



Entergy Services, LLC
639 Loyola Avenue
P. O. Box 61000
New Orleans, LA 70161-1000
Tel 504 576 2984
Fax 504 576 5579
hbarton@entergy.com

Harry M. Barton
Senior Counsel
Legal Department -- Regulatory

October 15, 2019

Via Hand Delivery

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

**Re: Rulemaking Proceeding to Establish Rules for Community Solar Projects
CNO Docket No. UD-18-03**

Dear Ms. Johnson:

Enclosed for your further handling please find an original and three copies of Entergy New Orleans, LLC's ("ENO") Response to Comments of The Council's Utility Advisors Concerning Implementation Plan for The Council of The City of New Orleans' Community Solar Rules and Exhibits attached thereto, in connection with the above-referenced matter. Please file an original and two copies into the record and return a date-stamped copy to our courier.

Should you have any questions, please do not hesitate to contact me. Thank you in advance for your usual courtesy and assistance with this matter.

Sincerely,


Harry M. Barton

HMB/bkd
Enclosures

cc: Official Service List (via e-mail)

RECEIVED
OCT 15 2019

BY: 

601 15 4 42

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

IN RE: A RULEMAKING)	
PROCEEDING TO ESTABLISH)	
RULES FOR COMMUNITY SOLAR)	DOCKET NO. UD-18-03
PROJECTS)	

**ENERGY NEW ORLEANS, LLC’S RESPONSE TO COMMENTS OF THE
COUNCIL’S UTILITY ADVISORS CONCERNING IMPLEMENTATION PLAN FOR
THE COUNCIL OF THE CITY OF NEW ORLEANS’ COMMUNITY SOLAR RULES**

Pursuant to Council Resolution No. R-19-111, Entergy New Orleans, LLC (“ENO” or the “Company”) hereby submits its Responsive Comments to the Comments of the Utility Advisors Regarding ENO’s Implementation Plan for implementing the Council of the City of New Orleans’ (“Council”) Community Solar Rules.

On August 29, 2019, the Company submitted its Community Solar Program (“CSP”) Implementation Plan (“Plan”) and supporting attachments as required by Council Resolution No. R-19-111 (the “Resolution”). The submission of the Plan followed a year-long rulemaking and resulted from ENO’s in-depth review of the Council’s Community Solar Rules (“Rules”) and evaluation of what ENO would need to do to comply with those Rules. The Plan was also informed by a technical conference between ENO, the Advisors, and all parties to this Docket. Many elements of the Plan and attendant documents reflect ENO’s business judgment concerning several issues arising from the Rules that affect (i) the integrity of the distribution grid owned and operated by ENO, and (ii) ENO’s long-term resource planning obligations. In all, the Plan contained some 139 pages of materials developed by ENO in order to comply with the Council’s Rules and begin implementation of the Council’s CSP.

On September 30, 2019, the Advisors submitted their Comments on ENO’s Plan and the attendant documents, contracts, interconnection standards, and other items included with the Plan. The Advisors’ Comments suggest several material revisions to the documents that ENO has spent

months working with the Parties in this docket, as well as personnel from several departments within ENO and Entergy Services, LLC (“ESL”), to develop. The Resolution affords ENO only 15 days to respond to the Advisors’ Comments.

Addressing many of the issues raised in the Advisors’ Comments will require ENO to revise and re-submit the Implementation Plan and documents affixed thereto, in essence filing a Supplemental Implementation Plan. Doing so will require more time working with the same personnel that were instrumental in developing the Plan in the first instance. The Resolution did not appear to contemplate the submission of a Supplemental Implementation Plan in the procedural steps currently enumerated. As such, the procedural schedule in the Resolution does not afford ENO the time necessary to undertake the efforts required to (i) determine whether the modifications suggested by the Advisors are feasible and, in ENO’s judgment, reflective of sound utility business practices as applied to ENO’s operations, and (ii) modify the Plan and attendant documents in accordance with the Advisors’ Comments if so. However, ENO knows the CSP is a priority for the Council and ENO will undertake diligent efforts over the next several weeks to assess issues raised in the Advisors’ Comments and create a Supplemental Implementation Plan based on those issues and ENO’s business judgment and managerial discretion.

Given these constraints, in the present filing, ENO addresses the limited set of issues raised in the Advisors’ Comments for which ENO possesses enough information to respond at this time. ENO also commits to filing a Supplemental Implementation Plan prior to December 31, 2019. In that filing, ENO intends to submit modifications to its Plan as informed by the Advisors’ recommendations, or provide an explanation as to why, according to ENO’s business judgment about prudent utility practices as applied to ENO operations, it determined that the suggested modifications could not be accommodated or were not warranted under the Council Resolution R-19-111. For example, ENO is already undertaking efforts to determine what will be necessary to calculate bill credits for Low-Income Subscribers on a monthly basis, as the Comments suggest, and plans to work with the Advisors and the Council’s Utility Regulatory Office (“CURO”) to achieve alignment on any issues that ENO’s efforts may reveal.

I. ENO has, and will Continue to, Exercise its Managerial Discretion and Business Judgment in its Efforts to Implement the Council’s CSP.

Several of the suggestions in the Advisors’ Comments touch on issues that implicate ENO’s management of its business and exercise of judgment necessary to maintain the integrity of ENO’s owned equipment and to fulfill its resource planning responsibilities. While ENO will evaluate each of the suggestions in these areas and attempt to accommodate and incorporate the feedback, well-established law concerning utility regulation indicates that many of these decisions are ENO’s to make and would be entitled to a presumption of prudence.

The Council is vested with broad authority as ENO’s regulator.¹ The Council’s authority includes the ability to set rates, establish procedural schedules, allocate funds and benefits, impose reasonable penalties, and other powers enumerated in the Home Rule Charter. Retail regulators of utilities across the United States are vested with similar powers via similar statutory schemes, and the Council’s authority has been found to be equivalent of that held by the Louisiana Public Service Commission to regulate utilities in Louisiana located outside of the City of New Orleans.² However, the Council has acknowledged important limits on its regulatory authority:

While the Home Rule Charter of the City of New Orleans vests the Council with the authority to supervise, regulate and control all utilities providing service in the City, that authority does not allow the Council, or other parties for that matter, the ability to substitute their own decisions for those of the utility.³

As discussed in detail in Council Resolution R-17-332 (relating to the Council rulemaking proceeding on Integrated Resource Planning), a utility has the “right to manage its own affairs to

¹ Home Rule Charter Article III, Section 3-130(1) (“The Council of the City of New Orleans shall have all powers of supervision, regulation, and control consistent with the maximum permissible exercise of the City’s home rule authority and the Constitution of the State of Louisiana and shall be subject to all constitutional restrictions over any street railroad, electric, gas, heat, power, waterworks, and other public utility providing service within the City of New Orleans including, but not limited to the New Orleans Public Service, Inc. and the Louisiana Power and Light Company, their successors or assigns.”).

² See, *Gordon v. Council of City of New Orleans*, 2008-0929 (La. 4/3/09, 12); 9 So.3d 63, 72 (“Just as the LPSC has exclusive statewide regulatory and rate making powers over public utilities, the Council has exclusive regulatory and rate making authority over public utilities in New Orleans.”).

³ Council Resolution No. R-17-332, *In Re: Rulemaking Proceeding Regarding Integrated Resource Planning*, Docket No. UD-17-01 (“Council Resolution R-17-332”), at 18.

the fullest extent, consistent with the protection of the public’s interest,”⁴ and must be able to “plan and manage its business.”⁵ Although the Council has the power of supervision, regulation, and control over public utilities providing service within the City of New Orleans,⁶ “[p]ublic regulation must not supplant private management.”⁷ Courts have consistently affirmed the Council’s view that its regulatory powers do not extend into making managerial or business decisions for utilities.

The United States Supreme Court articulated the basic premise of this limit on regulatory authority over utilities nearly a century ago, stating “It 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.”⁸ Numerous decisions have followed the Supreme Court’s pronouncement on these limits and have held that public service commissions must restrict their actions to regulation and avoid interfering with a public utility’s managerial or business decisions.⁹ Such

⁴ *Id.* at 18-19.

⁵ *Id.* at 18.

⁶ Council Resolution R-18-474, at 1.

⁷ Council Resolution R-17-332, at 18 (citing *Georgia Power Co. v. Georgia Pub. Serv. Comm’n*, 85 S.E.2d 14 (1954)).

⁸ *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276, 289 (1923). The Supreme Court’s focus on ownership of property is telling. For municipally-owned and operated utilities, regulators exercise a greater degree of control over managerial decisions. They also bear a greater degree of responsibility for the effects of such decisions.

⁹ *See, e.g., Emporium Water Co. v. Pennsylvania Pub. Serv. Util. Comm’n*, 955 A.2d 456 (Pa. 2008) (“As a general matter, utility management is in the hands of the utility and the [Commission] may not interfere with lawful management decisions...”); *Consumers Power Co. v. Pub. Serv. Comm’n*, 596 N.W.2d 126 (Mich. 1999) (reversing a commission order requiring a utility to engage in “retail wheeling,” reasoning that “absent specific legislative authority, the commission can encourage a specific management decision through the exercise of its ratemaking power, but it may not directly order the utility to make the decision.”); *Public Serv. Co. v. State ex rel. Corp. Comm’n*, 918 P.2d 733, 740 (Okla. 1996) (order requiring that certain costs be passed directly to customers and not absorbed by the utility is unconstitutional as “[i]t would give the Corporation Commission authority it does not otherwise have in that it interferes with the internal management decisions of the [utility]”); *Pennsylvania Pub. Util. Comm’n v. Philadelphia Elec. Co.*, 561 A.2d 1224 (Pa. 1989) (“Although the Commission is a watchdog for the public and against unreasonable rates, the Commission must not interfere with managerial decisions of a utility absent an abuse of discretion.”); *In re Mountain States Telephone and Telegraph Co.*, 745 P.2d 563 (Wyo. 1987) (“[The commission] is not in a position to take on any aspect of utility management. It must restrict its position to ‘regulation’ with management decisions being entirely that of the utility.”); *Pac. Power & Light Co. v. Pub. Serv. Comm’n*, 677 P.2d 799, 810 (Wyo. 1984) (Rose, J. specially concurring) (“Not only is the participation by a state agency in a utility’s business decisions unnecessary to regulation, it is impermissible.”); *Alabama Power Co. v. Alabama Pub. Serv. Comm’n*, 359 So.2d 776, 780 (Ala.1978) (“Although subject to regulation by the government, a utility, like any corporation, should be allowed to operate consistent with the free enterprise system to the extent

managerial decisions include negotiations of the terms of contracts,¹⁰ hiring and firing employees and contracting for services,¹¹ and planning to meet future needs.¹²

In citing and summarizing this authority, ENO does not assert that the Council is without authority to regulate ENO's efforts to implement the Council's CSP. Clearly, the Council, through CURO, bears primary responsibility for many aspects of the CSP. The Council must also exercise regulatory authority to supervise ENO's execution of the responsibilities that rest primarily with ENO and to review the business decisions ENO makes in fulfilling those responsibilities, under a presumption of prudence. But this regulatory authority does not extend to making managerial and business decisions for ENO by ordering it to implement some of the suggestions covered in the Advisors' Comments.

a. Decisions about the Timing and Level of Hiring are ENO's to Make.

The Advisors' Comments question whether, and when, ENO needs to hire a full-time employee ("FTE") to serve as the Community Solar Program Manager ("CSPM") and suggests that another existing employee may be able to serve this role. The Rules require that ENO designate a single point of contact to accept submission of all project application requests from Subscriber Organizations ("SOs"), and provide information on the application process and the

possible. ... The function of the Alabama Public Service Commission is that of regulation, and not of management. The Commission should not be allowed to interfere with the proper operation of the utility as a business concern by usurping managerial prerogatives."); *In re Consumers Power Co.*, 14 P.U.R. 4th 1 (Mich. P.S.C. March 8, 1976) ("The prudent investment theory has over the ensuing years been refined and expanded upon to stand for the principle that it is improper for a regulatory agency charged with the responsibility to establish just and reasonable rates to assume the management of a regulated entity under the guise of rate making."); *Pub. Serv. Comm'n v. Ely Light & Power Co.*, 393 P.2d 305 (Nev. 1964) ("It is the commission's duty to regulate rates but not to manage the utility's business."); *Petition of New England Tel. & Tel. Co.*, 66 A.2d 135 (Vt. 1949) ("The function of a public service commission is that of control and not of management, and regulation should not obtrude itself into the place of management. This rule is recognized in all of the cases.").

¹⁰ *Union Telephone Company v. Wyoming Public Service Commission*, 910 P.2d 1362, 1365 (Wyo. 1996) ("The PSC is not authorized to meddle in the private sector's contractual affairs...").

¹¹ *California Indep. Sys. Operator Corp. v. F.E.R.C.*, 372 F.3d 395, 403–04 (D.C. Cir. 2004) (holding that dictating "the choice of CEO, COO, and the method of contracting for services, labor, office space, [etc.]" would very clearly exceed the Federal Energy Regulatory Commission's authority.)

¹² *See, Pac. Tel. & Tel. Co. v. Whitcomb*, 12 F.2d 279, 288 (W.D. Wash. 1926), *aff'd sub nom. Denney v. Pac. Tel. & Tel. Co.*, 276 U.S. 97, 48 S. Ct. 223, 72 L. Ed. 483 (1928) ("Business judgment must be employed to anticipate reasonable future needs and to make provision for them in advance. This is essentially a matter of business management which may not be arbitrarily interfered with [by a regulator].").

Company's distribution system to SOs.¹³ ENO has thoroughly assessed the activities, duties, and responsibilities described in the Rules and has determined that the only feasible way of administering the CSP is for this single point of contact to also handle the numerous additional responsibilities set forth in the Rules, in the role of a CSPM. These duties include, among other things: 1) facilitating the numerous back and forth steps with SOs in reviewing and processing their applications within the stipulated time frames; 2) engaging ENO distribution personnel to process the interconnection applications; 3) establishing baseline annual usages ("BAU") for all subscribers; 4) verifying new subscribers are within the listed limitations on subscription size; 5) issuing Notices of Enrollment (Form CSG-6) to new Subscribers; 6) receiving the monthly subscriber updates (Form CSG-7) and ensuring back office billing functions update the Customer Care System ("CCS") as necessary; 7) processing subscription transfers; 8) tracking project and program data for reporting on ENO's external website, and 9) providing more general billing and customer service support to SOs and individual subscribers as such needs arise.

In fact, the Advisors' Comments make suggestions regarding the calculation of the BAU that would require even more responsibility and expertise of the CSPM role than ENO had originally contemplated. The Advisors recommend that additional factors be added to the criteria for estimating BAUs, such as considering square footage of the building or space associated with the account and whether a Net Energy Metering ("NEM") installation is on the building. Further, the Advisors recommend that the process should allow the customer to review the estimated annual usage and to inform ENO of any additional factors that may be unique to the property that the customer believes should be considered in estimating the BAU, such as machinery or equipment on site that would increase usage above the class and rate type average.

Adding these requirements to the estimation of the BAU would layer on another administrative burden for ENO that would have to be carried by the CSPM. It is reasonable to expect that the added criteria and customer-review process would lead to negotiation of BAUs

¹³ See, Rules Section VII.E.1.

with some customers since the Company does not have the tools necessary to differentiate estimates based on square footage of buildings or the specific characteristics or uses of different spaces associated with electric accounts or any factors deemed relevant by each individual customer. Requiring the CSPM to perform these estimations and engage in these negotiations would require an additional, particular set of skills from candidates for the position, which may make the position harder to fill and will require additional training. Finally, if the Council adopts these recommendations in this regard, which ENO cautions against due to the added administrative burden, it should recognize the fact that disputes will inevitably arise over the BAUs for different customers, which will require intervention by a third party to settle. Given CURO's enforcement obligations in the program, it would make sense to appoint that office as arbiter of any disputes that arise from BAU negotiations. Thus, if the Council adopts the Advisors' recommendations, CURO may need to reconsider the staffing estimates set forth in the Joint Report issued by the Advisors and CURO in this proceeding.

ENO does not currently employ any individual that is trained to perform these duties, or who has enough time to undergo such training and begin performing these duties once the Council's CSP becomes active while continuing to perform his or her current duties. Nor does it appear feasible to shift the current duties from such potential employee to ENO's existing employees to make available the time required to engage in the required activities. As such, ENO believes it will need to hire an FTE and train that person on the extensive duties they will be required to undertake to ensure ENO's compliance with the Rules and help the Council's CSP get off to a successful start.¹⁴ Upon approval of ENO's Implementation Plan, or the Supplemental

¹⁴ The alternative to ENO's proposal would be to adopt a "wait and see" approach before hiring a CSPM, *i.e.*, to only hire a person to perform the duties required by the Rules once SOs begin applying to participate in the Council's CSP. ENO does not have the luxury of taking this approach. The Council's Rules mandate that ENO accommodate the CSP and stand ready to perform numerous duties attendant to that mandate. ENO must prepare to administer the Council's CSP. The alternative "wait and see" approach would result in the Council's program being delayed from the start, with SO's applications sitting unattended while ENO spent the months necessary to hire and train a person to perform the duties required for accepting and processing the applications. ENO does not believe such a delay would be viewed favorably by the Council, or the Advisors and stakeholders who contributed to this Rulemaking. Such delay would also not serve the best interest of the Council's vision for the CSP.

Implementation Plan, ENO will be able to begin recruiting an employee to fill this role. ENO's experience and business judgment informed its estimate that recruiting, vetting, hiring, and training this employee will take up to four months from the time ENO receives the Council's approval of the Plan before that employee is ready to be the single point of contact to begin accepting and processing SO applications.

While creating its Supplemental Implementation Plan, ENO will assess the Advisors' suggestions, but ENO may ultimately determine that it cannot modify what was set forth in the initial Plan. Respectfully, the law cited above clearly establishes the decision about how many people to hire, and when to hire them, is ENO's to make. Law discussed in a subsequent section of these comments indicates that the costs ENO incurs in hiring such employees, and otherwise complying with the Council's Rules, are presumed prudent.

b. ENO's Responsibility for Ensuring the Integrity of the Distribution Grid and Resource Planning Require the Inclusion of Certain Contractual Protections.

Several suggestions in the Advisors' Comments relate to the various contracts that will be necessary to facilitate implementation of the Council's CSP. These contracts and agreements include the Community Solar Purchase Power Agreement ("PPA"), the Interconnection Application, and the Program Application. Upon initial review, ENO believes that many of the Advisors' recommendations are valid and can be incorporated into revisions that will be submitted with the Supplemental Implementation Plan. Some of these suggestions will require further evaluation from several different groups within ENO and ESL as to whether accommodating the suggestions would be contrary to sound utility business practices. ENO discusses some of its concerns with these suggestions below, but the below is not an exhaustive enumeration of ENO's concerns since evaluation of the Advisors' Comments is still ongoing.

The Advisors' Comments take issue with the minimum insurance amounts contained in the Interconnection Agreement, Form CSG-3, on the grounds that the Rules contemplate the Council setting insurance requirements under Section VI.B. It is important to note that the Interconnection Standards and Agreement set forth the requirements for any entity wishing to interconnect a

generating facility to the Company's distribution grid. Because the Company bears the responsibility for owning, maintaining, and operating the grid, it also has the right and obligation, as an "incident to ownership,"¹⁵ to set insurance requirements that, in its business judgment, will reasonably protect ENO (and, ultimately, customers) from economic loss in the event of damage or disruption caused by the applicant's equipment. The Council and CURO can and should choose to require SOs to provide proof of insurance protecting against damages directly incurred by members of the public and Subscribers relating to a CSG Facility, but these would be separate from the insurance and other requirements contained in Form CSG-3 that serve to protect ENO from damages to ENO's owned equipment comprising the distribution grid. If the Council ultimately mandates that CURO set the level of insurance required to be maintained by SOs against damages incurred by the public and Subscribers relating to a CSG Facility, CURO will need to work extensively with ENO and ESL personnel to adequately assess the level of insurance needed.

The Advisors' Comments state that the level of Liquidated Damages described in the PPA (Form CSG-4), Article IV, Section 4.5, are inappropriate. It is important to note that in its resource planning, the Company will account for amounts of capacity and energy contracted under the Community Solar PPAs to serve customer needs and to the extent counterparties are unable to perform, it will have to replace that capacity and energy from other sources. Liquidated damages would serve to protect customers from costs associated with procuring replacement resources or replacement power. Rather than striking the provision altogether, the Company will review possible changes to the formula for calculating damages such that the amount assessed is capped at a lower level but one that will still provide some level of risk mitigation to customers should the Company need to replace capacity and energy from a CSG Facility.

The Advisors' Comments state that the concerns about some components of the PPA and other contract forms stem from the fact that "organizations such as churches, homeowners' associations, condo boards, and the like" would be discouraged from participating in the CSP due

¹⁵ *Missouri ex rel. Southwestern Bell Telephone Co.*, 262 U.S. 276, 289 (1923).

to the complex, or allegedly onerous, nature of the contract terms.¹⁶ ENO submits that any entity capable of understanding and complying with the requirements and obligations placed upon SOs by the Council’s Rules (which are 24 pages, single-spaced) should also be able to comprehend and comply with the contract forms filed with ENO’s Implementation Plan. As such, ENO does not believe the assertion that the various contract terms would have a chilling effect on participation in the CSP is valid. In any event, ENO’s obligation to make sure that risks to its customers and equipment are adequately insured against, or otherwise contractually-mitigated, should take precedence over prioritizing the ability of entities who are “not a professional, for profit, community solar business” to construct community solar facilities, interconnect them to the distribution grid, and sell power to ENO and its customers. Nonetheless, ENO will evaluate the Advisors’ suggestions and endeavor to simplify the various forms associated with the CSP as much as reasonably possible.

c. Other Contractual Issues.

At the May 2019 technical conference, the parties discussed the obligations on SOs to certify the low-income status of their subscribers and the idea that, because a Subscriber’s financial situation could change from one year to the next, it would be necessary for SOs to recertify Subscribers’ status each year.¹⁷ The parties agreed that this issue merited a requirement that SOs provide written certification to ENO each year of its Subscribers’ status to ensure that the benefits intended for low-income customers reach as many of those customers as possible. Section IV.D of the Advisors’ Comments captures this decision from the technical conference: “ENO also proposes that the Subscriber Organization re-certify the Low-Income status of its Subscribers in

¹⁶ As ENO noted in its Implementation Plan, this PPA agreement was adapted from the form used for Xcel Energy’s successful community solar program in Colorado. The terms of the PPA are not unreasonable or out of line with sound utility business practices for community solar programs.

¹⁷ To this point, there was discussion of a hypothetical of a graduate student qualifying for assistance one year, but then not qualifying the following year once they begin employment and improve their financial circumstances.

writing by May 1 each year. The Advisors agree that ENO’s proposal in this regard is in compliance with the Community Solar Rules.”¹⁸

Sections 1.14 and 4.7 of the standard offer PPA, Form CSG-4, capture this obligation on the part of the SOs to re-certify annually. Section III.F of the Advisors’ Comments seems to suggest there is an inconsistency in the two sections of the PPA that needs to be resolved: “Those Sections should be made consistent and clarified to state that the annual re-certification applies to the new low-income subscribers for each year, rather than re-certifying low-income subscribers that are continuing their subscription from previous years.”¹⁹ The Company has reviewed the two PPA sections and believes they accomplish the purpose of requiring SOs to recertify annually as agreed by the parties at the technical conference and acknowledged in Section IV.D of the Advisors’ Comments. Given the prior consensus reached at the technical conference, ENO is unclear on what the Advisors’ Comments suggest as the necessary modification in this regard.

II. Expenditures Necessary to Comply with the Rules are Presumed to be Prudent and are Eligible for Full Cost Recovery Through an Appropriate Mechanism.

The Advisors’ Comments cover several issues related to cost recovery. These comments offer some helpful suggestions on the kinds of information ENO will need to provide the Council in order to facilitate cost recovery. The Comments also make recommendations of appropriateness of certain cost recovery mechanisms. The Comments also speculate on whether ENO will be able to demonstrate the prudence of certain expenditures. While it is premature to address some of the Advisors’ suggestions, ENO does address a limited subset of the cost recovery issues below.

a. Settled Law Regarding Prudence of Utility Expenditures Entitles ENO to a Presumption of Prudence.

As a matter of law, ENO would be entitled to recover from customers the reasonable and prudent costs of complying with the Council’s Rule and implementing the CSP. “[U]nder the prudent investment rule, a utility is compensated for all prudent investments at their cost when

¹⁸ Comments of the Council’s Utility Advisors Regarding ENO’s Implementation Plan for the Community Solar Program, Council Docket UD-18-03 (September 30, 2019) (“Advisors’ Comments”) at pgs. 21-22.

¹⁹ Advisors’ Comments at pg.17.

made, irrespective of whether they are deemed necessary or beneficial in hindsight.”²⁰ The Louisiana Supreme Court has been equally clear that “a utility’s investments are presumed to be prudent and allowable.”²¹ The presumption of prudence is overcome only when the regulator “raises serious doubt about the prudence of a particular investment.”²² At that point, the burden shifts to the utility to demonstrate “that it went through a reasonable decision making process to arrive at a course of action and, given the facts as they were or should have been known at the time, responded in a reasonable manner.”²³

The Louisiana Supreme Court has characterized the prudent investment rule as a “constitutional touchstone” and held in no uncertain terms that “a regulatory commission that does not take into account all prudently incurred investment has acted arbitrarily.”²⁴ The Louisiana Supreme Court also has confirmed that the “United States and Louisiana Constitutions protect utilities from being limited to a charge for their property serving the public which is so unjust as to be confiscatory.”²⁵ Furthermore, “the misuse or inconsistent use of a crucial rate making method, such as the prudent investment rule, even without a showing of confiscatoriness by the utility, may amount to a denial of due process.”²⁶

b. ENO’s Proposed Cost Recovery Provides a Reasonable Opportunity for Full Recovery of CSP Costs on a Timely Basis.

ENO has proposed that incremental costs incurred in connection with the CSP be recovered dollar for dollar through a Formula Rate Plan (“FRP”) suitable to the Company and the Council

²⁰ *Gulf States Utils. Co. v. La. Pub. Serv. Comm’n*, 578 So. 2d 71, 85 (La. 1991).

²¹ *Id.*

²² *Id.*

²³ *Id.* (internal quotation omitted).

²⁴ *So. Cent. Bell Tel. Co. v. La. Pub. Serv. Comm’n*, 594 So. 2d 357, 366 (La. 1992) (concluding that the regulatory commission acted “arbitrarily, capriciously and unreasonably in its refusal to accord the utility its due under the prudent investment rule”). *See also Central Louisiana Electric Co. v. LPSC*, 508 So. 2d 1361 (La. 1987) (affirming district court judgment setting aside as arbitrary a Commission order that denied a utility’s request to increase rates when a new generating facility was placed in service).

²⁵ *Gulf States Utilities*, 578 So. 2d at 107 (“If the rate does not afford sufficient compensation, the state has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments as well as Article I, § 4 of the 1974 Louisiana Constitution.”) (internal citations omitted).

²⁶ *S. Cent. Bell Tel. Co.*, 594 So. 2d at 364-365.

(if approved as part of Council Docket No. UD-18-07, the “2018 Rate Case”) or alternatively through a mechanism to fully recover on a timely basis any and all incremental costs associated with the upfront and ongoing costs of administering the CSP. For example, ENO proposes that recovery of such upfront and ongoing administrative costs associated with obtaining the capacity produced in connection with the CSP, which costs are anticipated to fall into the category of operation and maintenance (“O&M”) expense, be accomplished through the Purchased Power Capacity and Acquisition Cost Recovery Rider (“PPCACR”) or its replacement.

Although the Advisors’ Comments express agreement that a Council-approved FRP would be the appropriate mechanism for recovery of the CSP costs that ENO is permitted to recover from all customers, the Comments indicate that Section VII.G. (1) of the Community Solar Rules state that the Utility shall have a fair opportunity to receive full and timely cost recovery, but does not guarantee “dollar for dollar” recovery of costs.²⁷ The Advisors’ Comments recommend that ENO’s Implementation Plan should provide the specific FRP exhibit which will show the sub-accounts and description of all CSP-related revenue and expenses. They further recommend that the Implementation Plan should reference the annual report required under Rules Section VII.F.(2) of the Community Solar Rules and how the CSP cost data included in the FRP will correlate with cost data provided in the May 1 Community Solar Program annual report.

With respect to ENO’s proposed alternative method of recovery of CSP-related O&M expense through the PPCACR, the Advisors’ Comments noted that the Advisors have proposed a replacement rider in Docket No. UD-18-07, the Purchased Power Cost Recovery (“PPCR”) rider, which PPCR would recover costs incremental to existing to Purchased Power Agreements not recovered in base rates established as a result of the pending docket.

1. ENO’s Proposed Recovery of CSP Costs do not Provide Guaranteed Recovery.

In the 2018 Rate Case, ENO submitted for Council consideration an electric FRP based on an historic test year and proposed modifications to the existing PPCACR that would permit

²⁷ Advisors’ Comments at pg. 6.

recovery of that portion of costs associated with 1) existing and future Council-approved PPAs and 2) long-term service agreement (“LTSA”) costs that would not be recovered through base rates established from that proceeding. Several parties to the 2018 Rate Case, including the Advisors, objected to certain aspects of ENO’s proposed FRP and/or submitted alternative conceptual proposals for consideration. For example, the Advisors propose, among other things, that the Evaluation Period/test year of the proposed FRP would allow for certain pro forma adjustments for known and measurable costs (and related revenue changes) projected to be incurred for the twelve months immediately following the test year. They also propose that the FRP be designed to take into account total revenues (base revenue and riders). However, despite the various recommendations, no party submitted an alternative document setting forth a comprehensive proposal for modification of the form FRP. It is likewise true that certain parties objected to and/or suggested alternatives to aspects of the Company’s proposed PPCACR, but those parties did not submit a comprehensive proposal for modification of the form PPCACR.

It is important to first note that neither the proposed electric FRP filed by the Company, nor the alternative proposed by the Advisors, would *guarantee* specific “dollar for dollar” recovery of any cost, as these proposals contemplate prospective application of a change in rates as a result of each Evaluation Period/test year. Even assuming the Council were to approve an FRP suitable to both the Company and the Council that provides for pro forma adjustments for known and measurable changes as the Advisors have recommended, ensuing FRP proceedings would result in the setting of rates designed to target ENO’s collection of a specific level of revenue on a going-forward basis. Whether the Company *actually* recovers the targeted level of revenue is a function of a multitude of factors, including, for example, weather, sales, bad debt, *etc.* As such, the mechanism does not *guarantee* recovery of any costs, as the Advisors’ Comments suggest.

With respect to the modified PPCACR, the alternative recovery mechanism for CSP-related O&M that ENO proposes if an FRP that is suitable to both the Council and ENO is not approved, ENO believes this mechanism is appropriate because it would allow for recovery of costs associated with CSP-generated PPAs as authorized by the Council. The Advisors’

Comments note that the scope of the PPCR as proposed by the Advisors does not include the recovery of the CSP costs. However, the scope of the Advisors' proposed PPCR may be modified by the Council in a manner similar to what is provided for under the Agreement in Principle approved by Council Resolution R-19-293. That Resolution notes, and approves, an agreement among ENO, the Advisors, and other parties that, in the absence of an FRP being approved, that costs of the New Orleans Solar Station, and imputed capacity costs of the Iris and St. James PPAs, would be eligible for recovery through the PPCACR/PPCR Rider until those costs are realigned to ENO's base rates.²⁸ Nothing prevents the Council from approving a similar approach for the costs associated with the Council's CSP.

2. More Detailed Information Regarding the Administration Of Cost Recovery is Premature.

The Advisors' Comments recommend that if a rider is considered for recovery of CSP costs, ENO's Implementation Plan should provide for how the required compliance filings under the rider and the Rules would be correlated with respect to costs and differences in reporting times. The Comments likewise make a similar recommendation with respect to FRP recovery. Additionally, the Comments recommend that ENO's Implementation Plan provide the specific FRP exhibit that will show the sub-accounts and description for all CSP-related revenue and expenses. In order for ENO to comply with these recommendations for greater detail about the recovery mechanisms, it is necessary that the outstanding issues regarding the form of the FRP or the PPCACR/PPCR rider be resolved. Due to the numerous interdependencies of the FRP and various forms of the PPCACR/PPCR, it would be unduly burdensome for ENO to address the various scenarios that might arise under the different variations of the FRP and rider that have been proposed by the parties to the 2018 Rate Case.²⁹ ENO proposes that the Advisors'

²⁸ See, Council Resolution No. R-19-293, at pgs. 7-9.

²⁹ However, ENO can confirm at this time that any incremental payroll (i.e., over-time ENO employees and/or ESL employees whose time typically is not allotted 100 percent to ENO) would be charged to an appropriate project code for CSP costs in accordance with ESL's accounting policies to ensure that only appropriate costs are billed to the CSP.

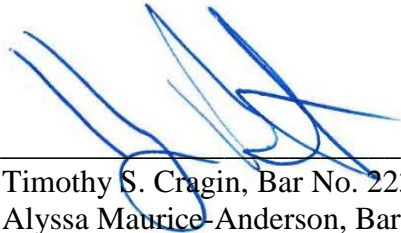
recommendations for this level of detail would more appropriately be addressed in the compliance filing resulting from the 2018 Rate Case.

Similarly, the Advisors' Comments note that the Council cannot pre-approve or otherwise render a decision on incremental information technology ("IT") costs of implementing the Council's CSP. ENO is not requesting pre-approval of the IT costs required to implement the Council's CSP. ENO will submit the actual IT costs of implementing the Council's CSP with an FRP or base rate case filing following the incurrence of those costs. At such time, ENO's recovery of these costs would be reviewed by the Council and entitled to a presumption that they were prudently incurred and are eligible for recovery, as discussed above.

III. Conclusion

ENO appreciates the Advisors' constructive feedback on the Implementation Plan submitted on August 29, 2019. ENO will continue to evaluate the issues raised in the Advisors' Comments as it formulates the Supplemental Implementation Plan that ENO will file no later than December 31, 2019. Following submission of that Supplemental Implementation Plan, ENO will look forward to continuing to work with the Advisors, Council, and all stakeholders on the steps required to refine, clarify, and ultimately implement, the Council's Rules and the CSP.

By: _____



Timothy S. Cragin, Bar No. 22313
Alyssa Maurice-Anderson, Bar No. 28388
Harry M. Barton, Bar No. 29751
639 Loyola Avenue, Mail Unit L-ENT-26E
New Orleans, Louisiana 70113
Telephone: (504) 576-2984
Facsimile: (504) 576-5579

**ATTORNEYS FOR
ENTERGY NEW ORLEANS, LLC**

CERTIFICATE OF SERVICE

Docket No. UD-18-03

I hereby certify that I have served the required number of copies of the foregoing report upon all other known parties of this proceeding, by the following: electronic mail, facsimile, overnight mail, hand delivery, and/or United States Postal Service, postage prepaid.

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

Erin Spears, Chief of Staff
Bobbie Mason
Council Utilities Regulatory Office
City of New Orleans
City Hall, Room 6E07
1300 Perdido Street
New Orleans, LA 70112

Andrew Tuzzolo
CM Moreno Chief of Staff
1300 Perdido Street, Room 2W40
New Orleans, LA

David Gavlinski
Council Chief of Staff
New Orleans City Council
City Hall, Room 1E06
1300 Perdido Street
New Orleans, LA 70112

Sunni LeBeouf
City Attorney Office
City Hall, Room 5th Floor
1300 Perdido Street
New Orleans, LA 70112

Norman White
Department of Finance
City Hall, Room 3E06
1300 Perdido Street
New Orleans, LA 70112

Jonathan M. Rhodes,
Director of Utilities, Mayor's Office
City Hall – Room 2E04
1300 Perdido Street
New Orleans, LA 70112

Hon. Jeffery S. Gulin
3203 Bridle Ridge Lane
Lutherville, MD 21093

Clinton A. Vince, Esq.
Presley R. Reed, Jr., Esq.
Emma F. Hand, Esq.
Herminia Gomez
Dentons US LLP
1900 K Street NW
Washington, DC 20006

Basile J. Uddo, Esq.
J.A. "Jay" Beatmann, Jr.
c/o Dentons US LLP
The Poydras Center
650 Poydras Street, Suite 2850
New Orleans, LA 70130-6132

Joseph W. Rogers
Victor M. Prep
Byron S. Watson
Legend Consulting Group
6041 South Syracuse Way, Suite 105
Greenwood Village, CO 80111

Errol Smith, CPA
Bruno and Tervalon
4298 Elysian Fields Avenue
New Orleans, LA 70122

Brian L. Guillot
VP, Regulatory Affairs
Entergy New Orleans, LLC
Mail Unit L-MAG-505B
1600 Perdido Street
New Orleans, LA 70112

Timothy S. Cragin
Harry M. Barton
Alyssa Maurice-Anderson
Entergy Services, LLC
Mail Unit L-ENT-26E
639 Loyola Avenue
New Orleans, LA 70113

Polly S. Rosemond
Seth Cureington
Derek Mills
Keith Wood
Kevin Boleware
Entergy New Orleans, LLC
Mail Unit L-MAG-505B
1600 Perdido Street
New Orleans, LA 70112

Joseph J. Romano, III
Suzanne Fontan
Therese Perrault
Entergy Services, LLC
Mail Unit L-ENT-4C
639 Loyola Avenue
New Orleans, LA 70113

Andy Kowalczyk
350 New Orleans
1115 Congress St.
New Orleans, LA 70117

Benjamin Quimby
1621 S. Rampart St.
New Orleans, LA 70113

Renate Heurich
350 Louisiana
1407 Napoleon Avenue, Suite #C
New Orleans, LA 70115

Katherine W. King
Randy Young
Kean Miller LLP
400 Convention Street, Suite 700
Post Office Box 3513
Baton Rouge, LA 70821

Carrie Tournillon
Kean Miller LLP
900 Poydras Street, Suite 3600
New Orleans, 70112

Maurice Brubaker
Air Products and Chemicals, Inc.
16690 Swingly Ridge Road, Suite 140
Chesterfield, MO 63017

Logan Atkinson Burke
Sophie Zaken
Alliance for Affordable Energy
4505 S. Claiborne Avenue
New Orleans, La 70125

Jeffery D. Cantin
Stephen Wright
Gulf States Renewable Energy Industries
Association
400 Poydras Street, Suite 900
New Orleans, LA 70130

New Orleans, Louisiana, this 15th day of October, 2019.



Harry M. Barton