

**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)	DOCKET NO. UD-18-07
RESOLUTIONS R-15-194 AND R-17-504)	
AND FOR RELATED RELIEF)	

MEMORANDUM AND ORDER

Background

Pending before the hearing Officer is a Motion to Strike Portions of Surrebuttal Testimony of Advisors' Witnesses James Proctor and Victor Prep, which was filed by Entergy New Orleans, LLC ("ENO") on May 8, 2019. In accordance with the expedited briefing schedule established by the Hearing Officer in his Order of May 9, 2019, the Advisors filed their Opposition on May 13, and ENO filed its Reply on May 16.

Analysis

Each of the arguments advanced by ENO in support of its motion to strike testimony is addressed below:

(A) Mr. Proctor's surrebuttal testimony regarding Goldman's application of CAPM in estimating Entergy Corporation's cost of equity for its transmission utility business is outside the scope of proper surrebuttal testimony.

Drawing heavily from the Hearing Officer's prior Memorandum and Order of April 16, 2019, ENO strives to construct parallels between the new and previously unaddressed analyses

that were stricken from its own rebuttal testimony, and this new and previously unaddressed analysis set forth in Advisors' surrebuttal testimony. *See, e.g.* ENO Motion at 8; ENO Reply at 4. Once again, the Hearing Officer struggles to resolve an extremely close issue and again observes that "where the issue of proper rebuttal [or surrebuttal] turns on 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." *See* Memorandum and Order, *supra*, at 3. And yet again, *on this specific matter*, the Hearing Officer finds that the prejudice outweighs the introduction of new evidence at this juncture.

And this *does* appear to be new evidence that could have been addressed at an earlier stage. Just as ENO similarly attempted to justify new evidence in its reply to the Advisors' motion, Advisors now contend that Mr. Proctor's surrebuttal testimony directly rebuts Mr. Hevert's Revised Rebuttal testimony, which states that Mr. Proctor's reliance on the CAPM method is "so far removed from the returns investors know to be available elsewhere." Advisors' Opposition at 2 (citing Hevert Revised Rebuttal Testimony at 50). Advisors view this as justification to delve into a Goldman application of the CAPM method, merely because they argue that Goldman utilized CAPM in a manner consistent with Mr. Proctor's analysis – which rebuts Mr. Hevert's assertion. But, this new testimony is not insignificant. It generates an entirely new issue – whether Goldman did, or did not, utilize CAPM in a reasonable manner that was consistent with, and appropriate to Mr. Proctor's analysis. Perhaps in a less compressed procedural schedule, the Hearing Officer would have allowed this relevant testimony (along with some of the previously stricken testimony), and fostered a robust discussion. But we must deal

with the reality of the current schedule.

It is worth reiterating that this newly generated issue certainly is highly *relevant*,¹ and under a more relaxed procedural schedule, might be fair fodder for additional discussion. But, the Hearing Officer applied a strict standard in assessing Advisors' motion to strike, and feels compelled to apply the same strict standard here. The testimony shall be stricken.

(B) Mr. Proctor should not be allowed in surrebuttal to offer opinions on IRS Private Letter Rulings, which the Company provided to the Advisors prior to their direct testimony and which Mr. Proctor ignored in his direct.

Here, the Hearing Officer finds no merit in ENO's motion to strike. While no Advisor witness addressed the cited IRS Rulings, Mr. Proctor quite fairly responded to the rebuttal testimony of ENO's witness, Mr. Roberts. *See* Advisors' Opposition at 4.

(C) Mr. Proctor should not be allowed to support his adjustment to the Company's Prepaid Pension Asset with a new basis, and the justification for his action is specious.

A closer issue is presented here. Advisors appear to concede that the testimony presented here would indeed constitute improper surrebuttal testimony, *but for*, ENO's failure to provide timely discovery responses. One might argue that it is the Advisors who failed to avail

¹ Just as was the newly discussed ECAPM analysis, which was the subject of Advisors' successful motion to strike. Memorandum and Order of April 16, 2019.

themselves of otherwise available discovery *enforcement tools*, and that failure does not justify otherwise improper surrebuttal testimony. But the chronology of events appears more complicated, and rather than conduct an exhaustive litigation of that chronology, the Hearing Officer elects to deny this aspect of the motion, particularly because there appears to be little consequential prejudice to ENO.

(D) Mr. Prep's accusations of non-compliance with Resolution R-17-504 are improper surrebuttal testimony and irrelevant at this stage of the proceeding.

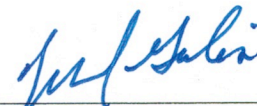
Finally, the Hearing Officer is unpersuaded by ENO's claimed objections regarding the cited testimony. A reasonable reading of Mr. Prep's original extensive criticisms of ENO's cost of service approach presented in the Application clearly conveyed that the approach was not in accordance with the Resolution. *See* Mr. Prep's Direct Testimony at 11-12. The failure of Mr. Prep's original articulation to explicitly use the term "non-compliance" is really a matter of insignificant semantics. And the "notice of deficiency" argument has no merit. *See* Advisors' Oppositon at 7.

Order

IT IS HEREBY ORDERED, that ENO's Motion to Strike is hereby GRANTED as to Mr. Proctor's Goldman CAPM testimony, but otherwise DENIED.

AND IT IS FURTHER ORDERED, that ENO and Advisors shall promptly enter into discussions regarding the removal and segregation of materials from Mr. Prep's's surrebuttal testimony in order to effectuate this Order. A revised version of said testimony shall be served on all parties by May 21, 2019, and the segregated - stricken portion of the testimony shall be maintained by Advisors, in the event same be proffered at the hearing for identification, or becomes the subject of further proceedings.

This 20th day of May, 2019.



Jeffrey S. Gulin
Hearing Officer