifically requested that the Company evaluate batteries as an alternative to installing new gas generation.[6]

Moreover, ENO's own faulty studies demonstrate that the gas plant is not necessary to resolve the reliability concerns. ENO's own data show that transmission upgrades, in combination with energy efficiency measures and solar generation, could resolve reliability violations more cheaply than the gas-fired plant. ENO admitted that it does not have any specific resource adequacy or transmission security need for a new gas plant, so long as it either develops a plan to reinforce five transmission lines at a cost of approximately $57 million, *see* ENO Response to Advisors 8-6.d.iii (quoted in Fagan-1 at 33), or if the Company constructs transmission reinforcements Similarly, the Advisor witnesses conclude, upgrading New Orleans' transmission lines and installing utility-scale solar, instead of constructing a gas-fired plant, would be the "economically preferred alternative." Rogers-1 at 3:1-5, 45:4-11, 50:4-11; Vumbaco-1 at 7:13-8:5.

In sum, ENO failed to conduct a detailed evaluation of transmission alternatives, failed to perform any of the detailed design and scoping work necessary to provide the timetable required to construct any of the transmission reinforcements purportedly necessary to maintain reliability, and failed to conduct any assessment of cost or the time necessary to make those upgrades. Movish-1 at 28:17-29; ENO Response to Advisors 12-4a; Dec. 21, 2017 Tr. 85:13-17, 182:5-9,

[6] See SC-5 (Advisors request for consideration of battery storage as an alternative to NOPS); Dec. 18, 2017 Tr. 177:5-9.

182:19-20. ENO similarly failed to evaluate the Council's existing energy efficiency programs or other DSM opportunities, such as additional industrial load shedding alternatives, which could reduce peak load requirements and reduce the risk of reliability violations. Nor did the Company conduct any evaluation of the availability of additional solar generation or battery storage.

Without this critical information, there is no basis for the City Council to determine that there is a capacity need for 128 MW of gas-fired generation in New Orleans. Similarly, there is no basis for the City Council to find that the gas plant is necessary to resolve reliability concerns.

The Company failed (or refused) to provide the Council with information necessary—and, in some instances, specifically requested by the Council—to make an informed decision about the need for gas generation. It is well-established that a utility "does not meet its burden of proof" of demonstrating that a proposed generation investment is necessary to serve the public interest "by mere speculation, guesswork, hopes[,] or aspirations." *In the Matter of the Application of KCP&L Greater Missouri Operations Co. v. Missouri Pub. Serv. Comm'n*, 515 S.W.3d 754, 760 (W.D. Mo. App. Ct. 2017). Instead, "a present need must be established," *id.*, as part of a "reasoned investigation of all relevant factors and alternatives" as they existed at the time the decision. *Gulf States Utilities Co. v. Pub. Util. Comm'n of Texas*, 841 S.W.2d 459, 476 (Tex. App. 1992); *see also Gulf States Utilities Co. v. Louisiana Pub. Serv. Comm.*, 578 So.2d 71 (1991) (the utility bears the burden of establishing public convenience and necessity, which includes a showing that its proposal is "prudent"—*i.e.*, that the process leading to the decision was a logical and reasonable one, and that the utility conducted a reasoned evaluation of the alternatives and reasonably relied on information and planning techniques known or knowable at the time).

The City Council's response to ENO's failure to meet its burden of proof was to improperly shift focus to the question of whether Intervenors demonstrated that a more reasonable and prudent resource option exists than the gas plant ENO seeks to build. Specifically, the City Council criticized Intervenor witnesses Mr. Fagan, Mr. Lanzalotta, and Dr. Stanton for failing to do studies. City Council Opposition Brief at 27, 33, 37.[7] In utility

[7] The Court should note that the City Council's criticisms of Intervenor witnesses' failure to perform any studies ignores the fact that ENO conceded that it could install the required

proceedings, the applicant—here, ENO—bears the burden of proving its case by a preponderance of the evidence. *Schaffer v. Weast*, 546 U.S. 49, 57-58, 126 S. Ct. 528, 534-35 (2005). As a matter of law, ENO was obliged to show by a preponderance of the evidence that it performed the analysis required and that such analysis reliably supports its preferred gas plant as the most reasonable and prudent resource option. This failure to require ENO to present the evidence necessary to prove that the gas plant was needed and in the public interest constitutes a fatal flaw which directly leads to the conclusion that the City Council's determinations were not based upon substantial evidence and therefore the approval of ENO's application was arbitrary and capricious. The City Council's approval of ENO's application is based on an improper burden shift and is therefore unlawful.

In Council Resolution 18-65, the City Council failed to explain, or even acknowledge why it had abandoned its directive requiring ENO to model very specific alternatives to the gas plant even though the City Council had previously found that the additional modeling was critical to the Council in its obligation to (1) ensure that ratepayers receive the most reliable electric and gas service at the lowest reasonable cost and (2) realize potentially cost-effective renewable resources and energy efficiency/demand-side measures. Council Resolution 16-506 at 8. The City Council also determined that the modeling was necessary to determine whether the construction of NOPS is necessary and in the public interest. This unexplained reversal on a vital component of the NOPS proceeding leaves the impression that the City Council steered the results to a pre-determined result; is arbitrary and capricious; and warrants reversal of the City Council's decision. Similarly, the City Council committed another error of law when it failed to address the unrebutted record evidence showing that, had ENO provided the analysis of alternatives ordered by the City Council, its modeling would have identified more reasonable and prudent options.

In sum, Council Resolution 18-65 unreasonably concludes that ENO met its burden to show that its preferred option—a $200 million gas plant is necessary and in the public interest

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transmission upgrades by "mid 2021." *See* Movish-1 at 28:9-10 (quoting ENO Response to Advisors 12-4a). It was patently unnecessary for Intervenors to prove facts which the Company already conceded.

relative to other options including demand response, energy efficiency, renewable energy resources, batteries, and alternatives to self-built new generation. Contrary to the City Council's finding, an examination of the record shows that ENO's modeling totally excluded many of those resource options even those options the City Council expressly directed ENO to analyze. Moreover, even the limited analysis that ENO did perform was riddled with errors. As such, any finding that ENO met its burden is unlawful and unsupported by competent, material, and substantial evidence and, therefore, unreasonable.

D. The Court Should Reverse the City Council's Decision Because It Failed to Follow Its Own Resolution Order Requiring the Full Vetting of Social Justice Issues.

The City Council issued Council Resolution 17-100, which ordered the full vetting of "social justice" issues and other concerns related to the proposed Entergy gas plant. Council Resolution 17-100 (Feb. 23, 2017). This resolution is undermined by the Council's prior agreement with Entergy that any such vetting of an issue or concern is "subject to mutually satisfactory resolution" by Entergy and the Council. FERC Settlement Agreement at 14. The Council did not disclose this prior agreement in the adjudicative proceeding nor did it provide a way to reconcile it with the resolution order. Instead, the Council's decision demonstrates a deference to Entergy's efforts to refute the existence of these social justice issues, which adheres to the prior agreement, but violates the legal requirement of its own resolution order for a full vetting of these issues.

The social justice issues of race, pollution, and health arise from the proposed Entergy gas plant. The City Council has a legal duty to fully vet this issue pursuant to Council Resolution 17-100. However, the City Council ignores, without explanation, the analysis prepared by the U.S. Environmental Protection Agency ("EPA") showing that all Entergy power plants in Louisiana, including the Michoud facility in New Orleans East, are located near communities that are predominantly African American and/or predominantly low-income. EPA, *EJ Screening Report for the Clean Power Plan* at 85-86 (July 30, 2015) (cited in Wright-1 at 22). The EPA does not distinguish the power plants according to the amounts of pollution they release, as was done by the Council for the purpose of dismissing the relatively lower pollution levels of the proposed Entergy gas plant in comparison to the former Michoud power plant. City

Council Opposition Brief at 46. Instead, the EPA applies the analytical method of determining whether there is a higher than average percentage of people of color residing within three miles of a pollution source. The EPA explains that its analysis of power plants and nearby populations is based on a "3 mile study area/buffer" typically used in environmental justice literature and studies. EPA, *EJ Screening Report for the Clean Power Plan* at 10 (July 30, 2015). The Council ignored the flawed analysis by Entergy's witness Bliss Higgins, who departed from the proven analytical method, by shortening the distance from three miles to only one mile that starts at the center of the Michoud site. Ms. Higgins could only reach her conclusion that "no people live within a one mile radius of the *center* of the Michoud site," by using this flawed analytical method. Higgins-2 at 10-11 (emphasis added). African American and Vietnamese American residents are deeply concerned about the impacts and safety risks of building a new gas plant near their homes, schools, and places of worship. *See* Wright-1 at 9, Exh. 4 (showing that 44 percent of all public comments made by residents at a City Council hearing -- the second highest percentage of all comments -- were by people "concerned that Entergy plan to build a gas plant in New Orleans East would be harmful to residents").

The Council errs in relying on the court decision, *North Baton Rouge Environmental Ass'n v. Louisiana Department of Environmental Quality*, 805 So. 2d 255, 263 (La. Ct. App. 1 Cir 2001) to conclude that the proposed Entergy gas plant would not perpetuate environmental discrimination. City Council Opposition Brief at 44. In *North Baton Rouge Environmental Association*, the court reviewed whether African American residents of the Alsen community were subject to purposeful discrimination when the Exxon facility was originally granted zoning permission "a long time ago" during the Jim Crow Era. *North Baton Rouge Environmental Ass'n*, 805 So. 2d at 263. The court determined that there was no purposeful discrimination. *Id.* Unlike the appellate court, the Council's mandate to vet social justice issues is not limited to purposeful racial discrimination but also encompasses disparate impact or racial disproportionate pollution burden. Council Resolution 17-100 at 94. The EPA's report establishes the fact that operating a power plant at the Michoud site would create a racially disproportion pollution burden on predominantly African American and Vietnamese American residents who live within three miles of the site. EPA, *EJ Screening Report for the Clean Power Plan* at 85-86 (July 30,

2015). However, the Council failed to fully vet this disparate impact of the proposed Entergy gas plant. Instead, the Council deferred to Entergy's flawed analysis, relied on an inapposite case on purposeful discrimination, and ignored the analysis prepared by the EPA showing that operating a gas plant at the Michoud site would have a racially disparate effect.

Both Petitioners' witness Dr. George Thurston and Entergy's witness Bliss Higgins acknowledge that for certain air pollutants, adverse health effects can occur from exposure to pollution at levels that are below the regulatory standard. Thurston-1 at 14:1-5; Higgins-2 at 4:9-11. Their scientific understanding is dismissed by the Council, which espouses the insupportable view that the proposed Entergy gas plant would have no adverse impacts because it would meet environmental regulatory standards. City Council Opposition Brief at 43-44. The Council's decision that there are no adverse health impacts arising from regulatory standards defies reality, especially in Louisiana, and dismisses the Louisiana Fourth Circuit of Appeals' finding that an environmental "regulatory standard and a guarantee of safety are not synonymous." *Johnson v. Orleans Parish School Board*, 975 So. 2d 698, 711 (La. Ct. App. 4th Cir. 2008).
The Council has no basis for arguing that there are no adverse health effects of permitted pollution. The Council applies this insupportable argument as grounds for not fully vetting the social justice issues concerning race, pollution, and health, as required by order of Council Resolution 17-100, but instead to find "mutually satisfactory resolution" with Entergy on its decision to refute this issue. FERC Settlement Agreement at 14.

E. The Court Should Reverse the City Council's Decision Because It Failed to Comply with the City of New Orleans Ordinances on Flood Damage Prevention and Utility Reliability.

The City Council's approval of the proposed Entergy gas plant fails to comply with two city ordinances: Flood Damage Prevention (New Orleans City Code § 78-51 *et seq.*) and Enumerated Rights, which applies to utility service and establishes "[t]he right to safe and reliable service in accordance with industry standards" (New Orleans City Code § 158-1045 (a)).

The City Council enacted the Flood Damage Prevention Ordinance, which took effect on June 1, 2016, prior to Entergy's submission of its initial gas plant application. The ordinance adopts FEMA standards for the elevation level of all new construction and substantial

improvements in FEMA designated high-risk flood hazard areas.[8] The Michoud site in New Orleans East, where Entergy proposes to construct the gas plant, is a high-risk flood hazard area designated as panel number 22071C0143F on the National Flood Insurance Rate Map for Orleans Parish, Louisiana. New Orleans City Code § 78-53 (b). *See also* J. Long-4 at 9, Fig. 2 (aerial photograph of Michoud site with boundaries of proposed Entergy gas plant, referred to as "RICE"). Therefore, the proposed Entergy gas plant is required to meet the elevation standard provided in the ordinance. Specifically, the ordinance requires a minimum elevation level for both residential and non-residential construction that is "one foot above the BFE (baseline flood elevation) . . . or three feet above the . . . highest adjacent roadway . . . whichever is higher." New Orleans City Code § 78-81 (a).

The administrative record shows that the elevation for the proposed Entergy gas plant approved by the City Council is not based on a measure that is the higher of three feet above an adjacent roadway or one foot above base flood elevation. In fact, the record shows that Entergy did not measure the elevation of any roadway on or near the Michoud site when it planned the elevation level for the proposed gas plant approved by the City Council.

Dec. 18, 2017 Tr. 88:6-22: Cross-Examination of Entergy witness Jonathan E. Long:

Q. So to arrive at the elevation level of 3.5 feet, Entergy's project team -- correct me if I'm wrong -- did three things according to your testimony on page 18, lines 4 through 14. The three things that they added up was 1.5 feet, which was the top of concrete elevation where the administrative building sits?
A. That's right.
Q. They added that 1.5 feet to another one foot that would be the flood height that was adjusted up from Hurricane Katrina?
A. That's right.
Q. And then they added an extra foot above that flood height to arrive at 3.5 feet; is that correct?
A. That's correct.

[8] *See* Flood Damage Prevention Ordinance § 78-53 ("The principal purpose of the regulations in this article is to prescribe minimum requirements for land use and control measures for flood prone areas in the city, as determined by FEMA.")

Entergy's team measured the top of concrete at an on-site building as 1.5 feet above sea level, but did not measure the elevation of nearby roadways as required by the ordinance. The team then added two feet to the 1.5 feet to arrive at 3.5 feet above sea level as the elevation for the proposed gas plant. Mr. Long's sworn testimony makes clear that Entergy's team determined the elevation level for the proposed gas plant before May 2016, which is prior to the enactment of the Flood Damage Prevention Ordinance on June 1, 2016 (Dec. 18, 2017 Tr. 88:23-89:13). Although the Entergy attempted to follow FEMA guidance available during Hurricane Katrina (Dec. 18, 2017 Tr. 86:22-87:4), the company did not re-assess the elevation to ensure compliance with FEMA standards codified in the Flood Damage Prevention Ordinance even though there were opportunities to do so when Entergy filed its Supplemental Testimony to address flood risks and other issues in November 2017 and when Entergy filed its second application in July 2018.

The City Council's approval of the Entergy gas plant application includes the insupportable defense of Entergy's outdated elevation determination to build the gas plant 3.5 feet above sea level. "[T]he Council found convincing evidence in the record demonstrating that . . . ENO determined the appropriate Top of Concrete level to be 3.5 feet above sea level, **which is 2.5 feet higher than the Federal Emergency Management Agency ("FEMA") Advisory recommendation and one foot higher than the observed Hurricane Katrina flooding.**" City Council Opposition Brief at p. 41 (emphasis in original). The Council's willfully ignores the fact that FEMA has since established a national elevation standard that supersedes prior advisory recommendations and guidance. The Council's ignorance extends to its own action in passing the Flood Damage Prevention Ordinance, which codifies the national elevation standard.

Similarly, the Council ignores the city ordinance titled Enumerated Rights, which applies to utility service and establishes "[t]he right to safe and reliable service in accordance with industry standards" (New Orleans City Code § 158-1045 (a)). Compliance with this ordinance mandates that the Council require Entergy to follow the industry standard of utilities, which is to avoid building power plants and other equipment in high-risk flood hazard areas and even relocate equipment out of these areas in order to maintain service reliability. As Petitioners have

documented, the U.S. Department of Energy reports the standard adopted by utility companies for existing facilities in high-risk flood hazard areas is 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.

U.S. Department of Energy, Hardening and Resiliency: U.S. Energy Industry Response to Recent Hurricane Seasons, at ix (Aug. 2010).

The Council can point to no industry standard among utility companies that endorses the construction of a power plant in a high-risk flood hazard area. Yet, the Council approves Entergy's reckless plan to build a power plant in a high-risk flood hazard area. Entergy's siting decision entirely undermines the position it shares with the Council that the proposed gas plant is needed in case of a hurricane. Council's Answer at 2.

1. *The City Council's Decision to Approve the Entergy Gas Plant Application Is Arbitrary and Capricious as It Ignores the Cautions Raised by FEMA and the Southeast Louisiana Flood Protection Authority-East on the Flood Risks Posed by the Proposed Entergy Gas Plant.*

In advancing the argument that it was reasonable for the Council to approve Entergy's decision to build a gas plant in a high-risk flood hazard area, the Council ignores the cautions raised by both FEMA and the Southeast Louisiana Flood Protection Authority-East ("SLFPA-E"). The Council throws this caution to the wind, figuratively and more than likely literally. In this adjudicative proceeding, the Council fails to acknowledge, much less reasonably respond to FEMA policy that warns against building a power plant in a high-risk flood hazard area. Council Opposition Brief 40-41. *See also* Petitioners' Post-Hearing Reply Brief at 8, 87 (discussing FEMA policy that discourages building power plants in high-risk flood hazard areas).

Similarly, the Council ignores the warning by SLFPA-E, a governmental body charged with maintaining the flood control system in New Orleans and surrounding parishes. City Council Opposition Brief 40-41. Although the Council acknowledges the important work of SLFPA-E on "flood protection measures," (*id.* at 41) the Council completely disregards the concerns raised by SLFPA-E Boardmembers, who are in agreement that the resumption of groundwater withdrawals for the operation of the proposed Entergy gas plant is likely to

accelerate land subsidence and impair a nearby floodwall, which would create serious flood risk. Petitioners' Post-Hearing Reply Brief at 74 (citing Southeast Louisiana Flood Protection Authority-East Meeting Minutes, Dec. 15, 2016 at 9). The Council also takes no notice of the fact that notwithstanding Entergy's claims on the amount of groundwater it plans to use, there is no guarantee that it won't contribute to land subsidence. There is also no restriction in law limiting the amount of groundwater Entergy may decide to withdraw for the proposed gas plant. Wright-1 at 18.

F. The Court Should Reverse the City Council's Decision Because It Failed to Comply with a City of New Orleans Ordinance that Requires a Recommendation from the Finance Director on the Entergy Gas Plant Application.

The City Council argues that City Code § 158-286(b) merely designates the Department of Finance as the proper party to represent the City and therefore the Department's participation in the proceeding is not required. The City Council's interpretation of this ordinance renders the provision meaningless.

New Orleans City Code § 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 provision unambiguously requires the Department of Finance to not only participate in all matters but to make recommendations in those matters. The City Council's interpretation is contrary to the plain meaning of the provision and is not supported by the language of the ordinance.[9]

The City Council's interpretation of section 158-286(b) also conflicts with section 158-287. City Code § 158-287 provides that "any public official, agency, board or department of the city . . . shall be permitted to appear in any proceeding . . . and present any relevant and proper testimony and evidence bearing upon the issues involved in the particular proceeding." Thus, contrary to the City Council's unsupported assertions, the Department of Finance is not the

[9] "*Ex officio*" means by virtue or because of an office; by virtue of the authority implied by office. Black's Law Dictionary (10th ed. 2014 online).

"designated representative" of the City. As the ordinance states, any agency, board or department of the City may participate.

Finally, the City Council argues that Petitioners' interpretation of section 158-286(b) violates section 158-232 because it would restrict the powers of the City Council as a legislative branch of government under the Home Rule Charter of the City of New Orleans. City Council Opposition Brief at 15-16. Here again, the City Council's argument lacks merit. Home Rule Charter § 3-130(2) provides:

> The Council shall make all necessary and reasonable rules and regulations to govern applications for the fixing or changing of rates and charges of public utilities and all petitions and complaints relating to any matter pertaining to the regulation of public utilities, and shall prescribe reasonable rules and regulations to govern the trial, hearing and rehearing of all matters referred to herein, under the same procedure as provided for ordinances granting franchises.

In Section 158-286(b) sets forth the role of the Department of Finance in regulatory proceedings. It does not limit the City Council's powers in any way. The Defendants neither cite to nor discuss any provision of the Home Rule Charter that specifically contradicts the City Council's ability to enact this specific rule.

This Court should reject the Defendants strained and unsupported interpretation of section 158-286(b).

G. The Court Should Find that the Matter of Setting Cost Conditions Was Properly Before the City Council.

In its Opposition Brief, the City Council incorrectly asserts that Petitioners failed to raise the issue of the City Council imposing cost conditions until after the evidentiary record was submitted to the City Council and just before the UCTT Committee meeting which considered the application. City Council Opposition Brief at 39-40. To the contrary, Petitioners argued in their Post-Hearing Brief, filed with Administrative Law Judge Gulin, that the City Council should condition any approval of the gas plant on ENO guaranteeing its projections as to the MISO capacity price and construction costs. *See* Public Interest Intervenors Post-Hearing Brief at 104-107. Petitioners' argument was expressly based upon the evidence filed in the NOPS proceeding, including, among other things, the fact that ENO's questionable assumption that capacity market prices are about to rise more than 16,000 percent by 2022 and remain that high, and that this is the only way gas plants could be a financially competitive deal for New Orleans

ratepayers to meet the City's reliability need, was disputed by every witness who examined the issue and by MISO's Independent Market Monitor ("IMM"). *See* Public Interest Intervenors Post-Hearing Brief at 105-106, citing Rogers-2 at 42, Tables 4-5, *with id.* at 44, Tables 6-7; Stanton-2 at 21, Figure 8; Fagan-2 at 4:4-5:9; Rogers-2 at 33:7-11, 36:6-37:15; Cureington-8, SEC-15 at 15 (IMM report).

Given that the City Council's only objection is the incorrect assertion that the Petitioners' assertion was untimely raised, the Court should find in favor of the Petitioners and remand the proceeding back to the City Council for the imposition of cost conditions.

H. The Court Should Find that the City Council's Denial of a Hearing on Petitioners' Request for a Rehearing Was Unlawful.

The City Council misrepresents Petitioners' argument with regard to the City Council's failure to hold a hearing on Petitioners' request for rehearing. Petitioners are not asserting that the City Council was required to grant their rehearing request.[10]

Petitioners' actual contention is that the City Council violated Regulation 1, which provides:

> Any person shall be entitled to a reasonable hearing on a) any proposed ordinance, motion or resolution or b) any petition, application, or communication presented to the Council as long as the subject matter is one upon which the Council has legislative and regulatory authority. Persons desiring such a hearing must request same in writing from the Clerk of Council in sufficient time to permit the notice required by Regulation Number 2.

In addition to misstating Petitioners' argument on this issue, Defendants also argue that Petitioners were not entitled to a hearing because Petitioners failed to meet the requirements of Regulation 2, which states:

> *Before a hearing is held*, all interested parties, including proponents, opponents, the Mayor or the Chief Administrative Officer, and members of the Council shall be notified by the Clerk of Council at least twenty-four (24) hours prior to the hearing (emphasis added).

Defendants distort this provision by claiming that Regulation 2 required the Petitioners to submit their motion for hearing on its request for rehearing 24 hours prior to the City Council's

[10] As such, the City Council's argument that this Court has no jurisdiction over the City Council's denial of the request for rehearing is irrelevant and the Court need not and should not address this contention.

publication of its public meeting agenda. City Council Opposition Brief at 17. The plain meaning of Regulation 2 is that all interested parties must receive notice of the hearing at least 24 hours before that hearing is held. Regulation 2 does not require and cannot reasonably be interpreted to require that a petitioner submit a motion prior to the City Council's publication of its *public meeting* agenda. The City Council's public meeting is not a hearing. Thus, the notice requirement in Regulation 2 is not applicable.

Defendants do not dispute that Petitioners requested a hearing on their request for rehearing. Defendants also do not dispute that the City Council failed to hold a hearing on the request for rehearing. The very language of that regulation contradicts Defendants' argument regarding the applicability of Regulation 2. This Court should find that the City Council violated Regulation 1.

CONCLUSION

For all of the reasons stated above and in Petitioners' Amended Initial Brief, Petitioners respectfully request that the City Council's decision, Council Resolution 18-65, be reversed on the grounds that it was rendered in an adjudicative proceeding that violated the fundamental rights of the Petitioners to due process, violates city ordinances and Council resolution orders, is not based on substantial evidence, and is arbitrary and capricious.

Additionally, Petitioners respectfully request this Court to remand Council Resolution 18-65 to the Council with directions that the Council:

1) Conduct new proceedings to consider ENO's application to construct a gas plant in a manner fully consistent with due process requirements, including but not limited to prohibiting any individual who participates as a party or witness in the proceeding from acting as an advisor to the Council on that matter;

2) Properly consider and evaluate reasonable alternatives to the construction of ENO's proposed gas plant;

3) Properly consider and address the evidence presented on all issues, including but not limited to the evidence presented regarding ENO's capacity need and reliability solutions;

4) Properly consider and address requests to establish cost conditions;

5) Fully examine whether any proposed project meets the requirements of the New Orleans City Code, including but not limited to New Orleans City Code §§ 158-1045 and 78-1 *et seq.*;

6) Properly consider and address the social justice issues raised in conjunction with any proposed construction of a gas plant at the Michoud site;

7) Ensure that the Director of the Department of Finance appropriately participates in the proceeding; and

8) All other relief that may be appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 22nd day of October, 2018, all parties to this proceeding have been served a copy of the **Reply Brief of Petitioners** by electronic mail.

Monique Harden

Monique Harden, Esq.