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November 30, 2018

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

In Re: Resolution Initiating a Show Cause Proceeding Regarding Imposition of Sanctions Against ENO Based Upon Report of Independent Investigators Filed with the Council on October 29, 2018
CNO Docket NO.: UD-18-__

Dear Ms. Johnson:

Please find enclosed for your further handling an original and three copies of Entergy New Orleans, LLC's ("ENO") Response to Show Cause filed pursuant to Council Resolution R-18-474. Please file an original and two copies into the record, and return a date stamped copy to our courier.

Thank you for your assistance with this matter.

Sincerely,

Brian L. Guillot

RECEIVED
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BY:

Enclosure
cc:
Honorable Helena Moreno (*via electronic mail*)
Honorable Jason Rogers Williams (*via electronic mail*)
Honorable Joseph I. Giarrusso (*via electronic mail*)
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BEFORE THE

COUNCIL OF THE CITY OF NEW ORLEANS

***IN RE*: RESOLUTION INITIATING A SHOW CAUSE PROCEEDING REGARDING IMPOSITION OF SANCTIONS AGAINST ENO BASED UPON REPORT OF INDEPENDENT INVESTIGATORS FILED WITH THE COUNCIL ON OCTOBER 29, 2018**	)))))))	**DOCKET NO. UD-18-___**

ENTERGY NEW ORLEANS, LLC'S RESPONSE TO SHOW CAUSE

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EXECUTIVE SUMMARY

The New Orleans Power Station ("NOPS") is a vital project for the citizens of New Orleans that will: (1) maintain the stability of the electric grid in New Orleans, (2) prevent widespread outages, and (3) respond to major weather events. The project was approved by the Council via a 6-1 vote after a two-year evidentiary proceeding in which Entergy New Orleans, LLC, ("ENO" or "the Company") and other interested parties submitted reams of documents and expert testimony.

On several occasions now, ENO has acknowledged the seriousness of this matter and has stated that it is ultimately responsible for the unauthorized actions of its contractor, The Hawthorn Group, L.C. ("Hawthorn"). The Company also has conceded that it should have been more diligent in investigating allegations that Hawthorn had paid people to appear in support of NOPS at two public meetings. That said, Hawthorne's actions were indeed unauthorized, and ENO was not aware of these activities before May 2018, a point that was not disputed by the Council's Investigators ("Investigators").

In fact, after spending hundreds of thousands of dollars, interviewing almost two dozen witnesses, and reviewing more than 9,000 pages of documents, the Investigators failed to produce any evidence substantiating the allegation that the Company "knew" that Hawthorn or its unauthorized subcontractor, Crowds on Demand, had paid people to appear in support of the New Orleans Power Station. Significantly, the Investigators intentionally failed to disclose to the Council and the public evidence proving that ENO was not aware of the conduct at issue and also generally conducted themselves in a manner that ignored well established legal principles along with basic tenets of due process and sought to confirm a pre-ordained conclusion rather than objectively reporting the facts.

Specifically, the Investigators refused to allow Entergy's counsel to participate in interviews of non-employee witnesses or even to question Entergy's own witnesses so that the full facts could be placed into the record. The Investigators failed to conduct recorded statements of all but two witnesses so that the truth of what the Investigators reported to the Council cannot be verified. Moreover, the Investigators failed to question or even show Entergy employees certain documents that exonerate Entergy or, in other instances, showed witnesses only parts of documents, ignoring statements in those very documents that belied the conclusions implied in the Investigators' questions. The report itself omitted material documents that did not support the Investigators' conclusions, including (1) a letter from Hawthorn confirming that Entergy did not authorize payments to anyone to attend Council meetings, (2) an email following the February 21, 2018 Utility Committee Meeting in which Hawthorn's President and Chief Operating Officer unequivocally stated that "Entergy did not pay anyone for their support," (3) a follow-up email from Hawthorn's President and Chief Operating Officer in which she responded that an individual who claimed to have been paid for his support was "dilusional [sic] or just lying," and (4) several other email exchanges proving that Hawthorn officials misled Entergy officials about their activities. Finally, the Investigators unfairly maligned the numerous Entergy employees who voluntarily appeared for interviews and sworn statements, and who testified truthfully during this proceeding.

Entergy engaged Hawthorn based on its national reputation and its repeated representations that it had the means and ability to identify and recruit legitimate supporters from Orleans Parish who supported the NOPS project. While much attention has been paid to certain text messages by ENO's former CEO, Charles L. Rice, the fact remains that he did not contemplate Hawthorn paying anyone to attend Council meetings, as the Investigators and certain media reports have insinuated. To the contrary, the messages merely contemplated paying for the additional resources that Hawthorn would expend for engaging a broader section of the community in order to turn-out legitimate support, which polling indicated was around 78% of New Orleans East residents. As Mr. Rice testified in his sworn statement, "It's just something [paying people] that never occurred to me, never occurred to me that it was a possibility, never occurred to me that it was even in the universe of possibilities."

Importantly, the Council's Investigation Final Report ("Report") concluded that ENO did not violate any laws or Council rules:

> There are no specific Council rules that prohibit this practice. Nor are there rules which require parties or groups with business before the Council to inform the Council that attendees and/or speakers are compensated.[1]

In fact, Resolution R-18-474 itself acknowledges that the Council's rules did not prohibit the conduct at issue, noting that "prior to recent revisions Council rules did not require that speakers disclose on comment cards whether they received or would receive compensation for speaking nor did they require other attestations or a signature." Resolution at 4. In the absence of a violation of any charter section, ordinance, rule, or regulation, the Council does not have the authority to impose a $5 million fine or any of the proposed "penalties" in Resolution R-18-474.

Moreover, the City Code articles and legal precedent relied on by the Council in Resolution R-18-474 to impose penalties do not apply when there is no violation of a Council order; indeed, the regulator in the first case cited in Council Resolution R-18-474, the Massachusetts Department of Public Utilities, found that it had no legal authority to fine a utility absent promulgated rules and regulations in force when the conduct at issue occurred—which is exactly the case here. Further, the Council's imposition of a fine or other penalties under these circumstances is blatantly unconstitutional and would violate the First Amendment, the Ex Post Facto clause, substantive due process, and the Eighth Amendment of the United States Constitution.

All of the evidence and analysis and credible expert witnesses in the evidentiary record in Docket No. UD-16-02, including the Council's own expert advisors, concluded that NOPS is in the public interest. NOPS is a critical resource for the City of New Orleans, and in Resolution R-18-474, the Council made clear that "the conduct detailed in the Report does not affect or alter the evidentiary record" in Docket No. UD-16-02.

As has been stated repeatedly, the Company understands that public discourse about important projects such as NOPS must be rooted in integrity and transparency, and it deeply

[1] *See* Report, at 50.

regrets the events that occurred and recognizes that it should have taken steps sooner to investigate the allegations when they first arose. In the wake of these events, the Company has taken significant measures to ensure that neither the Company nor its representatives or contractors ever engage in the practice of astroturfing. However, the fact is that the Company did not know of these unauthorized activities, and the Investigators' attempt to mask this fact with the phrase "knew or should have known" cannot serve as the basis to impose a $5 million dollar fine and other proposed penalties. The Company accepts accountability for the events that occurred and wishes to work with the Council to earn back its trust and respect and that of the citizens of New Orleans. But accountability is not served by standing silent in the face of inflammatory and misleading accusations, and the Company hopes that the Council will give due regard to its response in this matter.

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BEFORE THE

COUNCIL OF THE CITY OF NEW ORLEANS

***IN RE*: RESOLUTION INITIATING A SHOW CAUSE PROCEEDING REGARDING IMPOSITION OF SANCTIONS AGAINST ENO BASED UPON REPORT OF INDEPENDENT INVESTIGATORS FILED WITH THE COUNCIL ON OCTOBER 29, 2018**	)))))))	**DOCKET NO. UD-18-___**

ENTERGY NEW ORLEANS, LLC'S RESPONSE TO SHOW CAUSE

NOW BEFORE THE COUNCIL OF THE CITY OF NEW ORLEANS (the "Council"), through the undersigned counsel, comes Entergy New Orleans, LLC ("ENO" or the "Company"), which respectfully submits its Response to the Show Cause Proceeding initiated in Resolution R-18-474.

At the outset, ENO acknowledges both the seriousness of this matter and the Council's efforts to conduct a thorough review of the facts. Not to be forgotten in this proceeding is that the New Orleans Power Station ("NOPS") was approved by the Council after a two-year evidentiary proceeding in which ENO and other interested parties submitted reams of documents, fact testimony, and expert testimony. The evidence fully supported ENO's position that NOPS is a vital project that will: (1) maintain the stability of the electric grid in New Orleans, (2) prevent widespread outages, and (3) respond to major weather events. In fact, polling conducted by a well-respected New Orleans firm in December 2016 found that 78% of New Orleans East Residents supported the project.[2] The Company recognizes, however, that the facts supporting the Council's decision to approve the project have been overshadowed by recent

[2] *See* BDPC Poll, attached as Exhibit 1.

events, and that it must work to regain the trust and confidence of the people whom it serves and this Council.

On several occasions now, the Company has accepted responsibility for the unauthorized actions of its contractor, The Hawthorn Group, L.C. ("Hawthorn"), and conceded that it should have been more diligent in investigating allegations that Hawthorn paid people to appear in support of NOPS at two public meetings – October 16, 2017, and February 21, 2018. It is equally important to recognize for purposes of this proceeding, however, that the Council's Investigators ("Investigators") concluded in the Investigation Final Report ("Report") that ENO did not violate any laws or Council rules:

> There are no specific Council rules that prohibit this practice. Nor are there rules which require parties or groups with business before the Council to inform the Council that attendees and/or speakers are compensated.[3]

The Company understands that public discourse about important projects such as NOPS must be rooted in integrity and transparency, but the imposition of a $5 million dollar fine and other proposed penalties based on the unauthorized conduct of third parties that occurred without ENO's knowledge or acquiescence, and which did not violate any laws or Council rules, is improper and unsupported by law. Accordingly, pursuant to Resolution R-18-474, the Company hereby shows cause as to why no penalties should be imposed.

I. NOPS Procedural Schedule, the Evidence, and the Council's Approval

a. NOPS is Vital to the City of New Orleans

For more than 50 years the Michoud Generating Station in New Orleans East served as the "cornerstone" of ENO's electric system, providing 781 megawatts ("MW") of local generating capacity. ENO's high-voltage transmission system was designed and evolved around

[3] *See* Investigation Final Report, at p. 50.

the Michoud units; but because of their ages and related maintenance and operational issues (including concerns for worker safety), ENO deactivated the Michoud units in June 2016, leaving New Orleans with no local electric generating resource within the City. Since the deactivation of Michoud, ENO has faced a "serious reliability risk" and significant planning and operational challenges, including the risk of widespread, cascading outages and insufficient electrical support following a major storm.

In order to address these issues, on June 20, 2016, ENO filed its Application for Approval to Construct New Orleans Power Station and Request for Cost Recovery and Timely Relief ("Initial Application").[4] In the Initial Application, ENO requested approval of a 226 MW combustion turbine ("CT" or "CT Alternative") at the Michoud Site.[5] In early 2017, however, following receipt of an updated forecast of projected customer demand for electricity, or "load," over a 20-year planning horizon,[6] the Company filed a motion to suspend the procedural schedule in order to evaluate what impact, if any, the moderately decreased load forecast may have had on ENO's Initial Application.[7]

On July 6, 2017, ENO filed its Supplemental and Amending Application for Approval to Construct New Orleans Power Station and Request for Cost Recovery and Timely Relief ("Supplemental Application").[8] In the Supplemental Application, ENO requested that the Council approve either the originally proposed CT Alternative with an output of 226 MW, or, alternatively, seven Wärtsilä 18V50SG Reciprocating Internal Combustion Engine ("RICE") Generation sets, with a total capacity of 128 MW ("RICE Alternative").[9]

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4 Council Resolution R-18-65 at 10.

5 *Id.*

6 Council Resolution R-18-65 at 11.

7 *Id.*

8 Council Resolution R-18-65 at 11.

9 *Id.*

As detailed in ENO's Supplemental Application, and the supporting evidence and analysis, NOPS will mitigate ENO's serious reliability concerns, namely the potential for widespread, cascading outages that could cripple the entire City. The evidence was clear that because of its physically isolated location (*i.e.*, it is surrounded by water on three sides), the City of New Orleans is entirely dependent for its electricity on the set of existing transmission lines situated in a relatively small geographical area, meaning that the loss of even a portion of the transmission facilities delivering energy into the City would likely prevent ENO from serving its entire load. NOPS is vital to the City of New Orleans because it will ensure that ENO has a local generation source to respond to storms, and because it will address potential events that could lead to uncontrollable cascading outages in the New Orleans area.

The Council's Advisors agreed with ENO's analysis, concluding that NOPS was the only viable option to provide grid stability considering the substantial risks associated with all other options. It is noteworthy that ENO's biggest industrial customer, Air Products, also agreed that NOPS is necessary to address a serious reliability concern. The opponents of NOPS, however, fueled by an "anything-but-a-gas-plant" ideology and supported by well-funded, national environmental groups, relied on a string of false assumptions to argue that NOPS isn't needed and that the City should depend on very risky alternatives, all of which involved a wait-and-see approach to determine if they could actually work. The opponents failed to produce any evidence or analysis supporting their assertions, and the Council ultimately rejected their "risky-gamble" approach to ensuring grid stability.

b. The Council's Approval of NOPS was Based on the Evidence

A five-day evidentiary hearing was held on December 15, and 18–21, 2017, during which all parties were given the opportunity to cross-examine the witnesses who had provided written

testimony. Post-hearing briefs were submitted by the parties on January 19, 2018, and the Hearing Officer certified the record on January 22, 2018.

The Council's Utility, Cable, Telecommunications and Technology Committee ("UCTTC") held a meeting on February 21, 2018, at which the parties gave closing statements and the Committee heard hours upon hours of public comments. At the conclusion of the meeting, the UCTTC voted 4-1 in favor of moving proposed Council Resolution R-18-65 to the full Council for further deliberation.

On March 8, 2018, the full Council considered Resolution R-18-65. After hearing nearly five hours of public comments, the Council adopted Resolution R-18-65 in a 6-1 vote, finding NOPS to be in the public interest.

Council Resolution R-18-65 is a 188-page document that examined all the evidence in the record, including the arguments of those who opposed NOPS, and found that the construction of the plant is in the public interest. The Council found that: (1) ENO had shown an immediate and future need for peaking and reserve capacity;[10] (2) ENO had conclusively demonstrated a critical and urgent reliability need;[11] (3) the CT Alternative was not in the public interest;[12] (4) the RICE Alternative would serve the public interest;[13] (5) ENO had considered a sufficient range of options to meet the identified need;[14] (6) siting NOPS at Michoud was reasonable;[15] and (7) ENO shall have a full and fair opportunity to recover all prudently incurred costs of the project, and recovery of the project's costs should be accomplished using a two-step increase or

[10] Council Resolution R-18-65 at 43.

[11] *Id.* at 73.

[12] *Id.* at 92.

[13] *Id.* at 109.

[14] *Id.* at 141.

[15] *Id.* at 171.

adjustment to base rates.[16]

The unfortunate events that have emerged regarding the October 2017 and February 2018 meetings have no bearing whatsoever on the evidentiary record that the Council relied on in making these important determinations on behalf of the citizens of New Orleans. In fact, the Council announced at the start of the October 16, 2017, public meeting that, according to the City Code, "no part of statements made or evidence adduced at the at-large public hearing shall in legal terms form and such matters shall not form the basis of any Council decision in a contested proceeding."[17]

II. The Investigators Ignored Evidence Showing that ENO Was Not Aware of Hawthorn's Unauthorized Activities

After spending hundreds of thousands of dollars, interviewing almost two dozen witnesses, and reviewing more than 9,000 pages of documents, the conclusion reached by the Investigators was no different than the conclusion reached by Entergy's internal investigation on May 10, 2018: There is no evidence that anyone at Entergy "knew" that Hawthorn or its unauthorized subcontractor, Crowds on Demand, had paid people to appear in support of the New Orleans Power Station at either the October 16, 2017, or February 21, 2018, public meetings before the City Council.

It is noteworthy that the phrase "knew or should have known," which is sprinkled throughout the Report, is a legal standard used in civil negligence cases when a litigant cannot prove that a defendant had actual knowledge of a condition. There is a significant difference between someone who "knows" about conduct of another person and someone who "should have known" about that same conduct. Simply put, the legal phrase "should have known" was used by the Investigators in their conclusion to mask the fact that there was no evidence that ENO

16 *Id.* at 179, 188.

17 *See* October 16, 2017 Public Comment Meeting Transcript, attached as Exhibit 2, at 2-3.

actually "knew" about the conduct at issue. In fact, as discussed more fully below, the Investigators intentionally disregarded evidence proving that ENO was not aware of the conduct.

While the Investigators boldly proclaimed at the Council's October 31, 2018 hearing that they were engaged in an earnest search for the truth, their actions reflect otherwise. Nowhere was this more apparent than during Yolanda Pollard's sworn statement when the Investigators abruptly ended her statement and refused to allow Entergy's counsel to question Ms. Pollard on the record about certain documents that exonerate Entergy and others that the Investigators had taken out of context:

> Mr. Cahn: No, let me say my peace (sic). Matt, no, we're not going off the record. There are a number of documents that you have chosen not to show this witness. My understanding was that this was going to be an independent, objective investigation. You represented at the outset that this would be a fair investigation. What I have heard today and through witness interviews, it's not a fair investigation.
> Mr. Coman: I object to your narrative.
> Mr. Cahn: What I've heard –
> Mr. Coman: This statement is over.[18]

Among the material documents omitted from the report was (1) a letter from Hawthorn confirming that Entergy did not authorize payments to anyone to attend Council meetings, (2) an email following the February 21, 2018 UCTTC Meeting in which Hawthorn's President and Chief Operating Officer unequivocally stated that "Entergy did not pay anyone for their support," and (3) a follow-up email from Hawthorn's President and Chief Operating Officer in which she responded that an individual who claimed to have been paid for his support was "dilusional [sic] or just lying."[19] The Investigators' refusal to acknowledge these documents or address them in the Report calls into question whether they were fair and objective or simply

[18] *See* Yolanda Pollard Sworn Statement, attached as Exhibit 3, at 214-15.

[19] *See* Hawthorn Letter (Ashford), 5/9/18, attached as Exhibit 4; Hawthorn Email (Hammelman), 3/5/18, attached as Exhibit 5; and Hawthorn Email (Hammelman), 3/7/18, attached as Exhibit 6.

intent on generating a storyline that supported their desired outcome and creating media headlines.

In an effort to tarnish Energy's reputation, the Investigators repeatedly insinuated in their report that Hawthorn was a disreputable company, and that Entergy should have known that Hawthorn was going to pay people to appear at public meetings. In fact, Hawthorn represented to Entergy that it had a community outreach organizer "on the ground in the New Orleans area who can work on this for us and we are confident we can turn out NOLA citizens (18 and older) who support the issue (and will tell people why if asked)."[20] Hawthorn further represented that "[t]he people we would turn out would care about jobs/economic development, reliable and affordable power AND would be highly focused on preventing the kinds of issues the city just went through."[21] With respect to Hawthorn's credentials, the Investigators thoroughly researched the company and had the following to say about Hawthorn and its Board Chairman:

> Q: I'm going to do something that the people on this side of the table are not going to appreciate. I talked to John Ashford, and I'm assuming they know that. Because this is how Cal rolls. I assume there are no secrets. See, I assume that. And I was impressed with him. He's my kind of guy. I saw him on the website, yeah, on the website. I didn't see him beyond that. But I assume he's large in stature. He's a country guy. He's like me. You know, he can tell a good story. He can do all that kind of stuff that country people like me do. And that's the guy I talked to on the phone. And I looked at his – And looking at his website and the description of him, which again, he's kind of described in that fashion, he's well educated, very well educated. But that's his take. That's how he goes. That's his personality. If you Google John Ashford, he's renowned in terms of business. And he grew up with another guy, Nat Reese. If you Google Nat Reese, I mean, these two guys are movers and shakers across corporations, across political entities, across entities like Entergy. John Ashford is a mover and a shaker. Would you agree with that?

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20 *See* Hawthorn Email (Hammelman), 9/18/17, attached as Exhibit 7.

21 *See* Id.

A: I mean, I'm not that familiar with his background. But if you said he's world renowned, that's –
Q: You know –
A: -- or nationally renowned, then I assume that to be the case, which is why I think it would be fair for somebody to assume that he would conduct himself appropriately, along with other members of his organization.[22]

ENO engaged Hawthorn based on its national reputation and its repeated representations that it had the means and ability to identify and recruit legitimate supporters from New Orleans who supported the NOPS project. In fact, Hawthorn advertised on its website that it was experienced in community outreach efforts and had the ability to identify and recruit supporters on a nationwide basis. As Charles Rice explained:

Q: In that follow-up proposal that's part of Exhibit 14, what, if any, specific tasks did Entergy select from and engage the Hawthorn Group to perform?
A: We retained them to recruit grassroots support.
Q: Why?
A: As I previously stated, we don't know everybody in the community. We can't know everybody in the community. If there were people that they knew that we didn't know, if they had people in their database that we weren't aware of, we would like to know who those people were. Like they say right here, "We know the issues and the players."[23]

While Mr. Rice's verbiage in several text messages seized upon by the Investigators and the media were taken completely out of context, the fact remains that he earnestly believed that Hawthorn was engaging in legitimate community outreach activities. In other words, Mr. Rice's messages did not contemplate Hawthorn paying anyone to attend Council meetings as the Investigators and certain media reports have insinuated — they merely contemplated paying Hawthorn for the additional resources that it would expend for engaging a broader section of the community in order to turn-out legitimate support, which again, polling indicated was around

[22] *See* Rice Sworn Statement, attached hereto as Exhibit 8, at 188-89.

[23] *Id*. at 58.

78% of New Orleans East residents. ENO never anticipated that Hawthorn would hire Crowds on Demand, which was in violation of Entergy's contract with Hawthorn, or be involved in paying people to appear at public meetings before the Council. As Mr. Rice testified, "It's just something [paying people] that never occurred to me, never occurred to me that it was a possibility, never occurred to me that it was even in the universe of possibilities."[24] This point was echoed by Yolanda Pollard who confirmed that "paying people was never part of the arrangement."[25]

Following the October 16, 2017, public meeting, ENO questioned Hawthorn several times about allegations that had arisen regarding payments to NOPS supporters, and Hawthorn repeatedly denied the allegation. On October 23, 2017, ENO was alerted to a tweet in which the author stated that there had been paid protesters at the October 16th public meeting.[26] ENO immediately forwarded the tweet to Hawthorn.[27] There was a subsequent tweet later that same day, which ENO also forwarded to Hawthorn.[28] ENO then followed up those emails with a phone call to Hawthorn:

> Q: Well, you brought it up to her in the email, correct?
> A: I brought it up to her so that she was aware that this was being said, and we did not believe that this was actually part of their effort.
> Q: What discussion did y'all have, if any, beyond the emails?
> A: The only discussion that we had was: Here's what I'm seeing, is this anything that you have discussed with your team? Is this anything that you typically do? And she said no. And she thought that it was – it was not true, and she wasn't sure where it was coming from.[29]

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24 *See* Rice Sworn Statement, attached as Exhibit 8, at 187.

25 *See* Pollard Sworn Statement, attached as Exhibit 3, at 105.

26 *See* Entergy Email re Tweet (Pollard), 10/23/17, attached as Exhibit 9.

27 *See Id.*

28 *See* Entergy Email re Tweet (Pollard), 10/23/17, attached as Exhibit 10.

29 *See* Pollard Sworn Statement, attached as Exhibit 3, at 105.

Immediately following the February 21, 2018 public meeting, ENO emailed Hawthorn that a NOPS opponent wearing a marked-up, orange ENO shirt had commented about paid supporters and to question why some of the people recruited by Hawthorn wore orange shirts to the second meeting, despite Entergy's understanding that the orange t-shirts were only to be worn at the October 16, 2017 public hearing.[30] Hawthorn dismissed the payment allegation and told ENO that the supporters recruited by Hawthorn who wore the orange t-shirts to the February 21 Utility Committee Meeting did so because they "were passionate about the cause" and "believed in the message":

> I followed up with our supervisor/recruiter in NOLA who said that he didn't tell people to wear the shirts (tho he didn't tell them not to either). Just happened because the supporters loved the shirts and were passionate about the cause. For what it's worth, apparently many of them have been wearing those shirts everywhere because they were comfy shirts and because they believed in the message.[31]

On March 5, 2018, ENO again emailed Hawthorn to relay another payment allegation that was being circulated in an email by some opponents of the NOPS project. Hawthorn simply responded, "Interesting." Not satisfied with that reply, ENO pressed Hawthorn for a more thorough response to the allegation, to which Hawthorn responded unequivocally: "Entergy did not pay anyone for their support."[32] The following day, in response to a request from a blog writer seeking comment on payment allegations, which ENO immediately forwarded to Hawthorn, Hawthorn again dismissed the allegation: "Hired as an actor? Apparently their evidence is one person who is dilusional [sic] or just lying."[33]

To be clear, Hawthorn never even hinted to ENO that it had paid people to attend public

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30 *See* Entergy Email (Pollard), 2/22/18, attached as Exhibit 11.

31 *See* Entergy Email (Pollard), 2/22/18, attached as Exhibit 12.

32 *See* Hawthorn Email (Hammelman), 3/5/18, attached as Exhibit 5.

33 *See* Hawthorn Email (Hammelman), 3/7/18, attached as Exhibit 6.

meetings in support of NOPS. In fact, the evidence shows that Hawthorn actively concealed its relationship with Crowds on Demands and Crowds on Demand's activities from ENO. The evidence also shows that ENO repeatedly questioned Hawthorn about the payment allegations following the October 16, 2017, and February 21, 2018, public meetings, and Hawthorn repeatedly denied the allegations. As several of Entergy's employees recounted to the Investigators, numerous opposition groups were prolific in making unsubstantiated allegations to the community throughout the NOPS approval process. While in hindsight it is apparent that ENO should have done more to investigate the payment allegations, ENO had no reason at the time to doubt Hawthorn's denials.

Hawthorn maintained the charade that it had engaged in legitimate community engagement activities and had not paid anyone to attend a Council meeting in support of the NOPS project until Entergy's General Counsel confronted Hawthorn's Chairman of the Board, who confessed that Hawthorn had retained Crowds on Demand without Entergy's knowledge to work on the NOPS project in violation of the contract. He also admitted that Hawthorn had not requested, nor received, authority from anyone at Entergy to pay supporters to appear at either the October 16, 2017, public meeting or the February 21, 2018, Utility Committee Meeting:

> Hawthorn did not inform anyone at Entergy that Hawthorn had engaged Crowds on Demand as a vendor to work on the project, and Entergy did not authorize the engagement of Crowds on Demand.
>
> Hawthorn's order to Crowds on Demand was to provide supporters who would understand and be able to communicate their support for the proposed power plant in New Orleans East. Hawthorn did not authorize Crowds on Demand to make any payments to participants, and Entergy did not authorize or direct any payments to participants recruited by Crowds on Demand.
>
> *At no time did Hawthorn inform anyone at Entergy that Crowds on Demand was retained on this project, and Hawthorn neither sought nor*

> *received authorization from anyone at Entergy for Crowds on Demand to make payments to supporters*.[34]

In the face of this clear evidence that ENO was not aware of the conduct at issue, and unable to controvert the findings and conclusions in Entergy's initial investigative report, the Investigators resort to claiming that ENO refused to cooperate in the investigation. That assertion is simply false. Again, during the course of the investigation, Entergy produced thousands of documents, which were identified using the 46 search terms provided by the investigators and Entergy. Entergy produced 12 employees for interviews and two employees for sworn statements. In addition, at the request of the Investigators, four employees provided their personal cell phones to a third-party vendor for forensic imaging. The written communications between Entergy and the Investigators show that Entergy responded timely and completely to each of the Investigators' requests, a point that was confirmed by the Investigators on the record during Ms. Pollard's sworn statement:

> The only point that I have in this is that, and this is for the record, that Entergy has provided us with every aspect of information as regards to this particular incident; every aspect of information. There is no thing that Entergy has that we haven't seen that deals with this particular investigation.[35]

The focus of the Investigators' complaints during their presentation before the Council was on Entergy's assertion of the attorney-client privilege over documents that were generated by Entergy's attorneys during their internal investigation. These documents had absolutely nothing to do with the Investigators' charge "to independently conduct all aspects of the Council's investigation."[36] Furthermore, the Investigators' assertion that Entergy is legally prohibited from invoking the attorney-client privilege in connection with legal advice provided

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34 *See* Hawthorn Letter (Ashford), 5/9/18, attached as Exhibit 4. (emphasis added).

35 *See* Pollard Sworn Statement, attached as Exhibit 3, at 213-14.

36 *See* Request for Statement of Qualifications for the Services of an Independent Investigator, p. 1.

by Entergy's in-house attorneys regarding ongoing litigation and the Council's investigation is belied by none other than the United States Supreme Court.

The United States Supreme Court has been clear that the attorney-client privilege exists to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends on the lawyer's being fully informed by the client." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The Supreme Court has plainly held that an in-house counsel communications and/or attorney mental impressions generated in connection with an internal company investigation are protected from disclosure by the attorney-client privilege and the attorney work product doctrine. *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014); *Upjohn Co. v. United States*, 449 U.S. 383 (1981).[37]

It is also noteworthy that the Investigators refused to allow Entergy to participate in the interviews of third-party witnesses despite numerous requests, but then relied on the unsworn hearsay filled testimony of those third parties in their Report. On August 17, 2018, Entergy requested in writing that the Investigators allow Entergy's attorneys "to attend and participate fully in all interviews of non-Entergy witnesses in connection with the New Orleans Power Station Investigation."[38] Later that same day, the Investigators refused Entergy's request: "At this stage, we decline the request for Entergy Counsel to attend all interviews and sworn

[37] Further, the documents withheld by Entergy are also protected under the work product doctrine of Louisiana Code of Civil Procedure article 1424 and Federal Rule of Civil Procedure 26. Documents created in "anticipation of litigation" or in response to a governmental investigation trigger the protection. *E.g.*, *In re LTV Sec. Litig.*, 89 F.R.D. 595, 612 (N.D. Tex. 1981); *In re Int'l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1238 (5th Cir. 1982); *In re Linerboard Antitrust Litig.*, 237 F.R.D. 373, 377, 381, 381 n.7 (E.D. Pa. 2006); *Baker v. Chevron USA, Inc.*, No. 1:05-CV-227, 2009 WL 10679629, at *5 (S.D. Ohio June 8, 2009); *In re Trasylol Prod. Liab. Litig.*, No. 08-1928-MDL, 2009 WL 2575659, at *1 (S.D. Fla. Aug. 12, 2009). In compliance with both state and federal law, Entergy submitted a privilege log to the Investigators detailing each of the privileged documents.

[38] *See* Entergy Letter (Beker & Alarcon), 8/17/18, attached as Exhibit 13.

statements."[39] On August 29, 2018, Entergy re-urged its request.[40] The Investigators again refused, stating, "[t]here is no proper purpose for Entergy to be present at interviews of non-Entergy witnesses. The contents of those interviews and sworn statements will be made part of the Final Report."[41]

Considering the proposed penalties and sanctions against ENO, these refusals by the Council's Investigators raise significant due process issues. As a general proposition, "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). Not only was ENO denied due process in connection with the interviews, but the Investigators also refused to produce a complete set of their interview notes, opting instead to provide condensed summaries as part of their Report. This response calls into question whether there are additional facts provided by those third-party witnesses that further undermine the Investigators' assertions.

Finally, it is regrettable that the Investigators used this opportunity to personally attack the numerous Entergy employees who voluntarily appeared for interviews and sworn statements, and who testified truthfully during this proceeding. In fact, just days before issuing their Report, the Investigators lauded the integrity of the very Entergy employees their report subsequently maligned:

> One of the things, though – And I am really impressed with the people who work for Entergy, the people who we have had here and we have interviewed. I mean, to a person, I'm impressed with them. I'm impressed with their dedication, with their knowledge, with their belief in Entergy and truly in the values of Entergy. And

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39 *See* Investigators' Email (Coman), 8/17/18, attached as Exhibit 14.

40 *See* Entergy Letter (Beker & Alarcon), 8/29/18, attached as Exhibit 15.

41 *See* Investigators' Letter (Coman), 9/4/18, attached as Exhibit 16.

> to a person, I would think, they all have shared, and I'm impressed with that.[42]

These individuals have lived in this community, worked in this community, and contributed to this community for decades. It is a travesty that the Investigators used this opportunity to disparage Entergy's employees through innuendo and unsubstantiated allegations. Entergy's employees have earned the right to be treated fairly, and they deserved better.

In summary, the Investigators' actions indicate that they were intent on reinforcing a certain storyline rather than a legitimate search for the truth. Although there may be legitimate disagreement over whether ENO should have been more diligent in managing the Hawthorn contract, there is no evidence that ENO knew that Hawthorn had hired Crowds on Demand, or that Hawthorn or Crowds on Demand had paid individuals to appear and speak in support of the NOPS project.

III. The Council's Imposition of Penalties, including a $5 Million Fine, is Not Supported by the Law, is Arbitrary and Capricious, and Violates the United States Constitution

a. The Council Does Not Have the Authority to Impose its Proposed Penalties, which include a Fine, Because No Law or Council Rule was Violated

The Council is authorized to provide — by ordinance — penalties for willful violations of the City's charter, as well as for violations of the City's ordinances, rules, and regulations, Charter, Section 9-306. In this case, however, the Council's Investigators did not find any violation of the City's charter, ordinances, rules, or regulations, willful or otherwise. To the contrary, the Investigators expressly found that the Council had not prohibited or established penalties for the alleged conduct at issue:

> [T]he Council's rules did not speak to the ultimate issue presented in Council Motion M-18-196, whether a party or group may pay people to attend and/or speak at a meeting or hearing. There are no

[42] *See* Rice Sworn Statement, attached as Exhibit 8, at 167.

> specific Council rules that prohibit this practice. Nor are there rules which require parties or groups with business before the Council to inform the Council that attendees and/or speakers are compensated.[43]

Furthermore, Resolution R-18-474 itself acknowledges that the Council's rules did not prohibit the conduct at issue, noting that "prior to recent revisions Council rules did not require that speakers disclose on comment cards whether they received or would receive compensation for speaking nor did they require other attestations or a signature."[44] In the absence of a violation of any charter section, ordinance, rule, or regulation, the Council does not have the authority to impose a $5 million fine or any of the other "penalties" contemplated in Resolution R-18-474.

b. The Code of the City of New Orleans Does Not Allow the Council to Impose a Fine Under These Circumstances

The Resolution cites "Code of the City of New Orleans, Section 3-130 (7)[45] and Section 158-52" as the sources of the Council's "expressed" authority to impose penalties, monetary and otherwise, but neither provision is applicable here.

Code Section 158-52 concerns false or misleading representations made in any filing or throughout proceedings involving the setting of rates pursuant to Section 158-52, which provides as follows:

> It shall be unlawful and a misdemeanor for any person to **intentionally** or through **gross negligence** to make or to cause to be made any false or misleading **representations of fact** in any application or filing made under this article or in any proceeding, rate case, or other matter commenced by an application or filing under this article.[46]

The issue of compensated speakers, however, concerns unsworn public comments — not representations of fact. The October 16, 2017 hearing that is the focus of the Report was

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43 *See* Investigation Report at 50.

44 *See* Council Resolution R-18-474 at 4.

45 Section 3-130(7) is a section of the Home Rule Charter, not the City Code.

46 *See* Code, Section 158-52 (emphasis added).

explicitly conducted under Section 158-431(b), which provides that "no part of statements made or evidence adduced at such at-large public hearing shall, in legal terms, form (and such matter shall not form) the basis of any council decision in a contested proceeding."[47] Citing Section 158-431(b), the Resolution itself acknowledges that "the conduct detailed in the Report does not affect or alter the evidentiary record" in Docket No. UD-16-02.[48] Therefore, Section 158-52 is clearly inapplicable because the statements were made in the context of a public hearing and were not "representations of fact." At best, the statements were unsworn public statements of opinion.[49] Moreover, as stated before, the Investigation did not find that ENO "intentionally" or through "gross negligence" caused these activities to occur. In fact, the record proves the opposite—that ENO was not aware that anyone was paid to attend Council meetings and that the activities at issue were concealed by its contractor, Hawthorn, and Hawthorn's unauthorized subcontractor. Accordingly, Section 158-52 is not applicable.

Moreover, the Code does not specifically provide for fines or any other penalties resulting from the violation of Section 158-52. In an attempt to address this deficiency, the Resolution cites to Home Rule Charter provision 3-130(7), which provides:

> The orders of the Council shall be enforced by the imposition of such reasonable penalties as the Council may provide, and any party in interest may appeal from orders of the Council to the Civil District Court for the Parish of Orleans by filing suit against the Council within thirty (30) days from the date of the order of the Council, and not thereafter.

This provision, however, is found in a section of the Charter that addresses the "Establishment of Rates," and it is clear that it pertains to enforcement of and appeals from certain regulatory

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[47] Section 158-431(b) further provides that "no member of the public at large who speaks as such, and not as a party of record, shall be compelled to submit to cross-examination under an instanter subpoena."

[48] *See* Council Resolution R-18-474 at 4.

[49] That unsworn public comments are not evidence in a Section 158 proceeding was confirmed by Councilmembers Moreno and Williams at the October 31, 2018 meeting discussing R-18-474.

orders of the Council.[50] It does not purport to provide penalties for violations of Code Section 158-52. Furthermore, this matter does not involve the alleged violation of a regulatory order of the Council; indeed, the Investigative Report did not find that any orders of the Council had been violated in the first instance. Accordingly, Section 3-130(7) does not authorize or contemplate the penalties and sanctions proposed in Resolution R-18-474.

Even assuming Code Section 158-52 were alone sufficient authority to impose a fine under these circumstances, which it is not, the amount of that fine would be further limited by the Code to something far less than $5 million. A violation in a Section 158 proceeding is considered a "misdemeanor," and City Code Section 1-13 caps fines at $300 for the violation of any provision of the City Code or any ordinance when no specific penalty has been provided.[51] Furthermore, in passing a 2014 bill sponsored by then-Representative Moreno, the Louisiana Legislature generally capped at $500 the maximum penalty that may be imposed for a first-offense violation of any ordinance enacted by the Council.[52] That limitation is consistent with the general $500 maximum fine that may be imposed for violation of any parish ordinance in Louisiana.[53] Accordingly, the Council can cite no legal authority that would authorize it to impose a $5 million fine on ENO under the circumstances at issue here.

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[50] The Council did cite in the Resolution its responsibility for fixing and changing ENO's rates, but Louisiana law has long prohibited retroactive ratemaking. *See, e.g., So. Central Bell Tel. Co. v. LPSC*, 594 So. 2d 357 (La. 1992). Accordingly, although the Council mentioned ENO's net income for 2017, it is not permissible for the Council to require a divesture of any of those earnings under these circumstances. *See id.* at 359 (noting that "the revenues collected under the lawfully imposed rates become the property of the utility and cannot rightfully be made the subject of a refund").

[51] Sec. 1-13. - General penalty; continuing violations provides:

"Whenever in this Code or in any ordinance of the city any act is prohibited or is made or declared to be unlawful or an offense or whenever in this Code or any such ordinance the doing of any act is declared to be unlawful, when no specific penalty is provided therefor, the violation of any such provision of this Code or any such ordinance shall be punished by a fine not exceeding $300.00 or by imprisonment for not more than five months or both such fine and imprisonment."

[52] *See* La. R.S. § 33:1375.

[53] *See* La. R.S. § 33:1243.

c. The Massachusetts Storm-Response Penalty Does Not Support the Council's Imposition of a $5 Million Fine in this Case

Apparently aware that the Code of the City of New Orleans and Louisiana law do not allow for the imposition of a $5 million fine against ENO, Resolution R-18-474 resorts to citing easily distinguishable examples of fines or penalties imposed against utilities in other jurisdictions. Following precedent set by the very same Massachusetts regulator cited as the first example in the Resolution, however, the Council does not have the authority to impose a fine because its rules do not provide for such a fine.

The Resolution describes how "the Massachusetts Department of Public Utilities imposed a $24.8 million penalty on a group of the State's utilities for their poor preparation for and response to Hurricanes Irene and Sandy." What the Resolution fails to mention, however, is that the very same utility regulator found in 2009 that it had no legal authority to fine a utility for its performance during a storm in 2008 under its then-existing statutory authority.[54] After the 2008 storm, the Massachusetts Attorney General asked the Department to impose a $4.6 million penalty against the electric utility.[55] The utility successfully opposed the fine on the grounds that the Department did not have the statutory authority to impose such a fine, and that such a fine was unconstitutional.[56] The Department ultimately conceded that it did "not have authority to impose penalties for Winter Storm 2008."[57]

The Massachusetts legislature responded to these findings just ten days after the *Unitil* decision, directing the Department to promulgate rules and regulations that could allow for such

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54 *See* Order, *Fitchburg Gas & Elec. Light Co. ("Unitil")*, D.P.U. 09–01–A (Nov. 2, 2009) (docket available at https://eeaonline.eea.state.ma.us/ DPU/Fileroom/dockets/bynumber).

55 *See Unitil* Order at 167.

56 *Id.* at 176–8.

57 *Id.* at 181.

penalties for poor storm response of up to $250,000 per day.[58] After that legislation was passed, the Department promulgated regulations providing performance standards for emergency events and penalties for noncompliance.[59] Thus, by the time of Hurricane Irene in 2011, the Department had already promulgated the regulations that were in force when it imposed the $24.8 million penalties on utilities in Massachusetts for poor responses to Hurricane Irene and an October snowstorm.[60]

Before those regulations were put in place, the Department had determined that it could not lawfully impose a $4.6 million fine, and it declined to do so.[61] Here, the Council is in the same position as the Massachusetts regulator in 2008. The Council's Investigators found that "no specific Council rules" prohibited the practices at issue here.[62] Following precedent set by the very same regulator cited as an example in Council Resolution R-18-474, the Council does not have the authority to impose the requested $5 million penalty because its rules did not prohibit the practices at issue or provide for such a fine. The Louisiana Supreme Court has also been clear that "[i]t is the responsibility of the administrative body to formulate, publish, and

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58 *See Massachusetts Elec. Co. v. Department of Public Utilities*, 469 Mass. 553, 556 (2014) (discussing the legislative history of the November 12, 2009 Act Relative to Public Utility Companies).

59 *Id.* at 557; *see* also 220 Code Mass. Regs. § 19.03(3) Restoration of Service provides:

"Each Company shall restore service to its customers in a safe and reasonably prompt manner during all Service Interruptions and outages. During an Emergency Event, this shall include at a minimum, but not be limited to, implementing all applicable components of the Company's ERP related to restoration of service."

19.05(2)(a) provides:

"If after investigation the Department finds a violation of the standards established in 220 CMR 19.03, the Department shall levy a penalty not to exceed $250,000 for each violation for each day that the violation of the Department's standards persists; provided, however, that the maximum penalty shall not exceed $20,000,000 for any related series of violations. In determining the amount of the penalty, the Department shall consider, among other factors, the following:

1. the gravity of the violation;
2. the appropriateness of the penalty to the size of the Company;
3. the good faith of the Company in attempting to achieve compliance; and
4. the degree of control that the Company had over the circumstances that led to the violation."

60 *See Massachusetts Elec. Co.*, 469 Mass. at 558.

61 *Unitil* Order at 181.

62 Investigation Report at 50.

make available to concerned persons rules which are sufficiently definite and clear that persons of ordinary intelligence will be able to understand and abide by them."[63] The court stated that this is particularly true where the agency action, even "to some extent," impinges upon a substantive right, which as explained more fully below, is an issue created by the Council's proposed actions.[64]

d. The Penalties Proposed in Council Resolution R-18-474 are Unconstitutional

Furthermore, a host of constitutional considerations prohibit the imposition of the penalties proposed in Resolution R-18-474. Those considerations include the First Amendment, prohibitions against ex post facto laws, substantive due process, and the Eighth Amendment.

i. The Council's Proposed Penalties are Prohibited by the First Amendment

The First Amendment protects freedom of speech on issues of public concern. U.S. Const. amend. I; *see also Mills v. State of Ala.*, 384 U.S. 214, 218 (1966) ("[A] major purpose of that Amendment was to protect the free discussion of governmental affairs."). The First Amendment also protects political association, including participation in associations to petition for favorable legislation.[65] Providing public comment to a city council is classic First Amendment activity. *See Greenbelt Co-op. Pub. Ass'n v. Bresler*, 398 U.S. 6, 11 (1970) (reversing, on First Amendment grounds, a judgment in a defamation case against newspaper for reporting on public comments at city council hearing and noting that public hearings before a city council are "of particular First Amendment concern" and "the threat or actual imposition of pecuniary liability for alleged defamation may impair the unfettered exercise of these First Amendment freedoms").

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63 *See Bowie v. Louisiana Public Service Commission*, 627 So. 2d 164,169 (La. 1993).

64 *Id*.

65 The Louisiana Constitution similarly provides that "[n]o law shall curtail or restrain the freedom of speech or of the press." La. Const. art. I, § 7. And "[n]o law shall impair the right of any person to assemble peaceably or to petition government for a redress of grievances." La. Const. art. I, § 9.

In this case, the Council is proposing to punish ENO because some speakers at public meetings who supported the NOPS proposal were paid to attend. But the receipt of payment does not forfeit a speaker's First Amendment freedoms or permit punishment of those aligned with a speaker's position. "It is well settled that a speaker's rights are not lost merely because ***compensation*** is received; a speaker is no less a speaker because he or she is ***paid*** to speak." *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 801 (1988) (invalidating a statute that, among other things, compelled professional fund-raisers to disclose to a potential donor the average percentage of their gross receipts that they turned over to the charities for which they solicit) (emphasis added); *see also Meyer v. Grant*, 486 U.S. 414, 428 (1988) (holding that a Colorado statute violated the First and Fourteenth amendments by "prohibiting the payment of petition circulators" because it "impose[d] a burden on political expression that the State ha[d] failed to justify."). The Council has not investigated whether speakers who were aligned with others against and spoke in opposition to NOPS were paid to attend, and this scrutiny of speakers on only one side of a public debate triggers the closest scrutiny under the First and Fourteenth Amendments. *See First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 768, 787, 784–85 (1978) (ruling unconstitutional a Massachusetts statute forbidding "expenditures by banks and business corporations for the purpose of influencing the vote on referendum proposals," reasoning that "[i]n the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue").

The Council also notes in the Resolution that the issue of paid speakers has caused the Council to "incur substantial hours of additional work." Resolution at 5. In recognizing the seriousness of this issue, ENO understands that it has been an unfortunate drain on the Council's

limited resources, but, to achieve its own vital purpose, the First Amendment does not permit punishment to address the consequences of protected speech. Instead, "the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out." *Hartman v. Moore*, 547 U.S. 250, 256 (2006). The protections for political speech extend even to speech that is false or misleading. *New York Times v. Sullivan*, 376 U.S. 254, 273 (1964) (explaining how "neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct.").

Citing *New York Times v. Sullivan*, the Louisiana Supreme Court held that rules punishing protected political speech must be supported by a "compelling state interest." *State v. Burgess*, 543 So. 2d 1332, 1336 (La. 1989). Applying strict scrutiny, the Louisiana Supreme Court struck down as unconstitutional two sections of a criminal statute punishing certain false or anonymous statements in campaign materials, holding that the State could show "no compelling reason why its interest in fair elections should outweigh the fundamental right of free anonymous political discussion." *Id.* The State had argued that the statute was permissible "since it merely forbids anonymous false statements designed to mislead voters in an election and such 'lies and false statements' are not constitutionally protected." *Id.* at 1335. But the Court disagreed, concluding that the statute "infringe[d] significantly on protected speech." *Id.*

The First Amendment similarly provided protection for a racetrack owner in *Livingston Downs Racing Ass'n Inc. v. Jefferson Downs Corp.*, 192 F. Supp. 2d 519 (M.D. La. 2001) when he was accused of running a publicity campaign to defeat a competitor's attempts to build a new racetrack with purportedly "deceptive tactics" designed to mislead the public. *Id.* at 531. The alleged deceptive tactics included "forming and surreptitiously funding CCG [a non-profit

organization devoted to campaigning against the competitor] to make it appear that the views expressed during the campaign were those of independent persons and groups." *Id.* at 531. The court held, however, that this campaign was a valid exercise of the racetrack owner's First Amendment right to seek to influence government officials through public speech. *Id.* at 532.

In this case, the Council seeks to impose punishment for public speech and petitioning activity that were protected by the First Amendment and not prohibited by any rule of the Council. Although the Council cites City Code Section 158-52 in support of its authority to impose penalties, that section is unconstitutionally overbroad if it encompasses failure to disclose information about personal and political affiliations in connection with unsworn public comment in support of a resolution pending before the Council.[66] *See Seals*, 898 F.3d at 597 (ruling unconstitutional and overbroad a Louisiana statute that criminalized threats against "a public officer or employee with the intent to influence the officer's conduct in relation to his position," reasoning that such a law "tramples the core First Amendment freedom" to challenge state action). Simply put, the First Amendment prohibits the Council from imposing the penalties set forth in the Resolution.

ii. The Council's Fine is Prohibited as Ex Post Facto

Aside from First Amendment considerations, new rules prohibiting paid speakers at the Council's meetings cannot be applied retroactively to ENO to justify the proposed fine. The

[66] As noted previously, Section 158-52 should not be construed to extend to unsworn public comments, *see Seals v. McBee*, 898 F.3d 587, 593 (5th Cir. 2018) ("The first step in overbreadth analysis is to construe the challenged statute."), but to the extent the Council has done so to justify the proposed fine, Section 158-52 would be overbroad. Such an interpretation could subject commenters to penalties for failure to disclose a variety of associations between a speaker and organizations that could provide additional motivation for that speaker to give comment. Courts have long recognized, however, that "privacy in group association may in many circumstances be indispensable to preservation of freedom of association . . . ." *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (striking down an Alabama contempt judgment against the NAACP for failure to reveal to the State's Attorney General the names and addresses of all its Alabama members and agents).

Investigation Report makes clear that the payment of persons to attend and/or speak at the Council-sanctioned meeting was not prohibited when it occurred by any Council rule.

The federal and Louisiana constitutions both expressly prohibit the enactment of ex post facto laws. U.S. Const. Art. I, § 10 ("No State shall ... pass any ... ex post facto Law,...."); La. Const. Ann. art. I, § 23 ("No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be enacted."). The United States Supreme Court in *Collins v. Youngblood*, 497 U.S. 37 (1990), and the Louisiana Supreme Court following *Collins* in *State ex rel. Olivieri v. State*, 2000-0172 (La. 2/21/01), 779 So. 2d 735, adopted the following definition of a prohibited "ex post facto" law:

> [A]ny statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto.

Collins, 497 U.S. at 42; *accord Olivieri*, 779 So. 2d at 743.

The stated purpose of the $5 million penalty in Council Resolution R-18-474 is "to penalize and deter bad conduct." Resolution at 8. But the Council cannot impose penalties for conduct that was not prohibited at the time of the purported offense without violating the ex post facto clauses of the federal and State constitutions.

iii. The Proposed Fine Violates the Eighth Amendment and Substantive Due Process.

The proposed fine further infringes on ENO's substantive due process rights and Eighth Amendment right to be free from excessive penalties. Due process requires both certainty in the definition of criminal conduct and "that the penalty portion of a statute be definite." *See State v. Piazza*, 596 So. 2d 817 (La. 1992). In this case, ENO had no prior notice of either a legal prohibition on the conduct (there was none) or the sort of penalties that the Council now seeks to

impose. As Mr. Clinton Vince noted at the October 31, 2018 Council meeting, the penalty proposed here is the "highest penalty in the history of this Council." October 31, 2018 meeting at 1:44:20. But the "Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment. . . ." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996). And the Excessive Fines Clause likewise "limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense." *Austin v. United States,* 509 U.S. 602, 609–10 (1993) (internal quotation omitted)); *see also State v. LeCompte,* 406 So. 2d 1300, 1304 (La. 1981) (holding a criminal statute was unconstitutional and an excessive punishment under La. Const. Ann. art. I, § 20 insofar as it provided no maximum fine, but only a minimum fine) ("[W]e cannot uphold a statute that permits an unlimited fine . . . .").

The Resolution suggests that a $5 million fine is nevertheless appropriate here in part because "in 2005 Congress gave the Federal Energy Regulatory Commission ('FERC') enhanced sanction authority to punish an entity for 'willingly and knowingly' reporting certain false information in connection with the sale of natural gas or electricity, which penalties can total up to $1 million per day." Resolution at 8. In 2005, Congress by statute did expand FERC's penalty authority to provide for such maximum fines. *See Enf't of Statutes, Orders, Rules, & Regulations*, 132 FERC ¶ 61216, 2010 WL 3620417, (Sept. 17, 2010). In addressing a comment on its expanded penalty authority, FERC acknowledged "that our civil penalty determinations are subject to the Eighth Amendment's prohibition on excessive fines" and that all fines must take into account "the seriousness of the violation and the organization's efforts to remedy it." *Id.* at 62149. Although Council Resolution R-18-474 looks to penalties imposed by FERC as

examples,[67] the statutory authority and substantive due process protections afforded by the FERC policy statements and guidelines are not present here.

BMW v. Gore, explains when a punishment qualifies as so "grossly excessive" as to violate due process. 517 U.S. at 562. In that case, the Supreme Court vacated as excessive and violative of BMW's substantive due process rights a $4 million punitive damages award (that had been further reduced by the state supreme court to $2 million) to a plaintiff in a fraud suit who had been awarded only $4,000 of compensatory damages.[68] *Id.* at 565, 586. The Court reasoned:

> Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose. Three guideposts . . . indicate[] that BMW did not receive adequate notice of the magnitude of the sanction that Alabama might impose . . . :
>
> 1. the degree of reprehensibility of the nondisclosure;
>
> 2. the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages award; and
>
> 3. the difference between this remedy and the civil penalties authorized or imposed in comparable cases.

Id. at 574-75 (enumeration added); *see also Grefer v. Alpha Tech.*, 2002-1237 (La. App. 4 Cir. 8/8/07), 965 So. 2d 511, 527 (applying the three "guideposts" from *BMW v. Gore* to reduce a $1 billion award for punitive damages). In analyzing the first of these factors, the Court found significant that the company could have reasonably interpreted state statutes to conclude that its

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[67] Council Resolution R-18-474 also references "six figure penalties for poor vegetation management that results in risks to critical infrastructure and multi-million dollar penalties for improper data handling practices that increased cyber risks" imposed by The North American Electric Reliability Corporation ("NERC"), but NERC too has similarly promulgated sanction guidelines. *See* Sanction Guidelines of the North American Electric Reliability Corporation (Dec. 20, 2012) (available at https://www.nerc.com/FilingsOrders/us/RuleOfProcedureDL/Appendix_4B_SanctionGuidelines_20121 220.pdf).

[68] The purported fraud at issue involved non-disclosure of minor repairs to new vehicles that had been damaged in the shipping process.

conduct was legal, and it did not persist in that conduct once adjudged illegal. *BMW*, 517 U.S. at 577-79. The Court also examined the ratio of actual damages to punitive damages and concluded that the disparity was grossly excessive. *Id.* at 580-83. Finally, the Court looked at maximum statutory penalties for similar conduct ranging from $2,000 to $10,000 in concluding that the penalty was far beyond amounts typically authorized by legislatures to penalize such conduct. *Id.* at 584-85. Because the statutory penalties for similar conduct were so low compared to the award in this case, the Court reasoned that the company lacked fair notice that its conduct could subject it to such a severe penalty. *Id.*

Contrasting the FERC guidelines and applying the three *BMW v. Gore* guideposts here, the proposed $5 million fine would clearly violate substantive due process and the Eighth Amendment. *First*, assuming that ENO's executives had known about the conduct at issue (which is denied), they could have reasonably concluded that the recruitment efforts were protected by the First Amendment and not violative of any existing laws. *Second*, the fine, which is derived from a purported 10% of ENO's retained earnings, is not connected to any measure of actual damages and is the highest ever imposed by the Council, even though no violation of any rule or ordinance has been found. *Third*, a $5 million fine is grossly disproportionate to similar offenses given that a misrepresentation in a Section 158 proceeding is considered a "misdemeanor," and City Code Section 1-13 caps fines for municipal offenses when no specific penalty has been provided therefore at $300. ENO lacked fair notice that the conduct at issue, which it knew nothing about, could possibly result in a penalty of $5 million. The proposed fine, therefore, would be unconstitutional.

iv. Other Penalties such as Ethics Training and an ENO-Specific Code of Conduct are also Unsupported by Law

It should be noted that although this Section focused on the Council's proposed $5 Million fine, the same constitutional arguments apply to the other proposed "penalties" in Resolution R-18-474. Specifically, where no Council rules or other state laws were violated, the Council does not have the authority to require ENO's leadership to attend ethics training or to impose an ENO-specific code of conduct. In addition to all the constitutional concerns raised above, requiring ethics classes for ENO's leadership would also run afoul of the regulatory principle that state regulators cannot make business decisions for the utility.[69] Regarding the ENO-specific code of conduct, the Company states that given the tactics employed by the NOPS opponents, which has so far gone un-scrutinized, any code of conduct aimed at regulating interactions with the Council should apply to all parties equally. The goal here appears to be an attempt to regulate protected speech, which is very likely unconstitutional, and in any case, would be arbitrary and capricious to apply such restrictions only on ENO.[70] Moreover, ENO has already taken concrete steps to ensure that neither the company nor its contractors will engage in astroturfing in the future.

---

[69] *See Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276, 289 (1923) (stating that "[i]t must never be forgotten that, while the state may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership").

[70] It should also be noted that while certain NOPS opponents have advocated re-voting NOPS (which is not a penalty outlined in the Resolution), even Council Resolution R-18-474 has acknowledged that "the conduct detailed in the Report does not affect or alter the evidentiary record" in Docket No UD-16-02. Moreover, the Council's own rules makes clear that the deadlines for reconsidering NOPS have long ago elapsed, as Council Rule 37A states that "a vote or question may be reconsidered at any time during the same meeting, or at the first regular or special meeting held thereafter" and that "a motion for reconsideration, having been once made and decided in the negative, shall not be renewed, nor shall a motion to reconsider be reconsidered." *See also Wolfman, Inc v. City of New Orleans*, 2003-0120 (La. App. 4 Cir. 04/21/04); 874 So. 2d 261 (holding that a revote cannot occur once applicable deadlines have elapsed).

IV. Conclusion

In conclusion, ENO acknowledges both the seriousness of this matter and the efforts undertaken by the City Council to conduct a thorough review of the facts. The Company acknowledges that it could have, and should have, done more to discover these activities and stop them because these unfortunate events create the appearance of impropriety. The fact remains, however, that ENO had no knowledge of these unfortunate events, which the Council's Investigators have confirmed. The imposition of a $5 million dollar fine based on conduct that ENO was unaware of, and that broke no laws or Council rules, is improper and unsupported by law. Accordingly, pursuant to Resolution R-18-474, the Company has shown cause as to why no penalties and/or sanctions should be imposed.

Respectfully submitted:

BY: 

Karen H. Freese, Bar No. 19616
Cory R. Cahn, Bar No. 22984
Brian L. Guillot, Bar No. 31759
639 Loyola Avenue, Mail Unit L-ENT-26E
New Orleans, Louisiana 70113
Telephone: (504) 576-2603
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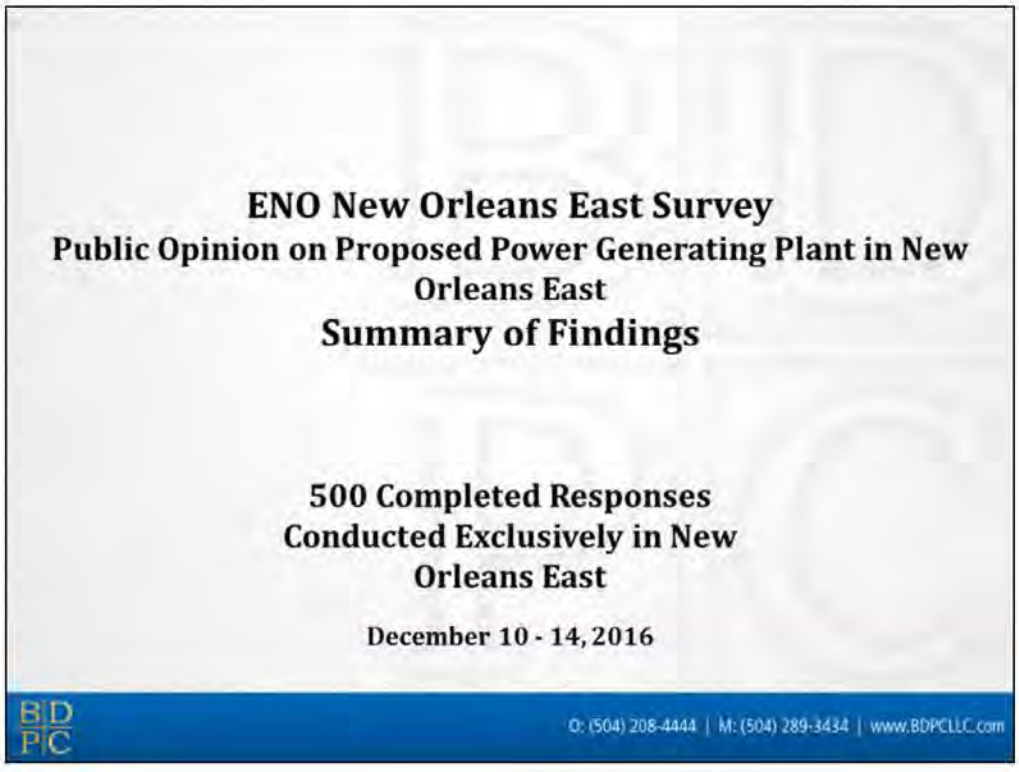
ATTORNEYS FOR ENTERGY NEW ORLEANS, LLC

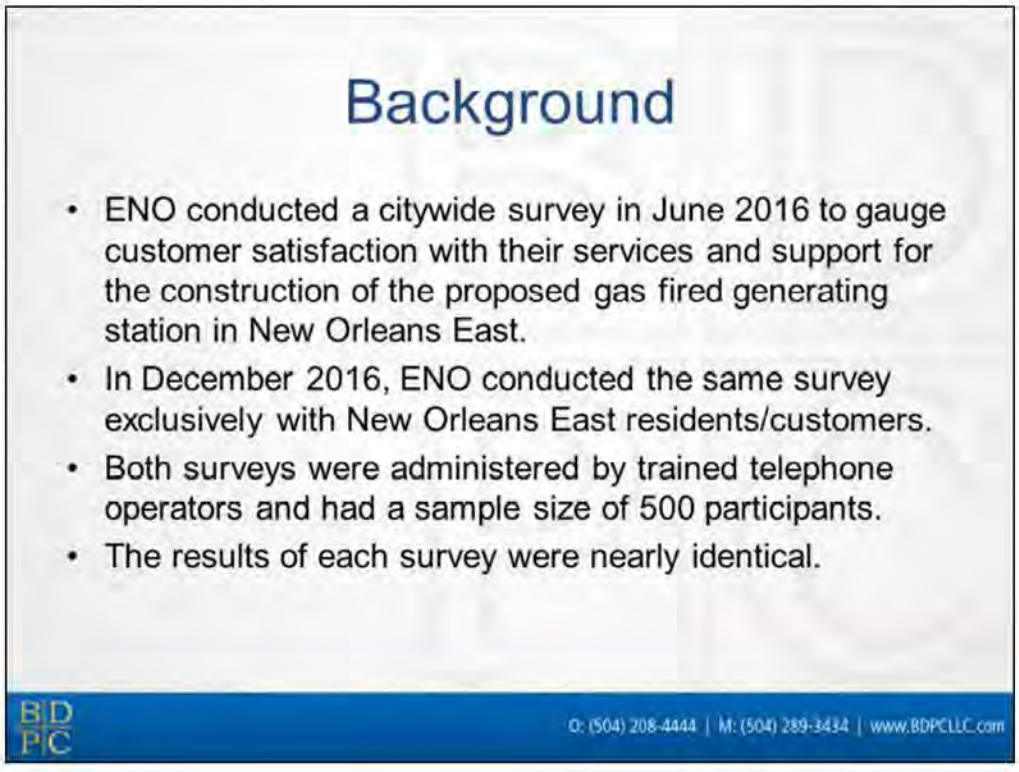
ENO New Orleans East Survey – December 10 – 14, 2016



Background

BDPC, LLC completed a telephone survey of 500 customers of Entergy New Orleans Inc. between December 10th and 14th, 2016. All respondents were residents of New Orleans East. The survey was conducted by trained telephone operators at a professional call center. With 500 completed surveys, the responses are considered very accurate with a margin of error of less than four percent. The call list for the survey consisted of current customers of ENO who have not been previously called for customer satisfaction surveys.

ENO New Orleans East Survey – December 10 – 14, 2016



The December 2016 survey included all of the questions posed in the June 2016 initiative plus these two items:

- Question 4 - Are you aware that Entergy New Orleans Inc. has had a power generation station in New Orleans East since the 1960's?
- Question 12 - Entergy New Orleans has been and is holding multiple public meetings throughout the community to better acquaint local residents with the plans to build the new power generating station in New Orleans East. Are you aware of this?

The results of each survey were very similar giving credibility to the observation that the opinion of the residents of New Orleans East is consistent with that of the residents of Orleans Parish at large on the issue of the proposed power plant.

ENO New Orleans East Survey – December 10 – 14, 2016

Summary of Findings

- 94% of the residents of New Orleans East are satisfied with the services provided by ENO.
- 94% of the respondents agree that ENO should restore power as safely and as quickly possible after a major weather event.
- 77% agree with ENO's strategy to use traditional generating sources to restore power after a storm.
- 78% agree with the decision to build a gas fired generator in New Orleans East as a part of ENO's storm response strategy.
- 70% agree with ENO's decision to build a gas fired generator rather than an alternative power facility like solar.
- 56% of the residents surveyed were unaware that ENO had a power generating station in New Orleans East.
- 56% of those surveyed were unaware of ENO's ongoing outreach program to inform the community of their proposal to build the new plant.

BDPC
O: (504) 208-4444 | M: (504) 289-3434 | www.BDPCLLC.com

Detailed responses to the questions posed are presented in the following pages of this report.

IN RE:

New Orleans City Council

Public Hearing

October 16, 2017

504-833-3330
www.currenland.com

P R O C E E D I N G S

MR. STRATTON:

Going on the record. The time is 5:30 P.M.

My name is Tom Stratton. I'm director of the regulatory office. And unless I get bumped by a councilmember, I'll be keeping everything rolling this evening. I am very happy to see all of you here. Thank you very much for coming.

We are here, of course, for the public hearing on the application of Entergy New Orleans to construct a combustion turbine power plant at the Michoud site of its former power plant, and that application was filed in the New Orleans City Council Docket UD-1602. We're conducting this public hearing this evening from 5:30 to 7:30 P.M. in accordance with -- and here we get into a little bit of legalese, but it's all for good purpose -- Ordering Paragraph 13 of Resolution R 17426 and as governed by City Council Code Section 158-431B to hear the comments from members of the public regarding the application.

Accordingly, as required by that

section of the code, no part of statements made or evidence adduced at the at-large public hearing shall, in legal terms, form and such matters shall not form the basis of any Council decision in a contested proceeding. No member of the public at large who speaks as to such and not as a party of record shall be compelled to submit to cross-examination under an instanter subpoena. (As read.)

And we've got somebody here to say what is an instanter subpoena if we get to that point, but hopefully we won't. In other words, feel free to speak and -- without concern about being cross-examined if you're a member of the public. If you're a party to the proceeding, well then, a different rule could apply.

The Council's interested in hearing the public's opinion on this matter and for that reason, we will be transcribing this hearing and placing the transcript in the record where all councilmembers will have access to it whether they attend tonight or not. However, the Council must base its ultimate decision in this case on a careful examination of all evidence and testimony

S W O R N S T A T E M E N T

OF

YOLANDA POLLARD

Recorded on Wednesday, the 10th day of October, 2018, at the Law Offices of Sher Garner Cahill Richter Klein & Hilbert, 909 Poydras Street, 28th Floor, New Orleans, Louisiana 70112.

REPORTED BY:

Gail G. Freese, CCR

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WITNESS:
Ms. Yolanda Pollard
EXAMINATION BY:
MR. COMAN 8, 211
JUDGE JOHNSON 17, 211
MR. LAWRENCE 191
MR. IBERT 197

APPEARANCES:

REPRESENTING THE NEW ORLEANS CITY COUNCIL:

SHER, GARNER, CAHILL, RICHTER, KLEIN & HILBERT
MATTHEW M. COMAN, ESQ.
909 Poydras Street - 28th Floor
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LAWRENCE & ASSOCIATES
BY: J. C. LAWRENCE, ESQ.
AND
ANTHONY J. IBERT, ESQ.
303 South Broad Street
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JUDGE CALVIN JOHNSON
5025 Willow Street
New Orleans, Louisiana 70115

REPRESENTING ENTERGY:

ENTERGY SERVICES, INC.
CORY R. CAHN, ESQ.
Legal Services
639 Loyola Avenue

APPEARANCES - Continued

REPRESENTING ENTERGY:

CHAFFE McCALL
BY: WALTER F. BECKER, JR.
AND
TERRY Q. ALARCON, ESQ.
1100 Poydras Street
Suite 2300
New Orleans, Louisiana 70163-2300

A No, I did not stop payment on the Hawthorn's invoice because we had no reason to believe that any such transaction had taken place. This was never part of the arrangement. I never directed anyone to pay anyone, so we never thought that this was part of any scenario that we would be involved in.

Q Well, you brought it up to her in the email, correct?

A I brought it up to her so that she was aware that this was being said, and we did not believe that this was actually part of their effort.

Q What discussions did y'all have, if any, beyond the emails?

A The only discussions that we had was: Here's what I'm seeing, is this anything that you have discussed with your team? Is this anything that you typically do? And she said no. And she thought that it was -- it was not true, and she wasn't sure where it was coming from.

Q Is that conversation reflected in any document that you can point us to?

A I am not sure. I don't recall the documents. I mean, we had many email exchanges, many phone call conversations. We may have had a phone conversation about here's what I'm seeing, is this something that maybe you're aware of or that your team may be aware of.

are parties to a docket, and subject of this particular investigation. And unlike a deposition, where there's multiple parties involved, we are not a party that is adverse to anyone.

You-all conducted your own investigation, you are free to conduct whatever investigation you want to continue to conduct. But this is a sworn statement that we intended to take, and we did take, so we were concluding that statement at this point.

BY MR. BECKER:

I would like to add one thing, if I might. This is all about trying to get all the facts out, and there are certain questions that you-all didn't ask and certain documents you did not show. So for the purpose of completeness, so the City Council can see all of the facts, we are asking to submit some limited questions so that we can supplement the record with all the facts.

BY MR. COMAN:

And I don't -- Go ahead, Judge.

BY JUDGE JOHNSON:

The only point that I have in this is that, and this is for the record, that Entergy

has provided us every aspect of information as regards this particular incident; every aspect of information. There is no thing that Entergy has that we haven't seen that deals with this particular investigation.

Let me also add that Entergy never provided us documents as regards text messages that we actually have in our hand. Entergy chose not to do so. Please.

BY MR. CAHN:

Sure.

BY MR. COMAN:

With that, we're concluding the sworn statement.

BY MR. CAHN:

No, we're not.

BY MR. COMAN:

So i am going to instruct Ms. Freese to end the sworn statement. You are free to do what you want however you want to do it.

BY JUDGE JOHNSON:

With all respect to this, Cory --

BY MR. CAHN:

No, let me say my peace. Matt, no, we're not going off the record. There are a number of

C E R T I F I C A T E

This certification is valid only for a transcript with my original signature and original required seal on this page.

I, GAIL FREESE, Certified Court Reporter in and for the State of Louisiana, the "Officer" before whom this sworn testimony was taken, do hereby certify:

That YOLANDA POLLARD, to whom oath was administered by me upon authority of R.S. 37:2554, did testify as herein set forth in the foregoing 211 pages;

That this testimony was reported by me in stenotype method, was prepared and transcribed by me or under my personal direction and supervision, and is a true and correct transcript to the best of my ability and understanding;

That this transcript has been prepared in compliance with transcript format guidelines required by statute or rules of the Board, and I am informed about the complete arrangement, financial or otherwise, with the person or entity making arrangements for deposition services;

That I have acted in compliance with the prohibition on contractual relationships as defined by Louisiana Code of Civil Procedure Article 1434 and in rules and advisory opinions of the Board;

That I have no actual knowledge of any prohibited employment or contractual relationship, direct or indirect, between a court reporting firm and any party litigant in this matter, nor is there any such relationship between myself and a party litigant in this matter;

That I am not related to counsel or to the parties herein, nor am I otherwise interested in the outcome of this matter.

_____

GAIL G. FREESE, CCR
Cert. No. 81013

HAWTHORN

THE HAWTHORN GROUP, L.C. SUITE 100, 625 SLATERS LANE ALEXANDRIA, VIRGINIA 22314
phone 703.299.4499 fax 703.299.4488 WWW.HAWTHORNGROUP.COM

May 9, 2018

Marcus V. Brown, Esq.
Executive Vice President and General Counsel
Entergy Corporation
639 Loyola Ave., Suite 2600
New Orleans, LA 70113

Dear Marcus:

Following is a summary of The Hawthorn Group's engagement to provide public affairs support for Entergy's proposed power plant in New Orleans East.

Specifically, Hawthorn was retained by Entergy to turn out supporters for public hearings on October 16, 2017 and February 21, 2018. Hawthorn was not retained to support any other hearings, proceedings or meetings on this project.

For those two hearings, Hawthorn retained Crowds on Demand, a subcontractor with experience and contacts in New Orleans, to provide supporters for the proposed new power plant. Hawthorn did not inform anyone at Entergy that Hawthorn had engaged Crowds on Demand as a vendor to work on the project, and Entergy did not authorize the engagement of Crowds on Demand.

Hawthorn's order to Crowds on Demand was to provide supporters who would understand and be able to communicate their support for the proposed new power plant in New Orleans East. Hawthorn did not authorize Crowds on Demand to make any payments to participants, and Entergy did not authorize or direct any payments to participants recruited by Crowds on Demand.

At no time did Hawthorn inform anyone at Entergy that Crowds on Demand was retained on this project, and Hawthorn neither sought nor received authorization from anyone at Entergy for Crowds on Demand to make any payments to supporters.

Thank you for the opportunity to respond, and please let us know if you need additional information.

Sincerely,

John Ashford
Chairman & CEO

From: "POLLARD, YOLANDA Y" <EXCHANGELABS/EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/RECIPIENTS/48C98C8423624AAFBA82674B27F1A931-POLLARD, YO>
Sent: 3/6/2018 3:09:18 AM +0000
To: Suzanne Hammelman <shammelman@hawthorngroup.com>
Subject: Re: Re: request for key points

Thanks. We'll talk tomorrow.

On Mar 5, 2018, at 8:53 PM, Suzanne Hammelman <shammelman@hawthorngroup.com> wrote:

EXTERNAL SENDER. DO NOT click links, or open attachments, if sender is unknown, or the message seems suspicious in any way. DO NOT provide your user ID or password.

See if this helps – you should also call me in the morning and I can provide a bit more background on a couple of these points. You are welcome to call me before your 9AM meeting.

Question	Response	For your background
We have heard that Entergy pays supporters $120 to come to City Council meetings and say they support Entergy's request for rate increases and plant approvals.	Entergy provides employees and other stakeholders – like union members – with information about some hearings and encourages them to participate if they support the company on the issue. They are provided with talking points and we have also provided	Some groups DO pay for "volunteer" supporters to do things. For instance – see this link: http://www.washingtonexaminer.com/craigslist-ad-offers-protesters-15-to-crash-trump-rally/article/2587047 Entergy did not pay anyone for their support.

	colored t-shirts in some instances so Council members can recognize supporters in the audience. We also inform our customers through social media about hearings and ask them to participate if they support us. We recruit support the same way other organizations do. For instance, the Green Army recruits hearing supporters actively on social media and blast emails, providing their them with talking points. Back in October we heard one gentleman – who I would describe as an "avid activist"	

	- Tweeted that we paid $60 for support, and it seems the latest rumor is $120. This is, perhaps, one man's way of stirring up controversy and create an illusion that we have to pay for support. That's simply not true. There is strong support for the plant in the community as I think we have demonstrated. There is also the expected opposition.	
People met up at Dave n' Busters after a hearing in October to get paid.	I don't know anything about a meeting at Dave n' Busters.	There was no meeting at Dave n' Busters. It is possible that some people gathered after the hearing but there was certainly no meeting. =
People were asked to sign non-disclosure agreements.	I don't know anything about this. Entergy did not ask anyone to sign a non-disclosure agreement for any reason	

	related to any of these hearings.	
A man with one of your orange t-shirts is saying he knows about non-disclosure agreements and payments.	Supporters at one of the hearings, including employees and union members, were provided with orange t-shirts so Council members would recognize supporters in the crowd. These were also passed out to other supporters who showed up. We had about 500 (?) t-shirts and, frankly, they were very popular. People wanted them and our team passed them out. So I don't know who may have gotten their hands on a t-shirt and I sure don't know what happens to the t-shirts after the hearings. People keep them and	

	wear them. Some people give them to Goodwill. Lots of people may have those orange t-shirts by now. They weren't hard to come by.	

From: POLLARD, YOLANDA Y [mailto:YPOLLAR@entergy.com]
Sent: Monday, March 5, 2018 8:14 PM
To: Suzanne Hammelman <shammelman@hawthorngroup.com>
Subject: Re: request for key points

Yes, very. We'll actually discuss it on an internal call tomorrow (TUES) at 9 a.m. CST. Any points you can share before then would be helpful.

On Mar 5, 2018, at 6:30 PM, Suzanne Hammelman <shammelman@hawthorngroup.com> wrote:

> EXTERNAL SENDER. DO NOT click links, or open attachments, if sender is unknown, or the message seems suspicious in any way. DO NOT provide your user ID or password.
>
> Interesting
>
> ---
> From: POLLARD, YOLANDA Y <ypollar@entergy.com>
> Sent: Monday, March 5, 2018 6:57 PM
> Subject: request for key points
> To: Suzanne Hammelman <shammelman@hawthorngroup.com>
>
> Hi Suzanne,
>
> This statement below is circulating in an e-mail distributed by

some opponents of New Orleans Power Station. We're finally heading into the full City Council vote on Thursday morning, March 8. Could you share with me by Wednesday some key points that our leadership could have on hand for this issue? The response points would be used to address questions from city council members or others only if asked. For background, one of the opponents wore a marked-up orange shirt to the Feb. 21 utility committee vote. He also referenced signed non-disclosure agreements and a meeting at Dave & Busters to pay people (I think $60) as part of his comments.

Thanks,
Yolanda

Entergy pays $120 to people to come to City Council meetings and say that they support Entergy's request for rate increases and plant approvals. We have proof of this that will be presented at the City Council meeting March 8 if community people are allowed to speak.

From: Suzanne Hammelman <shammelman@hawthorngroup.com>
Sent: 3/7/2018 11:04:36 PM +0000
To: "POLLARD, YOLANDA Y" <YPOLLAR@entergy.com>
Subject: Re: Re: information

Hired as an actor?

Apparently their evidence is one person who is dilusional or just lying

---

From: POLLARD, YOLANDA Y <YPOLLAR@entergy.com>
Sent: Wednesday, March 7, 2018 5:05:00 PM
To: Suzanne Hammelman
Subject: information

Just received these questions via email from "DeSmog Blog" writer:

Has Energy paid anyone to speak in favor of the company's proposed new project in New Orleans East at any of the public meetings/hearings- including any past council meetings , the meeting tomorrow on the 8 or at the DEQ permit hearing last night?

There is a man who has gone on the record to say he was hired and paid $120 as an actor to speak on behalf of Entergy about his support for the new proposed plant at a previous city council meeting.

Suzanne Hammelman

From: POLLARD, YOLANDA Y <YPOLLAR@entergy.com>
Sent: Tuesday, September 19, 2017 5:33 PM
To: Suzanne Hammelman
Subject: Re: Oct. hearing

Hi Suzanne,
I've reviewed this approach with Charles. We'd like to move forward with the plan. Other tactics will be placed and running in the background so you will have the benefit of general local awareness of Oct. 16 hearing.

We're both away from the office this week. Please let me know if you can get any of these items underway now in the interest of time.

Thanks,
Yolanda

On Sep 18, 2017, at 5:39 PM, Suzanne Hammelman <shammelman@hawthorngroup.com> wrote:

> EXTERNAL SENDER. DO NOT click links, or open attachments, if sender is unknown, or the message seems suspicious in any way. DO NOT provide your user ID or password.
>
> *Yolanda –*
>
> Thanks for calling and the answer is "YES" we can help turn people out for the **Monday, October 16 hearing**. We have a very good grassroots organizer on the ground in the New Orleans area who can work on this for us and we are confident we can turn out NOLA citizens (18 and older) who support the issue (and will tell people why if asked). These citizens would complement the company's efforts to recruit GrassTops or leadership types (business and community leaders). The people we would turn out would care about jobs/economic development, reliable and affordable power AND would be highly focused on preventing the kinds of issues the city just went through.
>
> I would caution you that we **generally do not recommend this type of stand-alone effort** and certainly would not suggest doing it more than once. Questions will be asked – who are these people and WHY did they turn out? Who got them here? So for future efforts, you most certainly should have

an organization behind it, with a "face(s)," a website where people can go for information and to join, and an active social media conversation.

For the October hearing, if the company can promote the event (local newspapers ads, some social media promotion) just letting people know about the hearing and encouraging them to weigh in, that would be helpful and would answer for the short-term the question, "why did these people turn out?" We CAN get people there without that, but it would be better to have it.

Below is a pricing menu, including turning supporters out; getting a few of them to sign in to speak and have them deliver a message; adding some branded t-shirts **so it will be obvious how many supporters are there** (e.g., "Local Energy. Reliable Energy."); and perhaps adding a petition that could be given to the Council members. It is important to note that this **price is based on having three-and-a-half weeks** to complete the recruiting process.

- Hawthorn management fee: $7,500
- Hawthorn expenses: minimal – I don't think there would be any expenses here except for the gross receipts tax we're required to charge which is 0.0035 x total invoice we send you
- Supporters for the hearing (50-100): $8,500-$14,000
- *Optional* - Supporters to sign in and speak (10): $6,500
- *Optional* – T-shirts (50-100): $1,000-$1,500
- *Optional* – Petition signatures (1,000-1,500): $19,000-$26,000

Let me know if this is sufficient for your purposes. Call me anytime with questions or revisions.

Thanks! And we'll be thinking about your Dad.

Best,

Suzanne
703-626-4385

SWORN STATEMENT

OF

CHARLES RICE

Recorded on Monday, the 15th day of October, 2018, at the Law Offices of Sher, Garner, Cahill, Richter, Klein & Hilbert, 909 Poydras Street, 28th Floor, New Orleans, Louisiana 70112.

REPORTED BY:
LESLIE L. NICOSIA
CERTIFIED COURT REPORTER

A P P E A R A N C E S

REPRESENTING THE NEW ORLEANS CITY COUNCIL:

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BY: WALTER F. BECKER, JR., ESQUIRE
TERRY Q. ALARCON, ESQUIRE
1100 Poydras Street
Suite 2300
New Orleans, Louisiana 70163

Q. Was that just a auto call, or was that like a video link as well?

A. I'm sure it was just audio.

Q. In that follow-up proposal that's part of Exhibit 14, what, if any, specific tasks did Entergy select from and engage the Hawthorn Group to perform?

A. We retained them to recruit grassroots support.

Q. Why?

A. As I stated previously, we don't know everybody in the community. We can't know everybody in the community. If there were people that they knew that we didn't know, if they had people in their database that we weren't aware of, we would like to know who those people were. Like they say right here, "We know the issues and the players."

Q. Certainly, Entergy knew the issues, correct, better than anyone; fair statement?

A. Of course we knew the issues.

Q. As you referenced earlier, you are from here, and Entergy New Orleans is obviously a New Orleans company, correct?

A. That is correct.

amount of money.

BY MR. LAWRENCE:

I'm done.

EXAMINATION BY JUDGE JOHNSON:

Q. Mr. Rice, I'm going to try my best not to make this long story longer. That's my goal. And I very truly -- And I said this to Cory outside. I have no intention of beating up on you.

A. I appreciate that.

Q. That's not my intent.

A. I've been around a while. I've been beat up before in a number of different environments.

Q. I feel you, my brother. I do. I do.

One of the things, though -- And I am really impressed with the people who work for Entergy, the people who we have had here and we have interviewed. I mean, to a person, I'm impressed with them. I'm impressed with their dedication, with their knowledge, with their belief in Entergy and truly in the values of Entergy. And to a person, I would think, they all have shared, and I'm impressed with that.

You are 101st --

contract specifically states that they were not supposed to hire a subcontractor without our permission.

So, again, I wouldn't anticipate nor contemplate that they would go out and hire a third party to pay people to show up at the meeting. It's just something that never occurred to me, never occurred to me that it was a possibility, never occurred to me that it was even in the universe of possibilities.

Q. So, the answer is no?

A. Again, I never had a conversation with Ms. -- What's her last name?

Q. Hammelman.

A. Hammelman. I had one conversation where Mr. Ashford did his presentation. And nobody on my team -- Or there was never any meeting or never ever a discussion where any of us even thought or contemplated paying people to show up at a meeting. So, there was no need for me to have that conversation.

Q. I'm going to do something that the people on this side the table are not going to appreciate. I talked to John Ashford, and I'm assuming they know that. Because this is how

Cal rolls. I assume there are no secrets. See, I assume that.

And I was impressed with him. He's my kind of guy. I saw him on the website, yeah, on the website. I didn't see him beyond that. But I assume he's large in stature. He's a country guy. He's like me. You know, he can tell a good story. He can do all that kind of stuff that country people like me do. And that's the guy I talked to on the phone.

And I looked at his -- And looking at the website and the description of him, which again, he's kind of described in that fashion, he's well educated, very well educated. But that's his take. That's how he goes. That's his personality. He is renowned in terms of business. If you Google John Ashford, he's renowned in terms of business.

And he grew up with another guy, Nat Reese. If you Google Nat Reese, I mean, these two guys are movers and shakers across corporations, across political entities, across entities like Entergy. John Ashford is a mover and a shaker. Would you agree with that?

A. I mean, I'm not that familiar with his

background. But if you said he's world renowned, that's --

Q. You know --

A. -- or nationally renowned, then I assume that to be the case, which is why I think it would be fair for somebody to assume that he would conduct himself appropriately, along with other members of his organization.

Q. One of the interesting things that have come out here is that what few, if anyone, at Entergy actually did what I just said.

A. What's that?

Q. Google John Ashford, Hawthorn. I mean, just do a little Google search. It's just so interesting in terms of the people we have talked to that that hasn't come out; that is, is that, well, we just out of caution, we looked up Hawthorn to see what they were about. I didn't talk to a person from Entergy who said they did that. Did you do that? I don't think -- The answer is no, because you actually already said no, you didn't.

A. I didn't. But he had done work for the company previously and apparently had done a good job.

C E R T I F I C A T E

This certification is valid only for a transcript with my original signature and original required seal on this page.

I, LESLIE L. NICOSIA, Certified Court Reporter in and for the State of Louisiana, the "Officer" before whom this sworn testimony was taken, do hereby certify:

That CHARLES RICE, to whom oath was administered by me upon authority of R.S. 37:2554, did testify as herein set forth in the foregoing pages;

That this proceeding and testimony was reported by me in stenotype method, was prepared and transcribed by me or under my personal direction and supervision, and is a true and correct transcript to the best of my ability and understanding;

That this transcript has been prepared in compliance with transcript format guidelines required by statute or rules of the Board, and I am informed about the complete arrangement, financial or otherwise, with the person or entity making arrangements for deposition services;

That I have acted in compliance with the prohibition on contractual relationships as defined by Louisiana Code of Civil Procedure Article 1434 and in rules and advisory opinions of the Board;

That I have no actual knowledge of any prohibited employment or contractual relationship, direct or indirect, between a court reporting firm and any party litigant in this matter, nor is there any such relationship between myself and a party litigant in this matter;

That I am not related to counsel or to the parties herein, nor am I otherwise interested in the outcome of this matter.

_____

LESLIE L. NICOSIA, CCR
Cert. No. 95004

John Ashford

From: Suzanne Hammelman
Sent: Monday, October 23, 2017 1:26 PM
To: Adam Swart
Cc: Steve Cohen (scohen@hawthorngroup.com)
Subject: FW: image

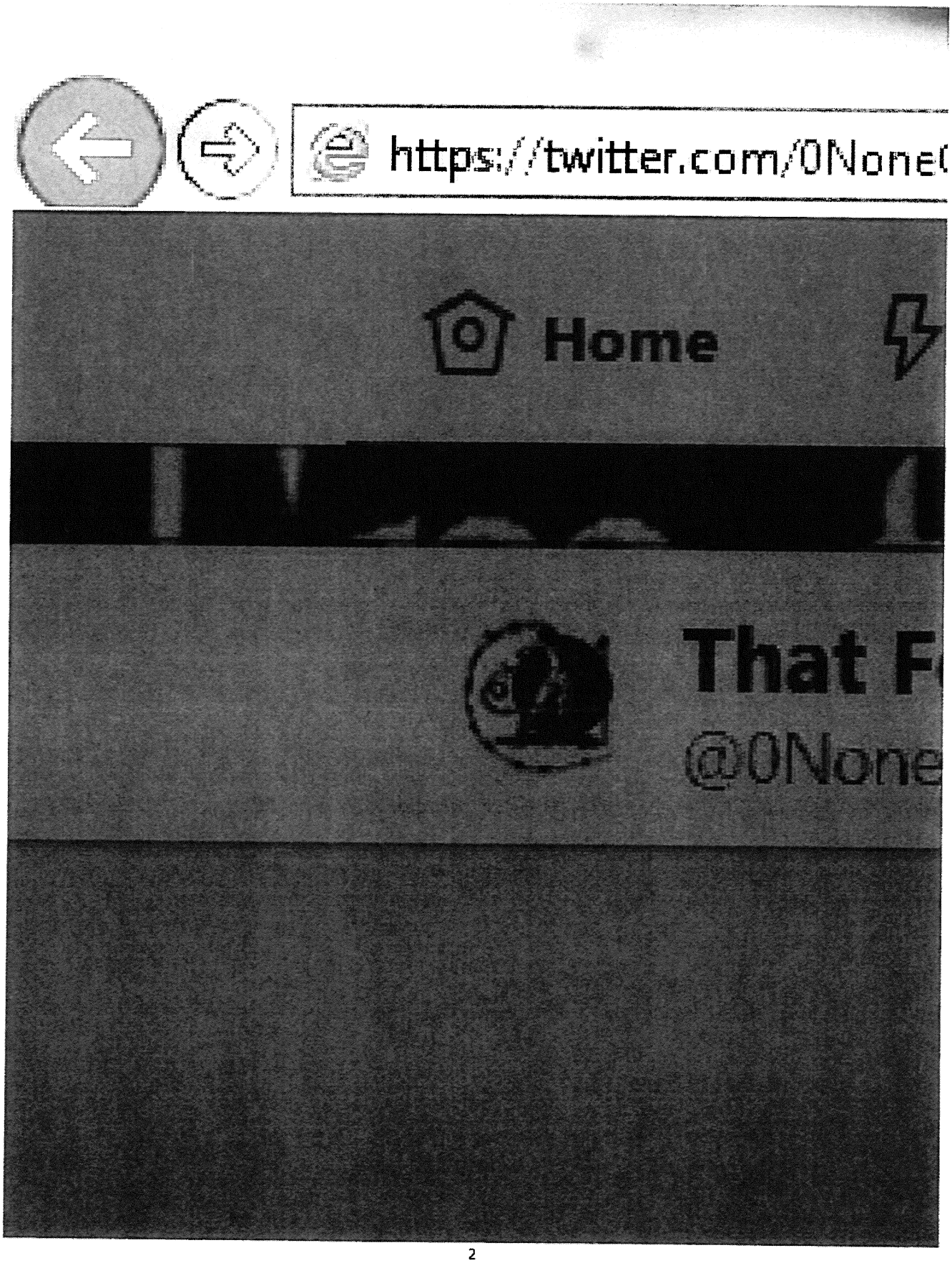
From: POLLARD, YOLANDA Y [mailto:YPOLLAR@entergy.com]
Sent: Monday, October 23, 2017 1:19 PM
To: Suzanne Hammelman <shammelman@hawthorngroup.com>
Subject: image


That Foolish Faust on Twitter: ...
That Foolish Faust on
Home
Moments
That Foolish Faust
@0NoneOfTheAbove
#AntiCorruptionAct advocate
#CriminalJusticeReform advocate
#unhackthevote advocate Non-Factor
New Orleans, LA
facebook.com/inoneoftheabove
Joined July 2016
That Foolish Faust
@0NoneOfTheAbove
So I got the verbal confirm
There were paid protesters
Council. $60 paid 2 hrs late
Busters
7:44 AM - 22 Oct 2017
3 Retweets 3 Likes

Suzanne Hammelman

From: POLLARD, YOLANDA Y <YPOLLAR@entergy.com>
Sent: Monday, October 23, 2017 4:28 PM
To: Suzanne Hammelman
Subject: second tweet, see comments

Here's the second tweet by same individual we discussed, with comments.


https://twitter.com/0None
Home
That F
@0None

From:	"POLLARD, YOLANDA Y" <EXCHANGELABS/EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/RECIPIENTS/48C98C8423624AAFBA82674B27F1A931-POLLARD, YO>
Sent:	2/22/2018 5:57:09 PM +0000
To:	Suzanne Hammelman <shammelman@hawthorngroup.com>
Subject:	RE: RE: last night

Thanks for checking in. Everything went fine and the proposal was passed by the utilities committee 4-1 for consideration by the full council on March 8. I was a little surprised that *some* folks wore the orange shirts again. An opponent wore a marked-up orange shirt and commented about paid supporters.

From: Suzanne Hammelman [mailto:shammelman@hawthorngroup.com]
Sent: Thursday, February 22, 2018 11:38 AM
To: POLLARD, YOLANDA Y
Subject: last night

Congratulations!

Wondering if there is any feedback on the turnout/speakers? Just want to make sure we're doing a good job (and if not, I need to make corrections!).

Thanks.

From:	"POLLARD, YOLANDA Y" <EXCHANGELABS/EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/RECIPIENTS/48C98C8423624AAFBA82674B27F1A931-POLLARD, YO>
Sent:	2/22/2018 11:16:21 PM +0000
To:	Suzanne Hammelman <shammelman@hawthorngroup.com>
Subject:	RE: RE: FYI

All good to know. Thanks for tracking this down.

From: Suzanne Hammelman [mailto:shammelman@hawthorngroup.com]
Sent: Thursday, February 22, 2018 1:13 PM
To: POLLARD, YOLANDA Y
Subject: FYI

Yolanda – I followed up with our supervisor/recruiter in NOLA who said that he didn't tell people to wear the shirts (tho he didn't tell them *not* to either). just happened because the supporters loved the shirts and were passionate about the cause. For what it's worth, apparently many of them have been wearing those shirts everywhere because they were comfy shirts and because they believed in the message.

You should know that we used to have this happen to us all them time when we were running a 12 state campaign over three election cycles (2008, 2010, and 2012) to support coal-based electricity. We passed out 10s of thousands of shirts during each run. We would often find people at one of the events with shirts on from a previous campaign. We would see shirts at events and shirts in airports and shopping centers. In fact, years later I still occasionally see a "Clean Coal" shirt or cap when I'm in one of the states at an airport. People LOVE this stuff and it does carry a message to more people than just the wearer.

For the "who knew" file. ☺

Chaffe McCall LLP

WALTER F. BECKER, JR.
Partner
Licensed in Louisiana and Texas

Direct Dial No: (504) 585-7046
Direct Fax No: (504) 544-6071
E-mail:becker@chaffe.com

August 17, 2018

CONFIDENTIAL COMMUNICATION

Via email: mcoman@shergarner.com
Hon. Calvin Johnson
Matthew Coman
Sher Garner, LLC
909 Poydras Street
Suite 2800
New Orleans, LA 70112

Re: New Orleans City Council –
Entergy/New Orleans Power Station Investigation
(Motion M-18 – 196)
Our File No. 52114

Dear Judge Johnson and Matt:

This is a follow-up to our meeting with you on August 10, 2018.

Entergy New Orleans, LLC ("Entergy") formally requests that the New Orleans City Council allow its attorneys to attend and participate fully in all interviews of non-Entergy witnesses in connection with the New Orleans Power Station Investigation. Entergy further requests that its attorneys be allowed to attend the taking of all sworn statements during the course of this investigation and participate in the questioning of both Entergy and non-Entergy witnesses.

Thank you for your consideration of this request.

Sincerely,

Walter F. Becker, Jr.
Terry Q. Alarcon

WFB/sbr

cc: Cory R. Cahn **(Via email: ccahn@entergy.com)**

CAHN, CORY R

From: Coman, Matthew <mcoman@shergarner.com>
Sent: Friday, August 17, 2018 12:35 PM
To: 'Rochelle, Sandy'; fourwakes@gmail.com
Cc: CAHN, CORY R; Becker, Walter
Subject: RE: N.O. City Council - Entergy (Motion M-18-196) [CMNO-ChaffeDMS.FID260936]

At this stage, we decline the request for Entergy Counsel to attend all interviews and sworn statements. As always, happy to discuss in detail. Thank you.

From: Rochelle, Sandy [mailto:rochelle@chaffe.com]
Sent: Friday, August 17, 2018 11:45 AM
To: fourwakes@gmail.com; Coman, Matthew <mcoman@shergarner.com>
Cc: ccahn@entergy.com; Becker, Walter <Becker@chaffe.com>
Subject: N.O. City Council - Entergy (Motion M-18-196) [CMNO-ChaffeDMS.FID260936]

Please see attached correspondence from Walter Becker.

Chaffe McCall L.L.P.
Serving our clients for over 190 years

Sandy Rochelle | *Legal Secretary*
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E-mail:becker@chaffe.com

August 29, 2018

CONFIDENTIAL COMMUNICATION

BY-HAND DELIVERY
Hon. Calvin Johnson (Email: fourwakes@gmail.com)
Matthew Coman (Email: mcoman@shergarner.com)
Sher Garner, LLC
909 Poydras Street
Suite 2800
New Orleans, LA 70112

Re: New Orleans City Council –
Entergy/New Orleans Power Station Investigation
(Motion M-18 – 196)
Our File No. 52114

Dear Judge Johnson and Matt:

This is a follow-up to our conference call with Matt this morning about outstanding issues in this matter.

As we discussed, we are prepared to produce the first two witnesses that you requested for interviews at your office on Wednesday, September 5, 2018. We have requested several times that you send us the names of the other Entergy witnesses you wish to interview so that we can schedule them on the dates you previously provided – September 5, 6, and 7. There is no reason why we cannot complete at least this part of the process next week.

Here is our position on the outstanding issues in this matter:

- **Privileged documents** – On August 22, 2018, we sent you a revised privilege log covering our two productions of documents on June 8, 2018, and August 21, 2018. To date, Entergy has produced approximately 6,965 documents. The communications identified on the privilege log are clearly privileged pursuant to Article 506 of the La. Code of Evidence and Rule 501 of the Federal Rules of Evidence. Case law has repeatedly held that in-house counsel communications and/or attorney mental impressions within the company are protected by attorney-client privilege and the attorney work product doctrine. *E.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed. 584 (1981); *Exxon Mobil Corp.*, 751 F. 3d 379, 382-383 (5th Cir. 2014); *Kyle v. La. Public Service Com'n*, 878 So. 2d 650, 658-59 (La. App. 1st Cir.

2004). Scholarly commentary in Louisiana says the same thing. 21 La. Civ. L. Treatise, 7.6. Accordingly, Entergy maintains its assertion of attorney-client privilege. Further, these matters are also protected under the work product doctrine of Louisiana Code of Civil Procedure article 1424 and Federal Rule of Civil Procedure 26. Documents created in "anticipation of litigation" are not discoverable. And a governmental investigation triggers the protection. *E.g.*, *In re LTV Sec. Litig.*, 89 F.R.D. 595, 612 (N.D. Tex. 1981); *In re Int'l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1238 (5th Cir. 1982); *In re Linerboard Antitrust Litig.*, 237 F.R.D. 373, 377, 381, 381 n.7 (E.D. Pa. 2006); *Baker v. Chevron USA, Inc.*, No. 1:05-CV-227, 2009 WL 10679629, at *5 (S.D. Ohio June 8, 2009); *In re Trasylol Prod. Liab. Litig.*, No. 08-1928-MDL, 2009 WL 2575659, at *1 (S.D. Fla. Aug. 12, 2009). Accordingly, Entergy maintains its assertion of privilege under the work product doctrine.

- **Participation by Entergy's in-house counsel in witness interviews and sworn statements** – Entergy's in-house counsel, Cory Cahn, is a member of the legal team in this matter and is entitled to attend witness interviews and sworn statements. Contrary to your representation, he is not a fact witness "relative to allegations that ENO, Entergy, or some other entity paid or participated in paying actors to attend and/or speak at one or more public meetings in connection with ENO's NOPS application." (Motion M-18-196, New Orleans City Council, May 24, 2018). Please reconsider your decision to cancel the scheduled interviews next week if Mr. Cahn will be present.

- **Participation by Entergy's counsel in all witness interviews** – We would also apprcciate it if you would reconsider your decision to exclude Entergy's counsel from participating in interviews and sworn statements of all non-Entergy witnesses in connection with the City Council's investigation. Entergy has a fundamental right to participate in the interviews/statements and question the witnesses claiming to have information relevant to this proceeding.

- **Cell phone data** – As we have discussed, Entergy does not provide cell phones to its employees. While Entergy makes a small stipend available to employees who choose to use their personal cell phones for company business, Entergy employees are required to purchase their own cell phones and pay for service. Furthermore, Entergy does not store text messages from its employees' personal cell phones on the Entergy network. In connection with the City Council's investigation, we requested that the employees identified in Topic No. 2 (Nos. 1-15) provide us with any text messages meeting the criteria outlined in your letter dated August 8, 2018. We previously produced several text messages to the City Council on June 8, 2018, and included several text messages in the August 21, 2018, production to you. Your request that Entergy image and search the cell phones of certain employees raises serious Constitutional concerns, which we will address next week.

We would like to resolve these disputes as quickly as possible so that Entergy witness interviews can be completed next week and you can deliver your report to the City Council on schedule.

Sincerely,

Walter F. Becker, Jr.
Terry Q. Alarcon

WFB/sbr
Enclosures

cc: Cory R. Cahn **(Via email: ccahn@entergy.com)**

LAW OFFICES OF
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September 4, 2018

becker@chaffe.com
Walter F. Becker, Jr.
Terry Q. Alarcon
Chaffe McCall, L.L.P.
1100 Poydras Street, Suite 2300
New Orleans, LA 70163

Re: New Orleans City Council - Entergy/New Orleans Power Station Investigation
(Motion M-18-196)

Dear Judge Alarcon and Mr. Becker:

This correspondence responds to your letter dated August 29, 2018. This correspondence exchange marks the second occasion in which we have requested Entergy's cooperation with this investigation. When we first began our engagement in this matter, Entergy proclaimed its intention to cooperate and to be transparent with this investigation. Contrary to that purported assertion, Entergy has been reluctant to cooperate with the investigation as directed by Motions M-18-196 and M-18-197. Given the mandates contained in those motions, we will move forward and hope that Entergy voluntarily and properly satisfies its obligations. Otherwise, we will continue the investigation and seek appropriate legal relief in order to compel Entergy to comply with the lawful requests previously made and detailed herein.

We offer the following regarding the remaining issues in your August 29, 2018 letter.

LAW OFFICES OF
SHER GARNER CAHILL RICHTER
KLEIN & HILBERT, L.L.C.

A. Entergy's Claim of Privilege – "Entergy's Investigation"

In Motion M-18-196, the New Orleans City Council, pursuant to Sections 3-124 and 3-130 of the Home Rule Charter, directed Entergy to produce the following on or before June 8, 2018:

1) **All Documents** that relate in any way to the Matter and/or the **Investigation**.
2) A **list of All Persons** who participated in the Matter and/or the **Investigation** with a detailed explanation of each Person's role.
3) All Contracts related to the Matter and/or the Investigation.
4) All **Communications** related to the Matter and/or the **Investigation**.
5) All Documents related to the Corporate Values and Business Practices.
6) All Documents related to Post-Report Communications.
7) All Documents related to Briefing Materials.
8) A list of all Persons who were interviewed, contacted or questioned in connection with the Investigation with contact information for each and an explanation of his/her role in the Matter and/or the Investigation.
9) A list of all Persons paid by Entergy, Contractor and/or Subcontractor in connection with the Matter.
10) **A list of all Persons who were involved in or conducted the Investigation**.
11) All Documents relating to prior agreements with or among Contractor and/or Subcontractor in connection with any proceeding before the New Orleans City Council.
12) All Documents relating to any existing agreements with or among Contractor and/or Subcontractor in connection with any proceeding before the New Orleans City Council.
13) All search terms used by Entergy to produce the above documents related to this matter and/or investigation.

Motion M-18-196 defined "**Investigation**" as "[t]he internal investigation performed by Entergy and the resulting report together with ***all materials***, ***documents***, ***interviews***, ***memoranda***, ***analysis***, ***communications***, contracts, ***witness statements***, witness lists, ***evaluations, drafts***, cancelled checks, itemized invoices, video or sound recordings and any other materials***, received, reviewed or used in the investigation***."

On or about June 8, 2018, Entergy responded in writing to the New Orleans City Council's document request but **failed to produce** reports or notes of interviews, analysis, witness statements, witness lists, evaluations, documents considered, or any other investigative

material "received, reviewed, or used in the investigation." Entergy also **failed to produce drafts** of the Report of Investigation published by Entergy on or about May 10, 2018. Instead, following the directives of Motion M-18-196, Entergy claimed that such production need not be made because of a claim of privilege.

To the contrary, applicable law shows that such data is **not privileged**. First, Entergy undertook their investigation **by their own employees and did not engage outside counsel**. As a result, the investigation and its resulting documentation is not privileged. *See Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981); *In re Fischel,* 557 F.2d 209, 211 (9th Cir. 1977) ("Corporations may not conduct their business affairs in private simply by staffing a transaction with attorneys."). Second, and more importantly, **the investigation was not conducted in order to provide legal advice**. Instead, at most, Entergy conducted the investigation for a "business purpose," which does not provide any protection for such information or records. *See Heaton v. Monogram Credit Card Bank of Georgia*, 2004 WL 515760 at *4 (E.D. La. Mar. 16, 2004) ("The attorney-client privilege protects confidential communications to a lawyer or his subordinate, 'for the primary purpose of securing either a legal opinion or legal services, or assistance ***in some legal proceeding***.'" (quoting *United States v. Robinson*, 121 F.3d 971, 974 (5th Cir. 1997)) (emphasis added); *Securities and Exchange Commission v. Gulf & Western Industries, Inc.*, 518 F.Supp. 675, 683 (D.D.C. 1981) (business advice not privileged); *U.S. v. ChevronTexaco Corp.*, 241 F.Supp. 2d 1065, 1067 (N.D. Cal. Sept. 12, 2002) ("Because in-house counsel may operate in a purely or primarily business capacity in connection with many corporate endeavors, the presumption that attaches to communications with outside counsel does not extend to communications with in-house counsel."). Here, there was no legal proceeding so any "internal investigation" is plainly not susceptible to a legitimate claim of privilege. Further "business advice" is not a cognizable ground to claim privilege. *See U.S. Postal Serv. v. Phelps Dodge Ref. Corp.*, 852 F. Supp. 156, 160 (E.D.N.Y. 1994) (the attorney-client privilege "attaches only to legal, **as opposed to business, services**" and protects communications "made to the attorney acting in her capacity as counsel. If the communication[s] are made to the attorney in her capacity as a business adviser, for example, [they] ought not be privileged.") (citations and quotations omitted) (emphasis added); *see also In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1037-38 (2d Cir. 1984); *United States v. Kovel*, 296 F.2d 918, 922 (2nd Cir. 1961) (explaining that, to qualify for the privilege, the confidential communication between client and attorney **must be made for the purpose of obtaining legal, not business, advice**). Notably, "[i]nvestigatory reports and materials are not protected by the attorney-client privilege or the work-product doctrine merely because they are provided to, or prepared by, counsel." *OneBeacon Ins. Co. v. Forman Int'l, Ltd.,* No. 04 Civ. 2271(RWS), 2006 WL 3771010, at *5–6 (S.D.N.Y. Dec. 15, 2006). Accordingly, Entergy's claim of privilege is misplaced, unfounded and legally wrong.

Even if Entergy's investigation was considered privileged initially, Entergy waived any such privilege when it voluntarily published Entergy's own "Report of Investigation" dated May 10, 2018 on its website. *See Conkling v. Turner,* 883 F.2d 431, 434 (5th Cir. 1989) (a party may not use privileged information for its benefit, while asserting the attorney-client privilege to prevent disclosure); *Nguyen v. Excel Corp.,* 197 F.3d 200, 207 (5th Cir.1999) (a party's disclosure of otherwise confidential communications acts as a waiver of the attorney-client privilege); *United States v. American Tel. and Tel Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980) (disclosure to third person waives attorney-client privilege). In other words, Entergy's investigation, even if it was privileged, which it was not, ceased being privileged when Entergy voluntarily published its Report of Investigation.

B. Presence of Multiple Witnesses at Requested Interviews – Entergy Employee Cory R. Cahn

Next, Entergy has expressed its preference to have Entergy's In-House Counsel, employee, and witness, Cory R. Cahn ("Cahn"), present for all interviews with other Entergy employees even though Entergy will already be accompanied by two or more extremely capable external counsel for Entergy. Such a scenario is fundamentally inappropriate and without precedent. In its response to Motion M-18-196, **Cahn listed himself** as having "[p]articipated in the investigation resulting in the Report of Investigation . . . dated May 10, 2018." Entergy New Orleans, LLC's Written Responses to City Council's Motion M-18-196 dated June 8, 2018 at p 7. As detailed above, Motion M-18-196 specifically **encompasses Entergy's investigation**, which, by his own declaration, Cahn helped conduct.

We propose that a different Entergy attorney attend these interviews but none that were involved in the investigation as claimed by Entergy in its written response to Motion M-18-196 (to include Mr. Cahn, Marcus V. Brown, Daniel Falstad, Karen Freese, or Wendy Hickok Robinson). *See* Entergy New Orleans, LLC's Written Responses to City Council's Motion M-18-196 dated June 8, 2018 at p 7. It is imperative that this investigation be conducted in an orderly and professional manner. Entergy's request to have one witness attend another witness' interview is inappropriate and evidences a refusal to cooperate with the investigation.

C. Entergy's Presence at Interviews of Non-Entergy Employees

In addition to the above, you have requested to be present at interviews of non-Entergy employees. For multiple reasons, such presence would be in appropriate. Entergy is free to conduct its own investigation and has apparently done so according to its "Report of Investigation" issued May 10, 2018. However, there is no proper purpose for Entergy to be present at interviews of non-Entergy employees. The contents of those interviews and sworn

statements will be made part of the Final Report.

D. "Cell Phone Data"

Finally, regarding data maintained on various cellular telephones in the control and custody of relevant Entergy employees, Entergy claims that such material is not the property of Entergy and is, instead, maintained by various employees. In addition, Entergy claims that it has produced the requested material. To be accurate, Entergy has produced two (2) text message threads between two (2) sets of individuals, which are allegedly representative of all available text messages concerning dozens of employees spanning several months in a contested matter subject to a high-level of media scrutiny. Such a claim defies reality. The absence of these records is troubling. As you know, we requested that Entergy provide relevant devices to us or a third-party vendor for data retrieval purposes. As we explained, third-party vendors are well-equipped to retrieve available data from various devices using Forensic Tool Kit (or "FTK"). Once that task is complete, Entergy may then review for responsiveness.

We look forward to discussing the above-listed issues and look forward to receiving Entergy's cooperation. Thank you in advance for your consideration.

Sincerely,

/s/ Matthew M. Coman

Matthew M. Coman
James M. Garner
Contract Independent Investigators

cc: The Honorable Calvin Johnson (Contract Independent Investigator) (via e-mail)