



Lacresha Wilkerson
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April 19, 2023

Via Electronic Delivery

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

**Re: Resolution Directing Entergy New Orleans, Inc. to Investigate and Remediate Electric Service Disruptions and Complaints and to Establish Minimum Electric Reliability Performance Standards and Financial Penalty Mechanisms
CNO Docket No. UD-17-04**

Dear Ms. Johnson:

Enclosed for further handling please find the attached correspondence dated April 18, 2023 submitted on behalf of Entergy New Orleans, LLC (“ENO”) to the Councilmembers, which correspondence is being filed into the record of the above-referenced docket.

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.

Best Regards,

A handwritten signature in blue ink, appearing to read 'Lacresha Wilkerson', with a long horizontal flourish extending to the right.

Lacresha Wilkerson

Enclosures

cc: Official Service List



Courtney R. Nicholson
Vice President – Regulatory and Public Affairs
Entergy New Orleans, LLC
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April 18, 2023

VIA ELECTRONIC DELIVERY

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Councilmember Oliver Thomas
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Re: Proposed Proceedings on Amount of Vacated Penalty

Dear Councilmembers:

I write concerning Item 3 on the agenda of the April 12, 2023 Joint Utility, Cable, Telecommunications and Technology and Public Works, Sanitation and Environment Committee Meeting. The item, which the Committee has now recommended to the full Council, is a proposed resolution to establish a procedural schedule to allow for the “submission of additional evidence regarding the penalty imposed by the Council in Resolution R-19-442 . . . ” (the “Proposed Resolution”). Because that penalty was set aside, reversed, and vacated by order of the Civil District Court, the proposed procedural schedule is unnecessary and improper, and Entergy New Orleans, LLC (“ENO”) respectfully takes this opportunity to inform the Council of its objection and concerns.

The Proposed Resolution's recitation of the June 13, 2022 ruling of the Civil District Court, Judge Rachael Johnson presiding, is incomplete and does not give an interested citizen an accurate summary of the litigation concerning Resolution R-19-442 and its now-vacated penalty. To be clear, the Court did not issue a judgment that the "penalty" should be remanded for more evidence, and the presentation of the Proposed Resolution seems unfortunately calculated to obscure the Court's actual ruling and its reasons for doing so. Here are the facts.

After its oral ruling, the Court entered Judgment on June 24, 2022, in favor of ENO and against the Council setting aside, reversing, and vacating the penalty imposed by Council Resolution R-19-442 (a copy of the Judgment is attached). The Judgment, which the Council did not appeal, says nothing about remanding the penalty for further consideration of its amount. The Court's Reasons for Judgment (a copy of which also is attached), consistent with its oral ruling, explain that the Court "granted the relief requested by Entergy and against the City Council setting aside, reversing, and vacating Council Resolution R-19-442 and the \$1 million fine." The Court found that "the City Council improperly, arbitrarily, and unlawfully imposed a \$1 million penalty on Entergy." After noting that Council Docket No. UD-17-04 began as a rulemaking proceeding, the Court rejected the Council's argument that it did not have to adopt reliability standards and a penalty mechanism in advance of the conduct at issue: "[T]he City Council . . . failed to make rules or regulations for Entergy to adhere to and instead chose to impose a \$1 million penalty upon Entergy without any advance regulatory guidance or notice of conduct which might result in a penalty. . . . Because the City Council had no pre-existing financial penalty mechanism in place at the time of the imposition of Council Resolution R-19-442 and the \$1 million penalty, this Court finds the actions of the City Council were arbitrary and capricious." Following the Judgment, on August 19, 2022, the Court entered an order proposed by the Council that remanded the matter to the Council "for further consideration consistent with this Honorable Court's ruling" (see remand order, also attached).

The Court's ruling on the penalty adopted in Resolution R-19-442 was firmly rooted in due process and fundamental fairness. It should not be controversial that a governmental body like the Council cannot punish before it makes rules about what conduct will subject citizens to punishment. Furthermore, in no way can it be fairly suggested that the Court remanded this matter to the Council for it to take and consider "additional evidence regarding the amount of the penalty" or to impose another penalty for the same time period addressed by Resolution R-19-442. In fact, nothing in the remand speaks to the allowance of "re-opening" an already adjudicated proceeding. The Proposed Resolution is not "consistent with [the] Court's ruling," as legal defects noted by the Court cannot be cured retroactively, and any actions or proceedings by the Council to re-impose the penalty would violate the Court's ruling.

Importantly, however, the Council has taken action to consider and address prospectively the defects that led the Court to set aside the penalty that the Council imposed in 2019. In August 2022, the Council adopted Resolution R-22-372, which proposed minimum reliability standards and an associated financial penalty mechanism and invited comments regarding those proposed standards. After receiving comments from stakeholders, and expressly recognizing the order from the Civil District Court remanding the matter to the Council, on February 16, 2023, the Council adopted Resolution R-23-73, which established the Electric System Distribution Reliability

All Councilmembers

April 18, 2023

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Standard (“ESDRS”) and an associated financial penalty mechanism. As recognized by the Council itself in Resolution R-23-73, the enforcement of ESDRS and its potential penalties is prospective, and calendar year 2024 is the first year for which the Council may assess a penalty for distribution reliability performance.

Considering that (1) the Council cannot re-impose the penalty that has been set aside as unlawful (or any other penalty for the years at issue), and (2) the Council has now adopted the ESDRS and associated enforcement/penalty mechanisms, additional proceedings “regarding the penalty” and concerning system performance in 2016 and 2017 are improper and counterproductive. The proposed procedural schedule will impose significant litigation costs from the Council (particularly if its Advisors continue to bill hundreds of thousands of dollars to this docket), ENO, and, ultimately, those costs will be borne by our customers. Now more than ever, it is important for the various stakeholders to work together to address the significant challenges that lie ahead. Devoting limited resources to assembling and submitting “additional evidence regarding the amount of the penalty,” which penalty, again, has been set aside as unlawful, would not serve the public interest in any way. ENO respectfully requests that the Council avoid further expensive litigation in this matter and forgo adoption of the Proposed Resolution.

Respectfully,



Courtney R. Nicholson

cc: Erin Spears, Esq. (via electronic mail)
Bobbie Mason, Esq. (via electronic mail)
Clinton A. Vince, Esq. (via electronic mail)
Presley R. Reed, Jr., Esq. (via electronic mail)
J. A. Beatmann, Jr., Esq. (via electronic mail)
Joseph Rogers (via electronic mail)
Victor Prep (via electronic mail)
Brian L. Guillot (via electronic mail)

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 2019-12654

DIVISION "B-5"

ENTERGY NEW ORLEANS, LLC,
Plaintiff

VERSUS

THE COUNCIL OF THE CITY OF NEW ORLEANS,
HELENA MORENO, JASON ROGERS WILLIAMS, JOSEPH I.
GIARRUSSO, III, JAY H. BANKS, KRISTIN GISLESON
PALMER, JARED C. BROSSETT, AND CYNDI NGUYEN,
Defendants

FILED: _____

DEPUTY CLERK

JUDGMENT

The Verified Petition for Appeal and Judicial Review of, and for Injunctive Relief from, Resolution R-19-442 of the Council of the City of New Orleans filed by Entergy New Orleans, LLC ("ENO") came for hearing before this Court on June 13, 2022. Present in Court were:

W. Raley Alford, III, and Brian L. Guillot, counsel for ENO; and


Basile J. Uddo, J. A. Beatmann, Jr., and Erin Spears, counsel for the Council of the City of New Orleans, Helena Moreno, Jason Rogers Williams, Joseph I Giarrusso, III, Jay H Banks, Kristen Gisleson-Palmer, Jared C. Brossett, and Cyndi Nguyen ("Defendants").


Considering the arguments of counsel, the pleadings, the parties' briefing, the record, and the law, and for the written reasons to be provided by the Court as requested by Counsel for the Defendants, the Court now renders Judgment as follows:

IT IS ORDERED, ADJUDGED and DECREED that judgment be and hereby is rendered in favor of ENO and against Defendants, and that the penalty imposed by Council Resolution R-19-442 be and hereby is **SET ASIDE, REVERSED, AND VACATED**.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that ENO's request to enjoin and prohibit the Defendants from taking action to enforce and/or collect the penalty assessed against ENO in Resolution R-19-442 is **DISMISSED AS MOOT**.

New Orleans, Louisiana, this 24th day of June, 2022.


Honorable Rachael Johnson
Judge, Division B


VERIFIED
7-13-2022

COST DUE
 * 6345.00
DEPUTY CLERK
Due


VERIFIED
6/24/2022

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

DOCKET NO. 2019-12654

DIVISION: "B" (5)

ENTERGY NEW ORLEANS LLC

VERSUS

THE COUNCIL OF THE CITY OF NEW ORLEANS ET AL

FILED: _____

DEPUTY CLERK

REASONS FOR JUDGMENT

On December 6, 2019, Entergy New Orleans, LLC (hereinafter "Entergy") filed a Verified Petition for Appeal and Judicial Review of, and for Injunctive Relief from, Resolution R-19-442 of the Council of the City of New Orleans requesting that this Court set aside, reverse, and vacate Council Resolution R-19-442 which included the imposition of a \$1 million penalty assessed against Entergy by the Council of the City of New Orleans (hereinafter "City Council").

This matter came for hearing on June 13, 2022. For the reasons herein, this Court granted the relief requested by Entergy and against the City Council setting aside, reversing, and vacating Council Resolution R-19-442 and the \$1 million fine. This Court further ordered that Entergy's request to enjoin and prohibit the City Council from taking action to enforce and/or collect the penalty assessed against Entergy in Resolution R-19-442 was dismissed as moot.

RELEVANT FACTS

In June 2017, Defendant, the City Council of The City of New Orleans (hereinafter "City Council") notified Plaintiff, Entergy of New Orleans, LLC (hereinafter "Entergy") of its concern about power outages and reliability issues. On August 20, 2017 the City Council adopted Resolution R-17-427 which opened Docket No. UD-17-04 to provide for the investigation of Entergy outages and reliability issues in Orleans Parish. The docket began as a rulemaking proceeding to consider the establishment of minimum reliability performance standards for Entergy which would ultimately establish financial penalty mechanisms for Entergy's failure to meet minimum reliability performance standards. Subsequently, the City Council converted the docket into a prudence investigation and rejected the reliability plan that Entergy filed because it lacked sufficient detail and issued Resolution R-18-98 requiring Entergy to show cause why

Entergy's alleged inaction and omissions in mitigating and remediating electric service disruptions and complaints and unacceptable reliability performance should not be presumed imprudent.

It is Entergy's position that despite the rulemaking docket being open for over two years, the City Council did not adopt either minimum reliability performance standards for Entergy nor a reasonable enforcement mechanism for any such standards. The City Council takes the position that it can enforce provisions of the Code and Entergy's own service regulations in the absence of a pre-existing penalty mechanism. At the end of the proceedings, the City Council adopted Resolution R-19-442 on November 7, 2019, assessing a \$1 million penalty against Entergy.

LAW AND REASONS

Entergy is an electric and gas utility company with residential, commercial, industrial, and governmental consumers throughout Orleans Parish. The City Council is vested with the authority to supervise, regulate, and control public utilities providing service within New Orleans. In its review of the City Council's regulatory orders, this Court applies the same standard that the Louisiana Supreme Court has developed for orders of the Louisiana Public Service Commission, which regulates the investor-owned public utilities providing service in Louisiana outside of New Orleans. *Gordon v. Council of City of New Orleans*, 9 So. 3d 63, 72 (La. 2009). The City Council's regulatory order is subject to judicial review on both the facts and law, and should be set aside if it is shown to be "arbitrary, capricious, abusive of its authority, clearly erroneous, or unsupported by the evidence." *LP&L v. Louisiana Public Serv. Com'n*, 237 So. 2d 673, 675 (La. 1970).

This Court finds that the City Council improperly, arbitrarily, and unlawfully imposed a \$1 million penalty on Entergy. Under Louisiana law, a utility regulator does not have unfettered discretion to penalize or impair property rights in the absence of articulated policies, standards, or guidelines. *See Bowie v. Louisiana Public Serv. Com'n*, 627 So. 2d 164 (La. 1993). This Court finds that the City Council, acting in its role as the regulatory agency over Entergy vested with substantive rulemaking power, failed to make rules or regulations for Entergy to adhere to and instead chose to impose a \$1 million penalty upon Entergy without any advance regulatory guidance or notice of conduct which might result in a penalty. *Id.* at 168-169. Because the City Council had no pre-existing financial penalty mechanism in place at the time of the imposition of Council Resolution R-19-442 and the \$1 million penalty, this Court finds the actions of the City Council were arbitrary and capricious.

The record before this record is devoid of any evidence that the City Council ever informed Entergy about what conduct could result in a penalty and the potential penalty or penalty

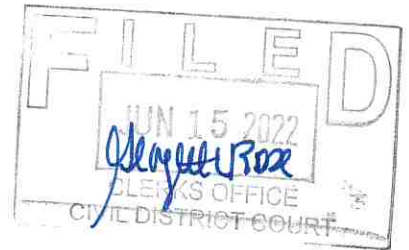
mechanism. In the absence of such notice and standards, the City Council erroneously relies upon Louisiana Supreme Court cases governing the prudent investment rule to support the decision to penalize Entergy. *See Gulf States Utils. Co. v. La. Pub. Serv. Com'n*, 578 So. 2d 71 (La. 1991).

For the reasons herein, this Court granted the relief requested by Entergy and against the City Council setting aside, reversing, and vacating Council Resolution R-19-442 and the \$1 million penalty. This Court further ordered that Entergy's request to enjoin and prohibit the City Council from taking action to enforce and/or collect the penalty assessed against Entergy in Resolution R-19-442 was dismissed as moot.

SIGNED AUGUST, 19th 2022.



Honorable Rachael D. Johnson
Judge, Civil District Court, Division "B" (5)



CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 19-12654

DIVISION "B"

SECTION 5

ENTERGY NEW ORLEANS, LLC

VERSUS

THE COUNCIL OF THE CITY OF NEW ORLEANS, ET AL

FILED: _____

DEPUTY CLERK

ORDER

CONSIDERING the foregoing *Motion for Remand*:

IT IS ORDERED that this matter be remanded to the Council for the City of New Orleans for further consideration consistent with this Honorable Court's ruling.

NEW ORLEANS, LOUISIANA, this 19th day of August, 2022.



Honorable Rachael Johnson
Judge, Division B

VERIFIED