



March 7, 2018

Via Email

Hon. Jason Williams, Councilmember  
New Orleans City Council  
Room 2W50, City Hall  
1300 Perdido Street  
New Orleans, LA 70112

***Re: Entergy New Orleans' Application for Approval to Construct New Orleans Power Station and Request for Cost Recovery and Timely Relief  
Docket No. UD-16-02***

***Response to Letter of Charles Rice, CEO Entergy New Orleans, LLC ("ENO") Concerning Conditional Approval of New Orleans Power Station***

Dear Councilmember Williams:

This correspondence is in response to the recent letter filed by Mr. Charles Rice on behalf of Entergy New Orleans, LLC ("ENO," "Entergy," or the "Company"). Regrettably, Entergy misrepresents 1) the Public Interest Intervenors' position, 2) the evidence in this proceeding, and 3) the rationale supporting the adoption of conditions in this proceeding.

**I. THE COUNCIL HAS THE AUTHORITY AND THE OBLIGATION TO  
CONDITION ANY APPROVAL TO PROTECT RATEPAYERS**

Entergy's letter asserts that the City Council lacks the authority to do anything but make an up-or-down decision on two proposed gas plants that were hand-selected by the Company in a non-competitive process. This is clearly not the case.

The Council has a wide-ranging regulatory obligation to protect the public interest in every aspect of ENO's proposals. *See City of Plaquemine v. La. Pub. Serv. Comm'n*, 282 So. 2d

440, 443 (La. 1973). While the public interest test requires the Council to balance numerous environmental, social and economic factors, the core of the test is about protecting ratepayers from unnecessary financial burden: “to assure the furnishing of adequate service [to] all public utility patrons at the lowest reasonable rates consistent with the interest both of the public and of the utilities.” *Id.*

To advance the public interest, regulatory bodies like the Council have “extremely broad authority to condition certificates of public convenience and necessity,” so long as the conditions are “reasonable.” *Transcontinental Gas Pipe Line Corp. v. Fed. Energy Reg. Comm’n*, 589 F.2d 186, 190 (5th Cir. 1979)(in the construction of a major extension of a natural gas pipeline, approving a condition that denied the company recovery of pipeline costs if the pipeline did not meet projected 60% load factor)(citing *Atlantic Refining Co. v. Pub. Serv. Comm’n of N.Y.*, 360 U.S. 378 (1959)). No party disputes that cost-control measures are lawful. In fact, utility regulators like the Council routinely impose conditions to protect the public interest when approving utility applications to build generating stations in nearly identical circumstances, as outlined in more detail below.

## **II. PROTECTIVE CONDITIONS FOR THE RATEPAYER ARE NECESSARY TO MITIGATE ENTERGY’S RISKY ASSUMPTIONS**

The conditions that the Public Interest Intervenors proposed in our January 19 brief, and again in closing arguments on February 21, as well as any other conditions that the City Council may adopt, are not “poison pills.” They are, however, a means to reasonably divide the substantial risks associated with the power plant the Company has insisted that it must build.

A primary risk for ratepayers is that ENO is asking the Council to agree that, in just four years, the price for the plants’ excess power would rise over **16,000 percent** to more than \$92

per kW-year, and increase from that high level for well over a decade into the future.<sup>1</sup> That has never happened before in our capacity market—not even close—as ENO itself admits.<sup>2</sup> In our capacity market, the record-setting price, in 2014, was just \$6 per kW-year. Right now, it is a mere \$0.55 per kW-year.<sup>3</sup> Moreover, our witnesses, the Advisors’ witness Joseph Rogers, and the capacity market’s own independent monitor all believe that capacity prices are at least as likely to remain very low.<sup>4</sup>

The Company’s unreasonable capacity-price predictions make a major difference for ratepayers. As the Advisors’ witnesses determined, even assuming a significant ten-fold increase in capacity prices to \$6 per kW-year—which is itself optimistic given that current prices are \$0.55 per kW-year—the gas plants would still cost ratepayers about 4 times more per month than transmission-focused solutions.<sup>5</sup>

A second risk is that ENO’s capital cost estimates will be wrong. ENO did not conduct a competitive, all-source solicitation process prior to proposing the two gas plants under consideration.<sup>6</sup> Rather, it hand-selected the projects and construction vendors in a closed, private process. ENO simply did not test the market to determine that its selection of the RICE units and CT units were least-cost options. Under such circumstances, customers deserve financial protection.

We are aware of the Advisors’ view, reflected in the draft resolution presented to the Council, that lower cost transmission improvements are not an appropriate response.

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<sup>1</sup> SEC-12, p. 8; Rogers-2 at 33, Table 3.

<sup>2</sup> Evid. Hr’g Tr., Dec. 18, 2017, at 205:7–206:13; *see* Rogers-2 at 33 Table 3.

<sup>3</sup> Rogers-2 at 33, Table 3.

<sup>4</sup> Fagan-2 at 4:4–5:9; Rogers-2 at 33:7–11; 36:6–37:1, 38:7-15; Cureington-8 SEC 15 at 15 (IMM report).

<sup>5</sup> Watson-2 at 21 Table 7.

<sup>6</sup> Henderson-1 at 7:3–10:2 (describing competitive all-source procurement process).

Prudence review is an after-the-fact, retrospective analysis of utility's activities performed during the licensing, construction, and start-up phases of the power-plant construction. The review is designed to ensure that the money spent on a project was invested as intended. The test provides that a utility will be compensated for prudent investments at their actual cost when made and is similar to a common-law negligence standard. Prudence review specifically prohibits any use of hindsight, so the utility gets paid regardless of whether the investments, in hindsight, prove to be necessary or beneficial. In most cases there is even a presumption that a utility's expenditures are prudent. The prudent investment rule is largely to protect the utility, and in practice only protects the ratepayer against fairly shocking mismanagement. *See generally Gulf States Utils. Co. v. La. Public Serv. Comm'n*, 578 So. 2d 71, 84–86 (La. 1991) (describing prudence review standard and burden of proof in Louisiana).

If a regulatory body approves a project knowing of the risks in the utility's analysis, instead of acting at the time of the decision to protect the public interest through conditions – such as those designed to protect against inflated estimates of revenues from power sales to other parties – the regulator will have a very difficult if not impossible time finding expenditures imprudent on that basis after the project is constructed.

Conditions like the ones described in this correspondence and our brief serve a much different purpose than protecting the ratepayers from waste or fraud. The purpose of the conditions is to protect the public interest from an unacceptable and unbalanced burden of risk. Thus, conditions aim to properly share risks, a purpose which prudency review cannot serve after the fact.

**IV. ENERGY IN ESSENCE ASSERTS THAT THE COUNCIL MUST APPROVE ITS PROPOSAL REGARDLESS OF THE COST TO THE RATEPAYER**

Nonetheless, given ENO's refusal to meaningfully evaluate less expensive options and the MISO capacity market risks outlined above, the Council can and should include reasonable conditions "dividing the risk between ratepayers and shareholders." *Transwestern Pipeline Co. v. F.E.R.C.*, 784 F.2d 609, 614 (5th Cir. 1986).

To put it plainly, Entergy's proposal requires ratepayers to place a bet that relies on (1) a power plant being built for a certain price, (2) a large share of the power that plant produces being sold to somebody other than ratepayers for a price that is 16,000 percent higher than what power sells for right now, and (3) that 16,000 percent higher price remaining in place for over 10 years.

On the face of it, this is a risky bet. Under Entergy's proposal, even if the company got the cost wrong, or was wrong about the radical increase in power prices, the company still makes money, while the ratepayer gets stuck on the losing side of these bets.

Reasonable conditions are a means to ensure that the risks and benefits are properly allocated in a manner that is justified by ENO's claims in the application and the facts in this case. As the proposal currently stands, customers bear all the cost and all the risk, while Entergy has no incentive to reduce these risks to the ratepayer.

### **III. PRUDENCE REVIEW DOES NOT SERVE THE SAME PURPOSE AS CONDITIONS MITIGATING THE RISK TO RATEPAYERS**

Entergy apparently asserts that the Council need not consider the reasonableness of Entergy's projections now, since eventually there will be a "prudence" review. As Entergy is well aware, prudence review is not intended to address the risks that regulators address through reasonable conditions on the approval of a project.

Entergy's justification for the power plant has changed over time. Page 2 of Entergy's letter makes the company's current position clear: regardless of the cost to the ratepayer, the company has reliability needs that only building a \$200 million plus power plant will address. Yet it is Entergy itself that left the ratepayer in this position. It is Entergy that failed to conduct appropriate analysis on less expensive transmission solutions to the reliability issues, and Entergy that did not seek out competitive solutions.

Basically, Entergy is saying that the Council no longer has a choice in the matter, and it would not matter whether the market price for electricity was one cent or one thousand dollars. Given that, inclusion of protective conditions in any approval is critical. The ratepayers of New Orleans should not be forced to hand Entergy a blank check, and Council conditions to protect against that are appropriate and have precedent.

#### **V. REGULATORY BODIES FREQUENTLY CONDITION APPROVALS OF GENERATING FACILITIES TO PROTECT RATEPAYERS**

Including protective conditions to mitigate ratepayer risk in project approvals is a common practice, as the following examples show:

- *Monongahela Power Co. and the Potomac Edison Co.*, No. 17-0296-E-PC, Public Service Commission of West Virginia. When Monongahela Power and Potomac Edison companies requested to shift a merchant generating plant into the rate base, the Public Service Commission of West Virginia deemed it in the public interest to protect customers by requiring a protective hedge against the utility's assumptions of market sales. Here, the Commission worried that the applicant companies' expectations of sales into the PJM market would not come to fruition, and sought to protect ratepayers from the potential impacts of the utility's assumptions. The Commission said, "The Companies will compensate customers through prospective rate credits as determined by the Commission for any year that market sales from Pleasants produce revenues that are below the full revenue requirements imposed on customers due to Pleasants."
- *Petition of Mississippi Power Co.*, Docket No. 2009-UA-014, p 108, Mississippi Public Service Commission. The Public Service Commission required the utility to guarantee,

subject to certain conditions, operating characteristics, capital costs and proposed sales of byproducts from an internal gasification power plant. The utility ultimately absorbed \$6.5 billion in losses when the plant did not operate as proposed.

- *In re Hawaiian Electric Co.*, No. 2014-0113, the Hawaii Public Service Commission capped the construction costs of a Wartsila RICE unit project at \$167 million.

## VI. CONCLUSION

In short, the Council has full authority to require protective conditions in the approval of any generating facility. The record shows that the proper path forward is to require a full investigation of the transmission, renewable and energy efficiency based alternative solutions that would best serve New Orleans. However, if the Council determines that it will approve a generating plant, at a minimum conditions must be included to protect the ratepayer.

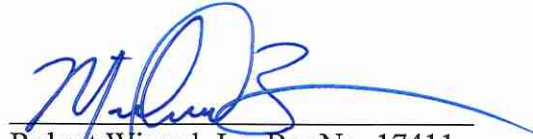
The formulation of appropriate conditions may well require some additional information. To the extent that the Council feels that it does not have adequate information at this point, the proper course is to remand this matter to the Utility Committee for focused fact finding proceedings, rather than approving a project which does not protect the ratepayer.

A remand may be proper in any case. Entergy's letter is apparently intended to be included in the record in this matter, which closed some time ago. For example, Entergy asserts a cost to the customer of \$5.99 in the first year of operation of NOPS. The Public Interest Intervenors are not aware of this specific figure being in the record at this point. If Entergy is adding to the record in this matter, the record must be re-opened for the other parties to respond.

This is particularly true since, as the Council is well aware, the City faces a daunting set of infrastructure needs expected to cost billions of dollars in the coming years, from upgrades to Entergy's faulty distribution system, to bolstering Sewerage and Water Board infrastructure, to

paving pot-holed roadways. New Orleanians simply cannot afford to break the bank on Entergy's gas plant while there are so many other costly infrastructure challenges to meet.

Respectfully submitted,



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- Service List for UD-16-02