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Via Electronic Delivery

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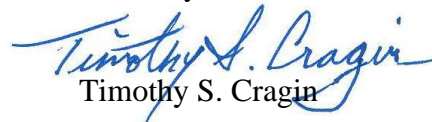
Re: *Revised Application of Entergy New Orleans, LLC for a Change in Electric and Gas Rates Pursuant to Council Resolutions R-15-194 and R-17-504 and for Related Relief*
Council Docket No. UD-18-07

Dear Ms. Johnson:

Please find enclosed for your further handling Entergy New Orleans, LLCs Opposition to Motion to Institute Prudence Review. As a result of the remote operations of the Council's office related to COVID-19, ENO submits this filing electronically and will submit the requisite original and number of hard copies once the Council resumes normal operations, or as you direct. ENO requests that you file this submission in accordance with Council regulations as modified for the present circumstances.

Thank you for your assistance with this matter.

Sincerely,


Timothy S. Cragin

TSC\rdm

Enclosures

cc: Official Service List (UD-18-07 via electronic mail)

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

ENO’S OPPOSITION TO MOTION TO INSTITUTE PRUDENCE REVIEW

Entergy New Orleans, LLC (“ENO” or the “Company”), respectfully submits this opposition in response to the Motion to Institute Prudence Review filed by the Alliance for Affordable Energy and Sierra Club (“Movants”) on December 11, 2020.

I. INTRODUCTION

Movants request that the Council institute a broad, unfocused prudence review “to investigate all aspects of the design and construction of the New Orleans Power Station (‘NOPS’).” Few projects of its size, however, have been investigated and challenged as thoroughly as NOPS. The Movants, moreover, have a history of advancing incorrect arguments concerning NOPS that have placed unwarranted demands on the Council’s limited resources and increased costs to ENO and its customers. Movants were part of a “no gas plant” coalition that opposed ENO’s application to the Council for approval of the construction of NOPS. After their arguments to the Council were unsuccessful, the Movants filed a judicial review action and argued that the Council violated due process rights and was arbitrary and capricious in approving the construction of NOPS.¹ Both

¹ The Sierra Club also initiated expensive litigation that sought to void the Council’s approval of Resolution R-18-65 under Louisiana’s Open Meetings Law. *See Deep South Ctr. for Envtl. Justice v. Council of City of New Orleans*, 292 So. 3d 973 (La. App. 4th Cir. 2020), *writs denied*, 302 So. 3d 1114, 1122 (La. 2020).

the district court and a unanimous panel of the Louisiana Fourth Circuit Court of Appeal rejected each and every one of the Movants' arguments,² and the justices of the Supreme Court of Louisiana voted unanimously to deny the Movants' petition to hear their arguments.

Simply put, NOPS entered commercial operation a month ahead of expected construction schedule and was completed under the \$210 million cost estimate that the Council considered when it approved ENO's application to construct the plant. The Motion at issue sets forth an incorrect legal standard for prudence reviews, fails to raise any serious doubt about the prudence of any of ENO's decisions concerning NOPS, and ignores the Council's extensive and successful efforts to monitor the NOPS Project during its construction. Accordingly, as ENO discusses further below, the Movants' requested prudence review is not warranted, and their Motion should be denied.

II. BACKGROUND

A. The Council Approved NOPS based on an extensive evidentiary record.

The Council approved NOPS via the 188-page Resolution R-18-65 that carefully considered the size, technology, and estimated cost of NOPS based on an extensive evidentiary record compiled during a nearly two-year proceeding. The Council found that NOPS will address a "critical and urgent reliability need" and "the risk of cascading outages that will leave 49,000 ENO customers without power for extended periods of time, particularly in New Orleans East," Resolution R-18-65 at 71, 73, and ordered that 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 adjustment to base rates. *Id.* at 188. After receiving the

² See *Alliance for Affordable Energy v. Council of City of New Orleans*, 298 So. 3d 765 (La. App. 4th Cir. 2020), writ denied, 302 So. 3d 1125 (La. 2020).

Council’s approval based on a \$210 million cost estimate, the Company constructed the plant timely and approximately \$3 million under budget despite the lawsuits filed by the Movants that were rejected by the Louisiana courts.

B. The Council put in place multiple protections to allow for effective monitoring of NOPS throughout its construction.

In Resolution R-18-65, the Council approved ENO’s proposed monitoring plan that provided for quarterly progress reports to the Council on the status of NOPS. *Id.* at 186–88. Under this monitoring plan, ENO kept the Council and its Legal and Technical Advisors updated on the Project’s schedule, budget status, financing, business issues (including any important amendments to the engineering, procurement, and construction (“EPC”) contract), transmission progress and cost estimates, safety information, and environmental permitting.³ Within its quarterly reports to the Council, ENO also provided information on (1) updates to ENO’s forecasted cost of natural gas; (2) information regarding material changes in the cost of alternative technology that could serve the same supply role; (3) material changes in the cost to complete the project; (4) material incremental changes in the cost of environmental compliance; and (5) an affirmation as to whether continuing construction of the Project remained in the public interest.⁴ As required by Resolution R-18-65, ENO submitted Quarterly Monitoring Reports to the Council on May 15, August 14, and November 14 in 2019 and on February 14, May 15, August 14, and November 16 in 2020.

In Resolution R-18-65, the Council further required ENO “to demonstrate its compliance with all applicable laws and regulations by filing with the Council all permits granted, and orders or rulings issued by any local, state or federal agency with jurisdiction over the project, including,

³ See Direct Testimony of Shauna Lovorn-Marriage in CNO Docket No. UD-16-02, Exh. SLM-2, Monitoring Plan.

⁴ *Id.* at 4.

but not limited to the EPA and LDEQ.” *Id.* at 188. ENO filed with the Council on February 11, 2019, the air quality permit that LDEQ issued to ENO for the NOPS plant.⁵ And on May 29, 2020, ENO submitted to the Council all permits that were granted in relation to NOPS.

In February 2019, after the Council’s approval of NOPS in Resolution R-18-65, the Council adopted Resolution R-19-78, which, among other things, required ENO to submit additional, regular reports on NOPS to allow the Council to monitor construction progress and Project costs. More specifically, ENO was required to (1) provide bi-monthly reports to the Council “detailing the expenditures made to date and the currently anticipated schedule for future expenditures;” and (2) report to the Council when it became aware of the possible need for expenditures that will exceed the \$210 million cost estimate contained in its application filed as part of Docket UD-16-02 and receive approval before making such expenditures. *See* Resolution R-19-78 at 13. As required by Resolution R-19-78, ENO submitted bi-monthly reports detailing the NOPS expenditures made to date and the currently anticipated schedule for future expenditures on March 25, May 28, July 25, September 25, and November 25 in 2019, and on January 27, March 25, May 26, July 27, September 25, and December 14 in 2020.

Through the reports and filings noted above, the Council and its Legal and Technical Advisors were able to monitor progress on NOPS throughout construction. As noted below, no party raised any prudence concerns regarding NOPS throughout its construction, and Movants do not raise any serious concerns in the Motion at issue here.

⁵ *See* Resolution R-19-78 at 9–11.

C. NOPS was completed under the \$210 million budget presented to the Council, and has been providing the expected benefits to utility customers in New Orleans.

NOPS reached substantial completion and commercial operation in May 2020, ahead of its expected construction schedule. NOPS was completed in time to serve customers throughout the 2020 Atlantic hurricane season, and, as intended, it is allowing ENO to maintain day-to-day reliability of electric service in the City of New Orleans. As of December 31, 2020, total Project expenditures were \$206.6 million, below the \$210 million cost estimate for the RICE Alternative that was presented in Council Docket No. UD-16-02

D. The Council already has provided for recovery of NOPS costs, as required by Louisiana law.

In Resolution R-18-65, the Council provided that “ENO shall have a full and fair opportunity to recover all prudently incurred costs” and determined that “the cost recovery of the NOPS project fixed costs shall be evaluated during the Council’s consideration of the Combined Rate Case to be filed in 2018, and cost recovery shall be accommodated through a two-step rate adjustment as recommended by the Advisors.” Resolution R-18-65 at 188. During ENO’s rate case, the Movants asserted that no provisions should be made for recovery of NOPS costs because the state district court purported to void the Council’s approval of NOPS in the open meetings lawsuit filed by the Sierra Club and others. Noting that it had appealed the district court’s judgment and that the matter was “not yet final,” the Council rejected the Movants’ position and approved a NOPS rate adjustment under which recovery from customers would commence upon “final judgment of the Council.” *See* Council Resolution R-19-457 at 113.⁶ Resolution R-19-457 was clearly addressing the finality of and litigation concerning Council Resolution R-18-65, which

⁶ The Movants now suggest that ENO should not have commenced recovery of NOPS costs before completion of the prudence review they now seek. But the Council’s resolutions addressing NOPS cost recovery do not support this suggestion.

approved construction of NOPS. And Resolution R-18-65 is now final. On February 12, 2020, the Louisiana Fourth Circuit Court of Appeal reversed the portion of the district court's judgment in the open meetings lawsuit that rendered Resolution R-18-65 void. On October 14, 2020, the Supreme Court of Louisiana rejected the Movants' attempts to have it take up the open meetings suit and the Movants' judicial review action.

On October 15, 2020, the Council adopted Resolution R-20-344, which approved an Agreement in Principle ("AIP") that addressed several ratemaking matters in light of the economic effects of the COVID-19 pandemic. In approving the AIP, the Council noted that it was striking a balance between avoiding unnecessary rate increases to customers and providing ENO with the financial security required to continue reliable operations. For its part, ENO agreed to forgo its 2020 Electric and Gas Formula Rate Plan ("FRP") Evaluation Report filings and rate adjustments that would have resulted therefrom and to make its initial FRP Evaluation Report filings on June 30, 2021. Reflecting the public interest that ENO remain a financially stable utility, Paragraph 7 of the AIP and Paragraph III.C of the Electric FRP Rider Schedule permitted ENO to recover the estimated first-year non-fuel revenue requirement associated with NOPS after Council Resolution R-18-65 became final, consistent with Ordering Paragraph 25(e) of Resolution R-19-457. Accordingly, on October 27, 2020, ENO submitted a new Attachment A to the Electric FRP Rider Schedule that implemented recovery of the estimated first-year non-fuel revenue requirement associated with NOPS, with such recovery to commence with the first billing cycle of November 2020. The Council and the Movants will have the opportunity to review ENO's revenue requirement calculations within the processes of ENO's FRP.

II. LAW & ANALYSIS

A. The Movants misstate Louisiana law governing prudence reviews.

No Charter section, City Code provision, regulatory order of the Council, or court decision requires the broad review and audit proposed by the Movants “to investigate all aspects of the design and construction of the New Orleans Power Station (‘NOPS’).” The Movants are incorrect that “the burden of proof in a prudency review is on the utility.” In fact, Louisiana law is clear that “a utility’s investments are presumed to be prudent and allowable.” *Gulf States Utilities v. Louisiana Public Serv. Comm’n* (“*GSU (1991)*”), 578 So. 2d 71, 85 (La. 1991). It follows that the utility has no initial burden to show that an investment was prudent. *Id.* The presumption of prudence is overcome only when “serious doubt [is raised] about the prudence of a particular investment.” *Id.* Only at that point does the burden shift 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.” *Id.* In this matter, as ENO discusses below, the Movants have not identified a single action or decision over which serious doubt about prudence exists. Accordingly, they have not shown that the review they propose is warranted.

The Movants rely on cases involving prudence reviews of decisions concerning the construction of nuclear power plants that had significant cost overruns. For example, in *GSU (1991)*, the regulator assessed in a rate case the prudence of the utility’s decision to continue construction of the River Bend nuclear plant, which was completed for \$3.1 billion over a total cost estimate of \$1.3 billion. 578 So. 2d at 76. Similarly, in *Alliance for Affordable Energy, Inc. v. Council of City of New Orleans*, 578 So. 2d 949, 954 (La. App. 4th Cir. 1991), the Council assessed the prudence of NOPSI’s decision to participate in the construction of the Grand Gulf I nuclear plant, which was completed for \$1.8 billion over the original total cost estimate of \$1.2

billion. The circumstances that triggered the prudence reviews and proposed disallowances in those cases are not remotely present here. As noted above, NOPS entered commercial operation a month ahead of its expected construction schedule and was completed *under* budget, thereby presenting markedly different circumstances from the nuclear build outs in the 1970s and 1980s.⁷

B. None of the Movants’ conclusory assertions raise “serious doubt” about ENO’s prudence.

Movants fail to raise “serious doubt” about *any* particular aspect of the design and construction of NOPS. Instead, they request a generalized review of “prudent management issues” potentially covering “the full range of cost and investment matters that may arise during the design, planning, and construction of a project.”⁸ But, under Louisiana law, prudence reviews are not fishing expeditions; they must be focused on particular investments and decisions for which serious doubt as to prudence is first established.⁹

The focus required by Louisiana’s prudence standard reflects that prudence reviews can be expensive. ENO disagrees with the Movants that New Orleans ratepayers should bear the costs of an unfocused audit or an unnecessary prudence review, particularly as the challenges presented by COVID-19 persist. NOPS has been perhaps the most scrutinized plant per MW in the United States, having been reviewed for years by the Council, the Council’s Utility Advisors, the Movants, and the courts. The Movants actively opposed construction of NOPS and litigated unsuccessfully to overturn the Council’s approval during its certification, and their current Motion provides no compelling basis for the Council to undertake the review that they now request:

⁷ As noted above, moreover, the Movants misconstrue the legal principles governing prudence reviews that were established in *GSU (1991)* and other Louisiana authorities.

⁸ Mot. at ¶ 24.

⁹ *GSU (1991)*, 578 So. 2d at 85.

1. The Motion does not identify any “affiliate transactions with Entergy Services, Inc.” that the Movants would like to scrutinize. Again, the Project was completed under its \$210 million budget.
2. The Motion provides no basis to question whether ENO’s EPC contract with Burns & McDonnell included appropriate terms. As the evidentiary record in Council Docket No. UD-16-02 made clear, Burns & McDonnell was selected because of its competitive pricing and industry leadership in constructing units using RICE technology. Moreover, the expected terms of the EPC contract were provided to the parties in that docket.
3. The Motion provides no basis to question whether ENO effectively administered contracts for the Project.
4. The Motion provides no basis to question the construction methods selected for the Project.
5. The Motion makes no attempt to identify “changing circumstances or new challenges” that arose during the course of the Project; accordingly, there is no basis to question whether ENO responded appropriately.
6. Whether ENO calculated correctly the first-year revenue requirement for NOPS is not a matter for a prudence review. The revenue requirement has been and will be addressed in other Council dockets, consistent with Council Resolution R-18-65.

This listing of the issues that the Movants suggest that the Council “analyze” through a prudence review confirms that the Movants are proposing a fishing expedition. They have provided no basis for the Council to conclude that the public interest would be served by opening yet another proceeding concerning NOPS.

III. CONCLUSION

The Council already has approved, monitored, and authorized implementation of cost recovery for NOPS, consistent with its regulatory authority. The Movants have not shown that the broad, unfocused audit and prudence review they seek is warranted or would serve the interests of utility customers in the City of New Orleans.

Respectfully submitted:



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CERTIFICATE OF SERVICE

I hereby certify that I have this 1st day of March, 2021, served the required number of copies of the foregoing pleading upon all other known parties of this proceeding individually and/or through their attorney of record or other duly designated individual, by: electronic mail, facsimile, hand delivery, and/or by depositing same with overnight mail carrier, or the United States Postal Service, postage prepaid.

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