BEFORE THE
COUNCIL OF THE CITY OF NEW ORLEANS

REVISED APPLICATION OF ENTERGY NEW ORLEANS, LLC FOR A CHANGE IN ELECTRIC AND GAS RATES PURSUANT TO COUNCIL RESOLUTIONS R-15-194 AND R-17-504 AND FOR RELATED RELIEF	))))))	**DOCKET NO. UD-18-07**

MEMORANDUM AND ORDER

Background

On September 21, 2018, Entergy New Orleans, LLC ("ENO") filed a "Revised Application for a Change in Electric and Gas Rates pursuant to Council Resolutions R- 15-194 and R-17-504 and for Related Relief" ("Revised Application").

Resolution R-18-434, adopted by the New Orleans City Council ("Council") on October 4, 2018, established Docket Number UD-18-07 for the purpose of evaluating the Revised Application. Said resolution allowed for interested parties to intervene in the proceeding, established a procedural schedule for conducting discovery, and set dates for filing of written testimony and the dates for conduct of an evidentiary hearing. In accordance with unopposed motions to extend portions of the procedural schedule, the undersigned Hearing Officer granted the extensions. The evidentiary hearing is currently set for June 17 - 21, and Intervenors' and Advisors' surrebuttal and cross-answering testimony is due April 26, 2019.

On February 1, 2019, the Advisors to the Council of the City of New Orleans ("Advisors"), and various Intervenors, filed written direct testimony responding to certain positions expressed by ENO's witnesses in the Revised Application (the ENO testimony shall hereinafter be referred to as "Revised Direct Testimony"). In response to said direct testimony, ENO filed its rebuttal testimony on March 22, 2019.

On April 3, 2019, Advisors filed a motion to strike ("motion") certain portions of said

rebuttal testimony, along with related charts and a table contained therein. On April 8, 2019, the Hearing Officer issued an order setting forth an expedited schedule for briefing the motion to strike. In accordance with that order, ENO filed an Opposition to the Motion ("Opposition") on April 10, 2019, and Advisors, along with Crescent City Power Users' Group ("CCPUG"), each filed a Reply to ENO's Opposition on April 15, 2019.

Analysis

Advisors' Motion seeks to strike three categories of the March 22 rebuttal testimony, and related exhibits, of ENO witness, Robert B. Hevert: (1) testimony concerning an Empirical Capital Asset Pricing Model ("ECAPM") and associated calculations; (2) testimony concerning an "Event Study" analysis of the effect of the Tax Cut and Jobs Act ("TCJA") on utility stock performance; and (3) testimony concerning updates of the models used in Mr. Hevert's prior written direct testimony in support of his ROE recommendation. Each is addressed below.

ECAPM

Advisors maintain that "[n]ew evidence improperly submitted as rebuttal severely prejudices other parties, including the Advisors, as it requires adequate time for parties to fully analyze it and effectively respond [but] [r]ate cases … [allow] a very limited time period for parties to submit and respond to various rounds of written testimony." Advisors Reply at 2. *See also* CCPUG's Reply at 4-5.

Advisors correctly observe that none of their witnesses relied upon, or even mentioned, the ECAPM model in their direct testimony. Mr. Watson employed the Discounted Cash Flow ("DCF") analysis and Mr. Proctor utilized the Capital Asset Pricing Model ("CAPM"). Memorandum in Support of Motion at 2-4. Accordingly, Advisors assert, Mr. Hevert improperly attempts to introduce a completely new and distinct additional financial model in his rebuttal testimony disguised as a response to testimony provided by Advisor witness Proctor. *Id.* Advisors argue the new ECAPM analysis put forth by Mr. Hevert is irrelevant to Mr. Proctor's work, and ENO should not be allowed to use its rebuttal testimony for the purpose of adding additional modeling that could have been properly presented in the Company's direct case. *Id.*

ENO concedes that the ECAPM analysis constitutes "new" evidence but, citing established law, correctly asserts that new evidence may be introduced in rebuttal if such new evidence is *otherwise* proper, *i.e.*, it is legitimately calculated to "explain, repel, counteract or disprove facts given in evidence by the adverse party." Opposition at 3. ENO argues that the new ECAPM analysis constitutes legitimate rebuttal of Mr. Proctor's CAPM analysis. Opposition at 4-7.

The ECAPM analysis presented by Mr. Hevert is certainly *not* "irrelevant." The ECAPM evidence is *highly* relevant and probative to the issue of an accurate ROE determination, which was the subject of Mr. Proctor's "work." Perhaps Advisors' use of the term was not the best choice of words. However, Advisors clearly intended to convey that Mr. Proctor's discussion of CAPM does not, in itself, justify invoking an entirely new model not heretofore addressed by any witness.

The Hearing Officer is concerned that Mr. Hevert did not mention ECAPM when presenting *his own* original CAPM analysis. After all, he did extensively discuss "beta coefficients." *See e.g.* Revised Direct Testimony of Mr. Hevert at 31-34. Doing so would have advanced the record before the Council by allowing a robust discussion of ECAPM *vis-a-vis* CAPM at every level of testimony, and allowed Mr. Proctor, or another witness, to address the matter at the outset of their testimony.

ENO argues that Mr. Proctor's testimony respecting the significance of declining beta coefficients on business risk opened the door to Mr. Hevert's ECAPM analysis as legitimate rebuttal.

Resolution of this issue is not clear-cut, but a careful reading of Mr. Proctor's testimony leads the Hearing Officer to conclude that the primary purpose of the ECAPM model is to bolster Mr. Hevert's own original testimony; not to rebut Mr. Proctor's testimony. As Advisors correctly state, Mr. Proctor was merely responding to a question regarding possible decline of business risk due to the TCJA. *See* Advisors' Reply at 5.

As the Hearing Officer has previously stated,[1] where the issue of proper rebuttal turns on

[1] *See* **e.g.**, Docket UD-13-01, Order of March 14, 2014.

a fine line, and the testimony is highly relevant and potentially valuable to the Council's task, it would be preferable to allow such testimony *if* it were practicable to adequately mitigate the prejudice to other parties. Unfortunately, given the tight time restrictions under which rate cases must operate, the Hearing Officer concludes that the ECAPM testimony and associated charts and table must be stricken.

TCJA (Event Study)

Advisors similarly complain that Mr. Hevert again "introduces for the first time new empirical methods and analyses to assess the effect of an event such as the … TCJA … on utility stock performance [that] could have been included in ENO's direct case but were not timely presented." Memorandum in Support of Motion at 4. Advisors characterize Mr. Hevert's "new event study … as a second bite at supporting ENO's arguments and recommendations made in their revised direct testimony" and urge the Hearing Officer to preclude ENO from introducing "completely new methods and analyses at this stage of the proceeding." *Id.*

ENO appears to again concede that Mr. Hevert's event study is a *new* analysis, but an analysis presented in direct rebuttal to Mr. Proctor's "claims that the effects of the TCJA are both short-lived and immaterial." Opposition at 8 (internal quotations omitted).

Once again, the Hearing Officer struggles to resolve this second aspect of the motion. Clearly, the event study is new, yet highly relevant to the issue at hand. But yet again, it appears that Mr. Hevert attempts to drive a truck through the narrow door arguably opened by Mr. Proctor. As Advisors observe, Mr. Proctor did not address utility stock performance as a function of the TCJA, which is the subject of the event study.

And again, the disturbing factors here are the failure to present this analysis in Mr. Hevert's revised direct testimony, where he initially discussed TCJA, and the resulting prejudice. Accordingly, the Hearing Officer again reluctantly grants the motion to strike the event study testimony.

At this juncture, the Hearing Officer wishes to be clear. Failure to offer a new analysis (particularly a relatively simple methodology) during direct testimony does *not* necessarily forever foreclose its use in later phases of a rate case including rebuttal. Resolution of a motion

to strike must be assessed on a case-by-case analysis. Obviously, the new analysis must honestly, in good faith, be primarily calculated to "explain, repel, counteract or disprove facts given in evidence by the adverse party," rather than merely bolster a witness' original analysis. As previously discussed, a major factor in that determination is whether the allegedly aggrieved, moving party, has sufficient opportunity to respond.

Updated Models

Finally, Advisors move to strike Mr. Hevert's attempts to update his models by utilizing new data as of February 28, 2019, claiming "[i]f this process were permitted, then parties would be allowed to submit updated data and new support for their direct case at each and every stage of the proceeding, which is inconsistent with the Council's regulatory rules and the Louisiana Code of Evidence." Memorandum in Support of Motion at 4.

ENO perceives no inconsistency with established rate case law and tradition and supports its position with extensive citation. Indeed, ENO asserts that updated analyses based upon more recent data, in this case updating data previously used from June 15, 2018, is critical to determining an accurate and reasonable ROE. Opposition at 9.

Resolution of this third prong of Advisors' motion is frankly less challenging. The Hearing Officer is sympathetic to Advisors' implied contention that parties cannot be permitted to indefinitely "update" their analyses. Fundamental due process requires that an *approximate* date certain cut-off be established at some point, so that all parties are figuratively on the same page. Under the circumstances here,[2] however, and given the protracted duration of this proceeding, the Hearing Officer finds that updating analyses that originally employed data from June 15, 2018, to data from February 28, 2019, is neither unreasonable nor unduly burdensome to the other parties. Of course, the other parties are free to provide reasonable updates in their Surrebuttal and Cross-Answering Testimony.

Here, the motion to strike is denied.

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[2] *See* Opposition at 9-13.

ORDER

IT IS HEREBY ORDERED, that Advisors' Motion to Strike is hereby GRANTED as to testimony, charts, and tables respecting the ECAPM analysis and to the Event Study, but DENIED as to updates respecting analyses other than those respecting ECAPM or Event Study.

AND IT IS FURTHER ORDERED, that ENO, Advisors, and CCPUG shall promptly enter into discussions regarding the removal and segregation of materials from Mr. Havert's's rebuttal testimony in order to effectuate this Order. A revised version of Mr. Havert's rebuttal testimony shall be served on all parties by April 22, 2019, and the segregated - stricken portion of the testimony shall be maintained by ENO, in the event same be proffered at the hearing for identification, or becomes the subject of further proceedings.

This 16th day of April, 2019.

Jeffrey S. Gulin
Hearing Officer