

RESOLUTION
(LYING OVER)
NO. R-19-17

CITY HALL: January 23, 2019

BY:  COUNCILMEMBERS MORENO AND WILLIAMS

IN RE: THE COUNCIL OF THE CITY OF NEW ORLEANS INDEPENDENT INVESTIGATION OF ENTERGY NEW ORLEANS (“ENO”) RELATIVE TO ALLEGATIONS OF THE USE OF PAID ACTORS IN COUNCIL PUBLIC MEETINGS IN CONNECTION WITH DOCKET NO. UD-16-02 AND RESOLUTION NO. R-17-426

RESOLUTION AND ORDER REGARDING IMPOSITION OF SANCTIONS AGAINST ENO BASED UPON REPORT OF INDEPENDENT INVESTIGATORS FILED WITH THE COUNCIL ON OCTOBER 29, 2018

WHEREAS, pursuant to the Constitution of the State of Louisiana and the Home Rule Charter of the City of New Orleans (“Charter”), the Council of the City of New Orleans (“Council”) is the governmental body with the power of supervision, regulation, and control over public utilities providing service within the City of New Orleans; and

WHEREAS, pursuant to its powers of supervision, regulation, and control over public utilities, the Council is responsible for fixing and changing rates and charges of public utilities and making all necessary rules and regulations to govern applications for the fixing and changing of rates and charges of public utilities; and

WHEREAS, Entergy New Orleans, LLC (“ENO” or “Company”), is a public utility providing electric and natural gas service to all of New Orleans;¹ and

WHEREAS, ENO is a wholly owned subsidiary of Entergy Utility Holding Company, LLC (“EUH”) and the other four operating companies are Entergy Arkansas, Inc. (“EAI”), Entergy

¹ On November 30, 2017, Entergy New Orleans, Inc. undertook a restructuring that resulted in the transfer of substantially all of its assets and operations to Entergy New Orleans, LLC, which since that date provides retail electric and gas utility service to New Orleans.

Louisiana, LLC, ("ELL"), Entergy Mississippi, Inc. ("EMI"), and Entergy Texas, Inc. ("ETI"). These five operating companies are referred to collectively as the "Operating Companies"; and

WHEREAS, the Council is responsible for ensuring that New Orleans customers receive reliable electric and gas service at just and reasonable prices; and

WHEREAS, the Council is responsible for assuring that its proceedings relative to its utility regulatory function adhere to the highest standards of integrity, transparency, accuracy, efficacy, fairness and reliability; and

BACKGROUND

WHEREAS, the entire NOPS process has been prolonged and arduous, and has its roots in bad choices by ENO, including its decision in its original application to seek approval for a new plant that was clearly and unjustifiably oversized at 226 MW; and

WHEREAS, the initial filing proposed a natural gas combustion turbine plant, which ignored the often articulated concerns of the Council, the Advisors and the community that any new plant would have to be a significantly improved technology from the antiquated Michoud plant, which would provide measureable environmental benefits; and

WHEREAS, the initial proposal also ignored the universal desire to facilitate the integration of renewables and to expand energy efficiency while also providing "black start," all-weather capability; and

WHEREAS, the reaction of the Council, its Advisors and the public to the original filing, in part, caused ENO to propose the more acceptable New Orleans Power Station ("NOPS") alternative; and

WHEREAS, the Council was clear and unambiguous as to the extreme importance of the NOPS proceedings and the seriousness of the decision that the NOPS proposal placed before the Council; and

WHEREAS, all action items on a regular Council meeting agenda must have some opportunity for public comment under the State’s open meeting law, not all matters that come before the Council as the utility regulator require a public hearing; and

WHEREAS, the Council schedules public hearings only when “it is deemed desirable by the council that members of the public at large who are not parties of record should be heard on any matter” in a regulatory proceeding;² and

WHEREAS, the October 17, 2017 NOPS public hearing was held pursuant to such a deliberative determination by the Council; and

WHEREAS, even though the City Code specifically excludes public comment gathered at such a public hearing from a regulatory administrative record, holding such a hearing clearly indicates that the Council believed it was very important to hear from the public and to receive **accurate** public opinions; and

WHEREAS, engaging in any manipulation, distortion or deception in connection with such an important public meeting severely undermines the Council’s clearly stated desire to obtain accurate public opinion, and is contemptuous of the Council’s plenary utility regulatory authority; and

WHEREAS, the Council also clearly ascribed the same importance to public comment at the Utility, Cable, Telecommunications and Technology Committee (“UCTTC”) meeting held to discuss NOPS on February 21, 2018; and

² *City Code Section 158-431 (b).*

WHEREAS, even though the City Code explicitly excludes public comment gathered at such a committee hearing from the administrative record, receiving public comment at a committee meeting indicates that the Council believed it was important to hear from the public and to receive **accurate** public opinions; and

WHEREAS, on April 19, 2018 a lawsuit was filed in Civil District Court alleging that people were paid to attend one or more NOPS-related meetings, and alleging that as a result opponents of the NOPS plant were prevented from entering due to the limited capacity of the meeting rooms; and

WHEREAS, in an ENO news release dated May 10, 2018, ENO stated that an internal investigation had been launched after the filing of the lawsuit alleging that people were paid to attend or speak at one or more public meetings; and

WHEREAS, the news release stated that ENO entered into a contract with The Hawthorn Group (“Hawthorn”) “to assist with organizing local grassroots support for NOPS at two public meetings relating to NOPS on October 16, 2017, and February 21, 2018;” and

WHEREAS, the news release further stated that ENO’s own investigation concluded that, in fact, Hawthorn retained Crowds on Demand, allegedly without ENO’s knowledge or consent, and that, allegedly without ENO’s knowledge or consent, Crowds on Demand paid individuals to appear and/or speak at two meetings for which **Hawthorn was contracted** to provide specific numbers of “supporters” to be present at the meetings with certain tangible expressions of support (e.g., t-shirts and signs), including some paid attendees that would be designated to speak at the meetings in support of the NOPS plant using prepared information; and

WHEREAS, neither the Council, the Advisors nor the public was aware that ENO had hired an “astroturfing” company like Hawthorn prior to the May 10th ENO news release; and

WHEREAS, based upon ENO's own investigation, which confirmed many key elements of the allegations about paid "supporters," the Council on May 24, 2018 considered and unanimously adopted Motion M-18-196 immediately initiating an independent third-party investigation of ENO relative to allegations that ENO, Entergy, or some other entity paid or participated in paying actors to attend and/or speak in support of NOPS at one or more public meetings in connection with ENO's NOPS application;³ and

WHEREAS, the Council also adopted Motion M-18-197 directing Council staff to issue a Request for Qualifications to begin the competitive selection process established under Council Rule 45 to select investigators to conduct the independent investigation; and

WHEREAS, a Request for Qualifications for an independent investigator was issued on May 25, 2018; and

WHEREAS, on June 21, 2018, the Council adopted Motion M-18-255 selecting Sher, Garner, Chaill, Richter, Klein, and Hilbert, L.L.C. and the Honorable Calvin Johnson (retired) ("Investigators") to conduct the investigation, and

WHEREAS, the contract between the Council and the Investigators was executed on August 4, 2018, and the investigation was formally commenced; and

WHEREAS, the Contract required that a report be filed with the Council on or before September 4, 2018; and

WHEREAS, Investigators asserted to the Council that ENO was resisting certain requests for documents and information, Investigators requested and received two extensions from the Council for filing the report; and

³ ENO and Entergy will be referred to collectively and interchangeably because the facts indicate that ENO, its parent and other Entergy affiliates coordinated efforts with respect to the matters under investigation.

WHEREAS, Investigators filed their final report (“Report”) with the Council on October 29, 2018; and

WHEREAS, the Report finds, among other things, that:

- Numerous individuals were paid to attend and/or speak in support of ENO at two public meetings;
- Instead of disclosing the payments and the affiliation with ENO these attendees and speakers were commissioned to pose as citizens genuinely in support of NOPS and were coached with respect to comments and with respect to avoiding the media;
- Payment and the obligation to pay flowed from ENO through ENO’s vendors to the individuals hired to attend and/or speak at meetings on October 16, 2017 and February 21, 2018;
- ENO took no corrective action and continued to deny any knowledge of the improper activity even after it was clear the conduct had occurred;
- ENO knew or should have known that such conduct occurred or reasonably might occur as a result of its engagement of Hawthorn; and

WHEREAS, these findings are extremely troubling to the Council and show a complete disregard for the Council’s high standards of integrity, transparency, accuracy, efficacy, fairness and reliability in the Council’s utility regulatory process, and undermine confidence in the utility regulatory system; and

WHEREAS, it is irrelevant that prior to recent revisions, Council rules⁴ did not require that speakers disclose on comment cards whether they received or would receive compensation for speaking, nor did they require other attestations or a signature; and

WHEREAS, the conduct detailed in the Report does not affect or alter the evidentiary record created in Docket No. UD-16-02 because the Code of the City of New Orleans specifically states that “no part of statements made or evidence adduced at... [an] at-large public hearing shall, in legal terms form (and such matter shall not form) the basis of any council decision in a contested

⁴ In June 2018 the Council revised the format of comment cards for speakers to include disclosure of compensation, attestation to truthfulness and require the speaker’s signature.

proceeding,” Code of the City of New Orleans, Section 158-431(b), ENO’s conduct, as detailed in the Report, has adversely affected the utility regulatory system by undermining the Council’s high standards of integrity, transparency, accuracy, efficacy, fairness and reliability;⁵ and

WHEREAS, ENO’s conduct also impeded the Council’s purpose in holding the at-large public hearing, and the UCTTC hearing, which was for the Council to hear the accurate opinions of the public regarding the matter and to allow members of the public at large **who were not parties of record** to be heard; and

WHEREAS, ENO’s conduct has caused Council members, staff and Council Advisors to incur substantial hours of additional work to deal with the matter for the past eight months and will continue to cause additional work for the foreseeable future as the Council and the Advisors deal with imposing appropriate sanctions and monitoring them for years to come; and

WHEREAS, such conduct by a regulated utility cannot be tolerated and must be effectively deterred in the future; and

WHEREAS, on October 31, 2018, the Council adopted Resolution R-18-474 initiating a show cause proceeding regarding the imposition of sanctions against ENO based upon the Investigators’ Report; and

WHEREAS, the Council has the expressed authority to impose penalties, monetary and otherwise, as provided in Code of the City of New Orleans, Section 3-130 (7) and Section 158-52; and

WHEREAS, the reasonableness of penalties is associated with several critical factors including: (1) the well supported finding that ENO knew or should have known that the improper conduct occurred or reasonably would occur; (2) the extremely serious nature and extent of the

⁵ In addition, the Report also confirmed that “Investigators did not uncover any information that showed any similar activity concerning the evidentiary hearing conducted by Judge Jeffrey S. Gulin.”

consequences of the conduct; and (3) the critical need to assess a penalty that will effectively deter future deleterious conduct so that improper conduct does not become simply a cost of doing business; and

WHEREAS, the Council has lost trust in the management team responsible for the conduct described both generally in Resolution R-18-474 and in detail in the Report, which makes deterrence a far more pressing concern; and

WHEREAS, the Council directed ENO to demonstrate, within thirty (30) days, why penalties and sanctions including: (1) a cash payment of \$5 million to be paid in accordance with and for purposes determined by the Council; (2) certification that each ENO management level employee has or will complete a third-party ethics training course; and (3) submitting for Council approval an ENO Code of Conduct, developed with special emphasis on its dealings with and before the Council, which includes credible oversight and enforcement provisions specifically designed to avoid a repeat of the glaring breaches of ENO's existing Entergy Values and Ethics Statement, should not be imposed; and

WHEREAS, interested parties were also allowed to file comments with the Council within thirty (30) days of adoption of Resolution R-18-474; and

WHEREAS, the Council further ordered that all costs associated with the Investigation incurred by ENO and the Council, including monetary penalties and costs of complying with non-monetary penalties, would be disallowed for recovery from ratepayers pursuant to Code of the City of New Orleans, Section 158-582 and Section 158-626; and

WHEREAS, Resolution R-18-474 states that all costs incurred by the utility Advisors in connection with any and all aspects of the Investigation, including, but not limited to, monitoring penalties and sanctions shall be billed and reimbursed as usual, however, such payments would

not be recoverable from ratepayers, and would be outside of and in addition to the Advisors' contract budgets, subject to normal Council review and oversight. ENO was also ordered to exclude all costs and penalties associated with this show cause proceeding, as well as their related regulatory ratemaking effects, from prospective rate action filings and clearly demonstrate the methodology by which such have been excluded; and

ENO'S RESPONSE TO THE SHOW CAUSE RESOLUTION

WHEREAS, ENO filed its Response to Show Cause ("Response") on November 30, 2018 criticizing the Investigators' Report and claiming that the Council lacks the authority to impose penalties, including those outlined in Resolution R-18-474;⁶ and

WHEREAS, in its Response, ENO asserts that the Investigators "failed to produce any evidence substantiating the allegation that the Company 'knew' that Hawthorn or its contractor, Crowds on Demand, had paid people to appear in support of the New Orleans Power Station;"⁷ and

WHEREAS, ENO also claims that the Investigators "intentionally failed to disclose to the Council and the public evidence proving that ENO was not aware of the conduct at issue and also generally conducted themselves in a manner that ignored well established legal principles along with basic tenets of due process and sought to confirm a pre-ordained conclusion rather than objectively reporting the facts."⁸ Specifically, ENO complains that the Investigators refused to allow "Entergy's counsel to participate in interviews of non-employee witnesses or even question Entergy's own witnesses....;"⁹ and

⁶ ENO Response to Show Cause at p. ii.

⁷ ENO Response to Show Cause at p. i.

⁸ ENO Response to Show Cause at p. i.

⁹ ENO Response to Show Cause at p. i.

WHEREAS, the Company takes exception with the Investigators' Report because it "omitted material documents that did not support the Investigators' conclusions" including certain correspondence that ENO believes to be exculpatory.¹⁰ ENO further argues that the "Investigators' refusal to acknowledge these documents or address them in the Report calls into question whether they were fair and objective or simply intent on generating a storyline that supported their desired outcome and creating media headlines;"¹¹ and

WHEREAS, ENO also avers that it did not violate any laws or Council rules by engaging a subcontractor that paid individuals to appear at public Council meetings to express support for NOPS. The Company cites the Investigators' Report, which stated that "[t]here are no specific Council rules that prohibit this practice. Nor are there rules which require parties or groups with business before the Council to inform the Council that attendees and/or speakers are compensated;"¹² and

WHEREAS, ENO asserts that in the "absence of a violation of any charter section, ordinance, rule, or regulation, the Council does not have the authority to impose a \$5 million fine or any of the proposed 'penalties' in Resolution R-18-474."¹³ The Company also argues that the "imposition of a fine or other penalties under these circumstances is blatantly unconstitutional and would violate the First Amendment, the Ex Post Facto clause, substantive due process, and the Eighth Amendment of the United States Constitution;"¹⁴ and

WHEREAS, ENO disagrees with the provisions of Resolution R-18-474 that cite the Home Rule Charter of the City of New Orleans, Section 3-130 (7)¹⁵ and New Orleans City Code

¹⁰ ENO Response to Show Cause at p. i.

¹¹ ENO Response to Show Cause at p. 7-8.

¹² ENO Response to Show Cause at p. ii citing Investigators' Report at p. 50.

¹³ ENO Response to Show Cause at p. ii.

¹⁴ ENO Response to Show Cause at p. ii.

¹⁵ Home Rule Charter of the City of New Orleans, Section 3-130(7).

Section 158-52 as the sources of the Council’s expressed authority to impose penalties, monetary and otherwise.”¹⁶ The Company asserts that Code Section 158-52 concerning false or misleading representations made in any filing or throughout proceedings involving the setting of rates only applies to misrepresentations of fact, not to paid actors who feigned their support for the NOPS proposal;¹⁷ and

WHEREAS, ENO’s Response attempts to draw a distinction between representations of fact and statements made by paid actors as “unsworn public statements of opinion;”¹⁸ and

WHEREAS, ENO narrowly interprets the Council’s authority to issue penalties by claiming that Home Rule Charter Section 3-130(7), which allows for the imposition of reasonable penalties, only applies to regulatory rate orders issued by the Council;¹⁹ and

WHEREAS, according to ENO, even if the Council had the authority to impose a fine under these circumstances, which ENO claims does not exist, “the amount of that fine would be further limited by the Code to something far less than \$5 million.”²⁰ ENO argues that “a violation pursuant to Code Section 158 is considered a “misdemeanor,” and City Code Section 1-13 caps fines at \$300 for the violation of any provision of the City Code or any ordinance when no specific penalty has been provided;”²¹ and

WHEREAS, according to ENO’s Response, providing public comment to a city council is “classic First Amendment activity”²² and that the Council violated ENO’s First Amendment

¹⁶ New Orleans City Code, Section 158-52.

¹⁷ ENO Response to Show Cause at p. 17.

¹⁸ ENO Response to Show Cause at p. 18.

¹⁹ ENO Response to Show Cause at p. 18-19.

²⁰ ENO Response to Show Cause at p. 19.

²¹ ENO Response to Show Cause at p. 19.

²² ENO Response to Show Cause at p. 22.

rights by penalizing ENO “because some speakers at public meetings who supported the NOPS proposal were paid to attend;”²³ and

WHEREAS, ENO further criticizes the Investigators’ Report for using the phrase “knew or should have known” as a standard by which the Company’s conduct was evaluated throughout the investigation.²⁴ Specifically, the Company asserts that the Investigators used the standard “should have known” to “mask the fact that there was no evidence that ENO actually ‘knew’ about the conduct at issue;”²⁵ and

WHEREAS, ENO asserts that it engaged Hawthorn based on its “national reputation and its repeated representations that it had the means and ability to identify and recruit legitimate supporters from New Orleans who supported the NOPS project.”²⁶ According to its Response, “ENO never anticipated that Hawthorn would hire Crowds on Demand, which was in violation of Entergy’s contract with Hawthorn, or be involved in paying people to appear at public meetings before the Council;”²⁷ and

WHEREAS, the Company’s Response states “[f]ollowing the October 16, 2017, public meeting, ENO questioned Hawthorn several times about allegations that had arisen regarding payments to NOPS supporters, and Hawthorn repeatedly denied the allegation. On October 23, 2017, ENO was alerted to a tweet in which the author stated that there had been paid protesters at the October 16th public meeting. ENO immediately forwarded the tweet to Hawthorn. There was a subsequent tweet later that same day, which ENO also forwarded to Hawthorn;”²⁸ and

²³ ENO Response to Show Cause at p. 23.

²⁴ ENO Response to Show Cause at p. 6.

²⁵ ENO Response to Show Cause at p. 6-7.

²⁶ ENO Response to Show Cause at p. 9.

²⁷ ENO Response to Show Cause at p. 10.

²⁸ ENO Response to Show Cause at p. 10.

WHEREAS, ENO asserts that “immediately following the February 21, 2018 public meeting, ENO emailed Hawthorn that a NOPS opponent wearing a marked-up, orange ENO shirt had commented about paid supporters and to question why some of the people recruited by Hawthorn wore orange shirts to the second meeting, despite Entergy’s understanding that the orange t-shirts were only to be worn at the October 16, 2017 public hearing.”²⁹ According to ENO, “Hawthorn dismissed the payment allegation and told ENO that the supporters recruited by Hawthorn who wore the orange t-shirts to the February 21 Utility Committee Meeting did so because they “‘were passionate about the cause’ and ‘believed in the message;’”³⁰ and

WHEREAS, on March 5, 2018, ENO emailed Hawthorn to relay another payment allegation that had been circulated by the opponents of NOPS and Hawthorn responded by stating, “Interesting.”³¹ ENO further argues that it “repeatedly questioned Hawthorn about the payment allegations following the October 16, 2017, and February 21, 2018, public meetings, and Hawthorn repeatedly denied the allegations;”³² and

WHEREAS, ENO’s procedural due process claims are based primarily on the refusal of the Investigators to allow Entergy to participate in the interviews of third-party witnesses and the refusal of the Investigators to produce a complete set of their interview notes;³³ and

WHEREAS, the Company argues that “the proposed fine further infringes on ENO’s substantive due process rights and Eighth Amendment right to be free from excessive penalties.”³⁴

ENO relies on *BMW v. Gore*, which requires “fair notice not only of the conduct that will subject him to punishment, but also the severity of the penalty that a State may impose.”³⁵ According to

²⁹ ENO Response to Show Cause at p. 11.

³⁰ ENO Response to Show Cause at p. 11.

³¹ ENO Response to Show Cause at p. 11.

³² ENO Response to Show Cause at p. 12.

³³ ENO Response to Show Cause at p. 15.

³⁴ ENO Response to Show Cause at p. 26.

³⁵ ENO Response at p. 28, citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996).

the Company, *BMW* requires the application of three guideposts to determine whether adequate notice was given regarding the magnitude of the sanction including (1) the degree of reprehensibility of the nondisclosure; (2) the disparity between the harm or potential harm suffered by the claimant and his punitive damages award; and (3) the difference between this remedy and the civil penalties authorized or imposed in comparable cases;³⁶ and

WHEREAS, the Company asserts that, when applying the guideposts set forth in *BMW*, the Council's proposed \$5 million fine would clearly violate substantive due process and the Eighth Amendment.³⁷ Similarly, ENO uses the same arguments as they relate to the Council's authority to require ethics training for ENO management and the development of an ENO code of conduct to prohibit the behavior in the future.³⁸ The Company, rejects the authority of its regulator, responding that where no Council rules or other state laws were violated, the Council does not have the authority to require ENO's leadership to attend ethics training or to impose an ENO-specific code of conduct;³⁹ and

INTERESTED PARTIES' COMMENTS

WHEREAS, the Alliance for Affordable Energy ("Alliance") submitted public comments to the Council's show cause resolution on November 30, 2018 noting several criticisms and suggestions. The Alliance noted that the Report asserted that ENO was "totally uncooperative throughout the investigation."⁴⁰ The Alliance notes a variety of materials that ENO did not provide, which the Alliance suggests ENO should have provided. The Alliance also avers that the Investigators did not provide as much information about the February 21, 2018 meeting as the

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ ENO Response to Show Cause at p. 30.

⁴⁰ Comments of the Alliance for Affordable Energy dated November 30, 2018 at p. 2.

October 16, 2017 meeting. The Alliance urges the Council to reopen the investigation and direct ENO “to provide all information that ENO previously refused to turn over and impose a fine of \$10,000 a day for every day ENO fails to provide the information requested;”⁴¹ and

WHEREAS, while complimenting the Investigators on some points the Alliance criticizes them for not focusing on the “true victims of this fraud.”⁴² The Alliance also criticizes Resolution R 18-475 for not going far enough in discussing and addressing the harms to the residents of New Orleans “intentionally created by ENO’s actions;”⁴³ and

WHEREAS, the Alliance criticizes the proposed \$5 million penalty as “merely a slap on ENO’s wrist,”⁴⁴ which they assert “will not deter future conduct.”⁴⁵ The Alliance also criticizes the basis for the \$5 million calculation and recommends a \$25 million penalty based upon what the Alliance calculates to be “approximately 5% of ENO’s revenues;”⁴⁶ and

WHEREAS, the Alliance also urges that although the investigation is incomplete, there is enough evidence to warrant the City Council rescinding the Council’s approval of NOPS;⁴⁷ and

WHEREAS, Justice and Beyond Coalition, and 350 New Orleans filed very similar comments; both arguing that the “obvious reason”⁴⁸ for ENO’s “drastic” conduct is the “lack of genuine community support for a 30-year mortgage on a gas power plant, which would benefit only Entergy’s bottom line, not our community.”⁴⁹ Both criticize the proposed \$5 million fine as a “drop in the bucket,”⁵¹ ⁵² and urge that the Council (1) insist on access to the 70 documents ENO

⁴¹ *Id.* at p. 2-4.

⁴² *Id.* at p. 3.

⁴³ *Id.* at p. 4.

⁴⁴ *Id.* at p. 6.

⁴⁵ *Id.* at p. 7.

⁴⁶ *Id.* at p. 8.

⁴⁷ *Id.* at p. 8-10.

⁴⁸ 360 New Orleans Comments on Resolution R-18-474 dated November 30, 2018 at p. 1.

⁴⁹ Justice and Beyond Coalition Comments dated November 30, 2018 at p. 1.

⁵⁰ 360 New Orleans Comments on Resolution R-18-474 at p. 1.

⁵¹ *Id.* at p. 2

⁵² Justice and Beyond Coalition Comments at p. 2.

is withholding; (2) rescind the March 8, 2018 vote in favor of the gas power plant; (3) fully review the decision that led to this vote so the five new Council Members can make an informed decision; and (4) insist on a full analysis of alternative options to a gas peaking plant before any subsequent vote,⁵³ ⁵⁴and

WHEREAS, three members of the public also submitted written comments including Lou Furman who asserted that “the real issue is all the falsehoods Entergy is using to get approval for a gas plant we do NOT need;”⁵⁵ and Marion Freistadt, Ph.D. who called the proposed sanctions “laughably weak”⁵⁶ and urged that the Council should reverse the vote on the NOPS approval and assess a much larger fine “that is truly punitive”.⁵⁷ Finally, Robert A. Hammer, M.D. submitted comments stating that the fine imposed by the Council is “FAR too low,” and should be \$50 million;⁵⁸ and

WHEREAS, the Council also received written communications from Mary Cuny, an Entergy Employee; Paris Woods, Ed.M. Executive Director, College Beyond; Howard Rogers, III, Executive Director, New Orleans Council on Aging; Melissa Manuselis, Executive Director, City Year New Orleans; Melanie Bronfin, J.D., Executive Director, Louisiana Policy Institute for Children; Natalie Jayroe, President and CEO, Second Harvest Food Bank; and Calvin Mackie, Ph.D., Founder and Executive Director, STEM NOLA.⁵⁹ We note each of these communications failed to address the specific facts and circumstances surrounding the Council’s show cause

⁵³ *Id.*

⁵⁴ 360 New Orleans Comments on Resolution R-18-474 at p. 2.

⁵⁵ Comments of Lou Furman dated November 14, 2018.

⁵⁶ Comments of Robert A. Hammer, M.D. dated November 28, 2018.

⁵⁷ Comments of Marion Freistadt dated November 19, 2018.

⁵⁸ Comments of Robert A. Hammer dated, November 28, 2018.

⁵⁹ Comments of Mary Cuny, Entergy Employee dated November 16, 2018; Paris Woods, Ed.M, Executive Director, College Beyond dated November 20, 2018; Howard Rogers, III, Executive Director, New Orleans Council on Aging dated November 21, 2018; Melissa Manuselis, Executive Director, City Year New Orleans dated November 26, 2018; Melanie Bronfin, J.D., Executive Director, Louisiana Policy Institute for Children dated November 26, 2018; Natalie Jayroe, President and CEO, Second Harvest Food Bank dated November 30, 2018; and Calvin Mackie, Ph.D., Founder and Executive Director, STEM NOLA dated November 30, 2018.

resolution, but rather provided generally supportive statements of ENO recognizing the contributions made by the Company to various organizations providing charitable and other services in New Orleans; and

ANALYSIS AND LAW

WHEREAS, in its Response ENO misstates, exaggerates and omits numerous facts that are relevant to the Council's analysis of this matter; and

WHEREAS, in its Response ENO disingenuously repeatedly characterizes its engagement of Hawthorn as "to recruit **legitimate** supporters," yet the word legitimate does not appear in its contract with Hawthorn or in any of the communications cited by ENO in its Response; and

WHEREAS, ENO strongly objects to the Hawthorn letter not being mentioned in the Report, the letter is an attached document and the Report reproduces ENO's summary of the role of Hawthorn as: "Without ENO's knowledge or concurrence, and in violation of its contract terms, The Hawthorn Group subcontracted at least a portion of its work to Crowds on Demand, which paid individuals to appear at public meetings organized by the New Orleans City Council on October 16, 2017 and February 21, 2018;"⁶⁰ and

WHEREAS, the Report shows that at best ENO engaged in willful ignorance as to how Hawthorn would accomplish its contractual obligations to ENO; and

WHEREAS, the Hawthorn contract describes the scope of services as, among other things, "turn out" 75 supporters for the hearings with 10 people "who will sign up to provide two-to-three minute testimony." The contract, drafted by ENO, further provides that "Contractor will have all people there ahead of the hearing, and the speakers **will be there at least two hours in advance** to ensure they get in the room;"⁶¹ and

⁶⁰ Investigation Report at p. 22.

⁶¹ ENO- Hawthorn Contract at section 3.1.

WHEREAS, it is not plausible that ENO could believe that Hawthorn could fulfill this contractual obligation to provide 75 “volunteer supporters” who would be obligated to commit to spend multiple hours attending the meetings, 10 of whom Hawthorn was **contractually obligated** to have arrive two hours before the meeting, unless they were being compensated, especially in light of admissions by Charles Rice and others that ENO had not been successful in turning out volunteer supporters; and

WHEREAS, ENO’s reliance on the May 9, 2018 Hawthorn letter as exoneration is totally misplaced in that it comes more than six months after allegations of paid actors began, which allegations should have been addressed immediately because unlike the Council, the Advisors and the public, ENO **knew** it had **hired** an “astroturfing” company to “turn out” supporters; and

WHEREAS, even the lowest standard of reasonable conduct would require someone with knowledge of the hiring of an astroturfing firm to assume allegations of paid actors would very likely be true, triggering a vigorous investigation to determine the truth, unless there was something to fear from the truth; and

WHEREAS, ENO’s assertions that it acted promptly and diligently are not credible because:

1. Although ENO claims that after the October 16th meeting “ENO questioned Hawthorn several times about allegations that had arisen regarding payments to supporters, and Hawthorn repeatedly denied the allegations,”⁶² there are **no** clear written denials until the May letter.
2. ENO claims that an email exchange with Hawthorn after the February 21st meeting confirms Hawthorn denials earlier than May. ENO claims “Hawthorn dismissed the

⁶² ENO Response at p. 10.

payment allegations” in a return email. However, the Hawthorn email only discusses people wearing orange t-shirts at the second meeting, **but makes no mention, much less a denial, of the payment allegation.**⁶³ ENO is simply disingenuous in saying Hawthorn “dismissed” the allegation when, in fact, Hawthorn ignored the allegation.

3. ENO also asserts that on March 5, 2018 it emailed “another payment allegation” to Hawthorn, as well as a blog writer’s question seeking comment. The entirety of Hawthorn’s reply to the first email was “interesting.” To the second, Hawthorn said: “Hired an actor? Apparently their evidence is one person who is dilusional [sic] or just lying.”⁶⁴ Both non-answers are verbal sleight of hand with nothing resembling an actual, unequivocal denial. Yet, ENO meekly accepted both as definitive.
4. In a follow up email on March 5th about continued allegations from “some opponents,” Ms. Hammelman provided ENO with talking points to “refute” the allegations of payment, a meeting at Dave and Busters to get paid, and the signing of non-disclosure agreements. Within the talking points Ms. Hammelman provides private “for your background” notes to Ms. Pollard, which are different from the suggested public comments. Significantly, Ms. Hammelman never categorically denies payment, non-disclosure agreements or a meeting at Dave and Busters. Instead, she suggests that ENO deny that ENO did any of those things. For example, as to payments, Ms. Hammelman’s background comments are “some groups DO pay for ‘volunteer’ supporters to do things,” while very artfully saying “**Entergy** did not pay anyone for their support.”⁶⁵ Hammelman never denies “volunteers” were paid. As to a meeting at

⁶³ See ENO Response, exhibit 12.

⁶⁴ ENO Response at 11.

⁶⁵ Email exchange between Pollard and Hammelman, March 5, 2018 (emphasis added).

Dave and Busters, Ms. Hammelman suggested that ENO say “I don’t know anything about a meeting....” However, in her private “background” notes to Ms. Pollard, Ms. Hammelman says “[i]t is possible some people **gathered** [at Dave and Busters] after the hearing....”⁶⁶ Similarly, as to non-disclosure agreements, Ms. Hammelman suggests that Entergy deny that **Entergy** asked anyone to sign such agreements, but never denies that it happened.⁶⁷

5. ENO further asserts that Hawthorn’s Chair “confessed that Hawthorn had retained Crowds on Demand without Entergy’s knowledge to work on the NOPS project in **violation of the contract**” in a call with Entergy General Counsel Marcus Brown.⁶⁸ Again, ENO is being disingenuous. In the summary of the interview with Hawthorn Chair, John Ashford, the Report quotes Ashford as saying “Brown never claimed that [Hawthorn] ever breached its contract with Entergy.”⁶⁹ ENO also cites the May 9th letter in connection with this discussion, however the May 9th letter makes no “confession,” or even a suggestion, that Hawthorn violated its contract; and

WHEREAS, ENO ignored every “red flag” with its inexplicable passivity in reacting to the rising tide of explosive allegations of paid actors, and by its acceptance of useless verbal dodges, which no diligent utility company employing prudent practices would ever accept in a matter of such importance; and

WHEREAS, the *allegation* that a regulated utility would collude with a paid contractor to deceive the regulator on a matter as important and high profile as the NOPS decision is an allegation

⁶⁶ Email exchange between Pollard and Hammelman, March 5, 2018 (emphasis added).

⁶⁷ Email exchange between Pollard and Hammelman, March 5, 2018 (emphasis added).

⁶⁸ ENO Response at 12.

⁶⁹ Investigators’ Report at 42.

of epic significance, which any prudent utility would immediately investigate thoroughly and overwhelmingly refute if it were not to any degree true; and

WHEREAS, ENO's willful ignorance and near complete inaction are further confirmed by Hawthorn's Suzanne Hammelman in her interview with the Investigators where she reported that "she and ENO's Yolanda Pollard did not discuss particulars about supporters being paid or not being paid," and that "Pollard never expressed shock or dismay" once the allegations surfaced;⁷⁰ and

WHEREAS, contrary to ENO's assertion that it did not know that its contractor, Hawthorn, had paid people to appear in support of NOPS at two public meetings, the Council's Investigators clearly concluded that the "information uncovered to date indicates that Entergy *knew or should have known* that such conduct occurred or reasonably might occur;"⁷¹ and

WHEREAS, the Council need not address whether ENO knew of the improper conduct only whether ENO's conduct was grossly negligent in allowing the conduct to occur; and

WHEREAS, in his October 11, 2018 letter to the Council, Entergy executive Rod West admitted that ENO could have and should have prevented or stopped the improper conduct:

Furthermore, even though there are no facts in either our investigation or the one performed by the independent legal team to support the conclusion that Entergy employees "knew" about the hiring of Crowds On Demand ("COD") or their payments to individuals to show support for the NOPS, **we do agree that by providing sufficient oversight and asking the right questions, we could have either prevented the actions of The Hawthorne Group and COD or discovered them and stopped them. In essence, we should have been more diligent and we "should have known."**

As we have noted before, **we recognize that we are ultimately responsible for the actions of people working on our behalf.** We have outlined and continue to implement steps to ensure a situation like this does not happen again. These steps include significant changes in leadership, additional training for employees and

⁷⁰ Investigators' Report at p. 42.

⁷¹ Investigators' Report at p. 3 (emphasis in original).

vendors, specific contract provisions with all our vendors to prohibit this type of behavior and conducting periodic contract assessments to verify compliance,⁷² and

WHEREAS, the Investigators' Report cited specific correspondence dated September 18, 2017 between Suzanne Hammelman, of Hawthorn, and Yolanda Pollard, ENO's Communications Manager, in which Hammelman "discussed the 'crowd building'" effort where Hammelman stated in bold letters: **'I would caution you that we generally do not recommend this type of stand-alone effort and certainly would not suggest doing it more than once.'** Further Hammelman stated: **"Questions will be asked--who are these people and WHY did they turn out? Who got them here?"**⁷³ Such language expresses a clear intent to deceive; and

WHEREAS, the very next day, in the face of Hammelman's description of a deceptive process, and her caution about avoiding detection, Charles Rice signed on through Pollard, who emailed Hammelman: **"I've reviewed this approach with Charles. We'd like to move forward with this plan;"**⁷⁴ and

WHEREAS, on October 3, 2017, Hammelman copied a Crowds on Demand email address in an email to Pollard showing communication with Crowds on Demand;⁷⁵ and

WHEREAS, On October 3, 2017, ENO's President and CEO, Charles Rice exchanged email communications with Ms. Pollard as follows, which expresses ENO's clear intent to pay for "support" of the NOPS plant:

Rice (7:58 a.m.): "How is Hawthorn looking getting people to the hearing."
Pollard (8:00 a.m.): "They've committed to securing 50 people and 10 speakers."
Rice (8:01 a.m.): "Hell I would pay for more if they can get them."
Rice (8:26 a.m.): "If Hawthorn can get more people I will pay;"⁷⁶ and

⁷² Correspondence from Rod West to all Council Members, October 31, 2018 (emphasis added).

⁷³ Investigators' Report at p. 4.

⁷⁴ Investigators' Report at p. 10 (emphasis added)..

⁷⁵ Investigators' Report at p.11.

⁷⁶ Investigators' Report at p. 4-5. The number of "supporters" was increased to 75.

WHEREAS, it is important to note that during the October 16, 2017 public hearing, “multiple speakers listed addresses outside of Orleans Parish, such as River Ridge or Marrero (Jefferson Parish), which will not directly benefit from the proposed power plant;”⁷⁷ and

WHEREAS, on October 3, 2017 in an email Pollard asked Hammelman: “How do the participants you’re securing answer questions about their support and affiliation, if asked by the media, etc.” To which Hammelman responded: “[T]he supporters are told to **avoid the media** to the extent it’s possible....[E]ven the speakers will be told to **avoid the media** but will be prepared to speak with them if needed. We run our speakers through media practice drills several times prior to the event to make sure they know how to handle **and divert;**”⁷⁸ and

WHEREAS, there would be no reason to fear the media and “divert” questions if Hawthorn was just “turning out” **legitimate** NOPS supporters and not conjuring an artifice with ENO; and

WHEREAS, based upon these indisputable facts alone, it is simply not possible that ENO should not have known that certain individuals, wearing orange shirts provided by its contractor, were not legitimate supporters of NOPS who would require a scripted explanation for answering simple questions from the media about who they support and why; and

WHEREAS, Mr. West asserts that ENO had no “reason to doubt the veracity of Hawthorn at the time,”⁷⁹ and

WHEREAS, ENO and its affiliated companies have a long relationship with Hawthorn and its Chair, John Ashford, including a 2014 contract for \$2.3 million to work on “solar issues” for Entergy;⁸⁰ and

⁷⁷ Investigators’ Report at p. 5.

⁷⁸ Investigators’ Report at p. 12 (emphasis added).

⁷⁹ Correspondence from Rod West to all Council Members, October 31, 2018 (emphasis added).

⁸⁰ Investigators’ Report at pp. 41-42.

WHEREAS, Entergy, as a major utility company, knew or should have known that Hawthorn has engaged in similar astroturfing tactics previously; and

WHEREAS, Hawthorn has a **reported** history of similar conduct, including in 2009 the questionable use of subcontractors to send **fraudulent** letters to Members of Congress to oppose a “cap and trade” bill opposed by Hawthorn’s client, the American Coalition for Clean Coal Electricity (ACCCE). In that instance, *Hawthorn blamed a subcontractor, who blamed “one rogue temporary employee.”* A congressional investigation found that Hawthorn and ACCCE both knew the letters were fraudulent **before** the House vote, but did not inform the Members until weeks **after** the vote;⁸¹ and

WHEREAS, the most generous explanation of ENO’s engagement of Hawthorn, and participation with Hawthorn, is that ENO was grossly negligent in allowing the deceptive scheme to be concocted and to proceed, which ENO has admitted it could have prevented with “sufficient oversight and asking the right questions;”^{82 83} and

WHEREAS, it is not reasonable to believe that based on the facts revealed in the Investigator’s Report, even considering the facts as advanced by ENO, that ENO should not have known that Hawthorn “turned out” individuals who were not genuine supporters of NOPS and who were being paid to appear and make misrepresentations to the Council and the public about their endorsement of the NOPS project; and

WHEREAS, ENO should have known that Hawthorn and/or Crowds on Demand had paid individuals to speak in favor of NOPS at public hearings conducted by the Council, the record

⁸¹ <https://www.politico.com/story/2009/10/coal-industry-knew-about-fake-letters-028885>

⁸² Correspondence from Rod West to all Council Members, October 31, 2018 (emphasis added).

⁸³ “Gross negligence” has been described as an “extreme departure from ordinary care or the want of even scant care.” W. Page Keeton, et. al., Prosser & Keeton on the Law of Torts, § 34, at 211 (5th ed. 1984); *Citron v. Gentilly Carnival Club, Inc.* (La. App., 2015).

clearly shows that just six days after the October 16, 2017 public hearing, ENO and Hawthorn discussed “claims that had surfaced on social media that Entergy had paid people to attend and/or speak on Entergy’s behalf.”⁸⁴ ENO admitted that it was alerted to claims being made on social media that people had been paid to support NOPS at the October 16, 2017 public hearing; and

WHEREAS, ENO claims that it forwarded two tweets from the social media platform, Twitter, to Hawthorn that claimed that individuals were paid to support NOPS at the October 16, 2017 public hearing and then followed up with **one** phone call to Hawthorn to inquire about the truthfulness of the allegations.⁸⁵ Ms. Pollard’s phone call with Ms. Hammelman was described by Ms. Pollard in the following manner:

Q: Well, you brought it up to her in the email, correct?

A: I brought it up to her so that she was aware that this was being said, and we did not believe that this was actually part of their effort.

Q: What discussion did y’all have, if any, beyond the emails?

A: The only discussion that we had was: Here’s what I’m seeing, is this anything that you have discussed with your team? Is this anything that you typically do? And she said no. And she **thought** that it was – it was not true, and she wasn’t sure where it was coming from;⁸⁶ and

WHEREAS, it is inconceivable that after becoming aware of potential conduct as extremely troubling and unacceptable as paying individuals to support NOPS, ENO would simply forward two very flimsy emails and have one brief phone conversation with its contractor and conduct absolutely no plausible follow-up to determine the veracity of the allegations even though Ms. Hammelman could only say she “thought” it was not true; and

⁸⁴ Investigators’ Report at p. 6.

⁸⁵ ENO Response to Show Cause at p. 10.

⁸⁶ ENO Response to Show Cause at p. 10 citing Pollard Sworn Statement, attached to ENO’s Response as Exhibit 3, at 105 (emphasis added).

WHEREAS, ENO saw as early as October 3rd that Crowds on Demand was copied on emails concerning Hawthorn's astroturfing,⁸⁷ ENO failed to ask Hawthorn a single question about Crowds on Demand's role in the NOPS engagement; failed to ask Crowds on Demand whether they paid anyone to speak at the public hearing on October 16, 2017; failed to question Hawthorn about whether Hawthorn had engaged or instructed Crowds on Demand to pay people to appear at the public hearing in support of NOPS; failed to require **sworn** assurance in writing from both Hawthorn and Crowds on Demand that they had not paid individuals to appear at the public hearing in support of NOPS; and failed to conduct any follow-up investigation whatsoever for the purpose of determining whether Hawthorn or Crowds on Demand had paid people to appear at a public hearing and support NOPS; and

WHEREAS, not only did ENO fail to make any reasonably diligent attempt to determine whether people had been paid by Hawthorn or Crowds on Demand to appear at public hearings to support NOPS, the Company doubled down and began making preparations with Hawthorn to get additional paid support for the February 21, 2017 Utility, Cable, Telecommunications & Technology Committee ("UCTTC") meeting;⁸⁸ and

WHEREAS, after the February UCTTC meeting, Ms. Pollard emailed Ms. Hammelman stating that she was "surprised that some folks wore the orange shirts again. An opponent wore a marked-up orange shirt and commented about paid supporters."⁸⁹ In response, Ms. Hammelman said, "[w]e wanted to make sure some of the people showed up because **that is what would happen organically**;"⁹⁰ and

⁸⁷ Investigators' Report at p. 11 citing (Hawthorn000001).

⁸⁸ Investigators' Report at p. 6.

⁸⁹ Investigators' Report at p. 7.

⁹⁰ Investigators' Report at p. 7.

WHEREAS, the Company was again made aware of allegations of “paid supporters” coupled with Hawthorn’s revealing characterization that nominal supporters appearing at the February UCTTC meeting is what would occur “organically,” which were again, clear indications to ENO that the support generated by Hawthorn and Crowds on Demand was artificial and contrived; and

WHEREAS, on April 27, 2018, after both public meetings had occurred, and **after the lawsuit alleging the use of paid actors had been filed**, ENO deleted from the Hawthorn contract the phrase “[t]alk point and testimony will be vetted,” with the obvious intention of attempting to remove ENO from the process, after the fact⁹¹ and

WHEREAS, during the investigation no text messages involving Charles Rice were provided to the Investigators for any date after January 11, 2018, and no text messages from Rice’s cellular telephone were provided, except for a single message received by Rice in September 2018;⁹² and

WHEREAS, during the interview of Gary Huntley, Entergy’s attorneys instructed Huntley not to answer any questions beyond the October and February meetings claiming such questions were beyond the scope of the Investigation;⁹³ and

WHEREAS, Huntley claimed that although he texted Entergy colleagues about this “hot topic” at work, he did not possess a single one of those text messages, despite the “preservation of evidence” letter sent to ENO by the Council on May 15, 2018;⁹⁴ and

⁹¹ Investigators’ Report at p. 19.

⁹² Investigators’ Report at p. 18.

⁹³ Investigators’ Report at p. 26.

⁹⁴ Investigators’ Report at p. 27

WHEREAS, Entergy undertook a flurry of activity between May 1st and May 7th as evidenced by its privilege log, Entergy refused to produce those communications and records, as well as others claimed to be privileged;⁹⁵ and

WHEREAS, although ENO takes issue with New Orleans City Code Section 158-52 regarding penalties for false or misleading representations, particularly the standard of gross negligence cited in that Section, the definition of gross negligence is simple and easily understood—an “extreme departure from ordinary care or the want of even scant care”;⁹⁶ and

WHEREAS, the Council finds that ENO’s response and reaction to these extremely serious claims was completely inadequate and grossly negligent. Further, despite numerous communications and repeated allegations that should have served as “red flags” for anyone, especially personnel at the highest levels of ENO management who knew an astroturfing team had been hired by ENO, the Company failed to conduct any meaningful investigation to determine whether the allegations had merit; and

WHEREAS, even assuming ENO did not know about Crowds on Demand and the paid supporters program, a modicum of diligence would have discovered the actual facts very shortly after the October 16th meeting in time to ameliorate the harm; and

WHEREAS, instead, after receiving evasive, dismissive, flimsy and deflective responses from Hawthorn to the scarce, weak and inchoate queries from ENO, the Company chose to engage in willful ignorance and ignore the issue until the media, the public, the Council, and the Advisors had presented overwhelming evidence that people had been paid to appear at public hearings to present intentionally deceptive support for NOPS; and

⁹⁵ Investigators’ Report at p. 20

⁹⁶ See also definitions and case citations at note 63, *supra*.

THE INVESTIGATORS' REPORT DID NOT STATE THAT NO COUNCIL RULES, ORDINANCES OR CHARTER PROVISIONS WERE VIOLATED

WHEREAS, ENO's Response erroneously states that the Investigators' concluded that ENO did not violate any law or Council rules,⁹⁷ the Investigators' report makes no such declaration. The Report states that "there are no specific Council rules that prohibit this practice" referring to whether a party or group may pay people to attend and/or speak at a meeting or hearing.⁹⁸ The Investigators did not opine, nor were they asked to opine, on whether ENO, or its subcontractors, made misrepresentations to the Council that would constitute violations of other Council rules or Code provisions; and

WHEREAS, ENO's grossly inadequate attempts to ascertain the truth about the actions of its contractor clearly rise to the level of gross negligence, especially in light of the fact that only ENO knew that it had engaged Hawthorn to "turn out" specific numbers of supporters to deliver specifically crafted false messages with the expressed goal of misleading the Council, its regulator, to believe that the "supporters" were acting sincerely and on their own accord; and

WHEREAS, there is no evidence, even in ENO's Response, that ENO required Hawthorn to **only** recruit and confirm "legitimate supporters" that were motivated by actual support and not money; and

WHEREAS, any reasonable entity properly motivated to present only facts to the Council would have reacted swiftly to ameliorate the deception in the face of sufficiently credible evidence that people had in fact been paid to appear to support NOPS, instead ENO waited months to take any reasonably diligent action; and

⁹⁷ ENO Response to Show Cause at 2.

⁹⁸ Investigators' report at p. 50.

WHEREAS, the Council finds that, contrary to arguments made by ENO, Section 158-52 of the City Code is fully applicable to this case. ENO narrowly interprets the Code provision to only apply to misleading representations of fact in proceedings involving the setting of rates and not to public hearings conducted by the Council. The Company also argues that the paid speakers merely provided unsworn public comments and therefore those comments are outside of the scope of the plain language contained in Section 158-52. In fact, the Code makes no distinction between misrepresentations that are made in sworn testimony and those that are unsworn at the Council's public hearings or committee meetings. Section 158-52 specifically states that misleading representations of fact shall not be made in any "application or filing made under this article or in **any proceeding, rate case, or other matter** commenced by an application or filing under this article;"⁹⁹ and

WHEREAS, ENO's original NOPS application and its supplemental application both request determinations and approvals from the Council for recovery of the Company's prudently-incurred costs associated with the project, including the retail non-fuel revenue requirement and the related energy costs and expenses, from customers through rates;¹⁰⁰ and

WHEREAS, ENO cannot reasonably assert that the NOPS proceeding, wherein ENO has requested recovery costs exceeding \$210 million, is not a utility rate proceeding; and

WHEREAS, it is also critically important to point out that the Council, in adopting Resolution R-17-426, specifically required ENO to conduct a minimum of 5 public outreach meetings, one in each Council district, for the purpose of sharing information with, and answering questions from, the public related to the proposed projects.¹⁰¹ In addition to the 5 public outreach

⁹⁹ Code of the City of New Orleans, Section 158-52 (emphasis added).

¹⁰⁰ Supplemental and Amending Application of Entergy New Orleans, Inc. for Approval to Construct New Orleans Power Station and Request for Cost Recovery and Timely Relief dated July 6, 2017 at p. 27.

¹⁰¹ Council Resolution R-17-426 dated August 10, 2017 at p. 17.

meetings, the Council also required a public hearing in the Council Chambers for the purpose of receiving additional public comment related to the projects.¹⁰² The October 16, 2017 public hearing was, in fact, conducted pursuant to the Council's specific requirement outlined in Resolution R-17-426 for the sole purpose of providing information to the Council regarding ENO's proposal; and

WHEREAS, in light of the Council's specific requirement to conduct a public hearing on ENO's NOPS proposal, the Company, a regulated utility providing critical electrical service to the entire City of New Orleans, had a clear legal, regulatory and ethical obligation to allow the members of the public not parties of record to the case to provide their honest, uncompensated and non-deceptive expressions of support or opposition to the Council. However, ENO instead hired Hawthorne in an attempt to fill a specific number of seats in the room and prevent members of the public from having an opportunity to be heard; and

WHEREAS, the Council finds that ENO breached the Council's trust and violated the City's Home Rule Charter and the New Orleans City Code as detailed herein and in Resolution R-18-474. ENO's broad mischaracterization of the Investigators' conclusions regarding whether any laws or Council rules were violated are rejected; and

THE COUNCIL HAS EXPRESS AUTHORITY TO IMPOSE PENALTIES ON PUBLIC UTILITIES WITHIN ITS JURISDICTION, INCLUDING ENO

WHEREAS, the New Orleans City Council is the legislative branch of local government and has the power to enact ordinances to protect the public health, safety, and welfare of the citizens of New Orleans.¹⁰³ The Council of the City of New Orleans is vested with the sole legal

¹⁰² Council Resolution R-17-426 dated August 10, 2017 at p. 18.

¹⁰³ *Gordon v. Council of City of New Orleans*, 2005-1381 (La. App. 4 Cir. 2/25/08), 977 So. 2d 212, 242-43, writ granted, 2008-0929 (La. 10/24/08), 8 So. 3d 563, and writ granted, 2008-0932 (La. 10/24/08), 8 So. 3d 563, and writ granted, 2008-1226 (La. 10/24/08), 8 So. 3d 564, and writ granted, 2008-1240 (La. 10/24/08), 8 So. 3d 564, and rev'd in part, 2008-0929 (La. 4/3/09), 9 So. 3d 63.

authority to regulate the rates charged by companies furnishing utility services in the city of New Orleans.¹⁰⁴ The Council is also vested with the powers of supervision, regulation and control over ENO.¹⁰⁵ The City Council's power is conferred by the Home Rule Charter and the Code of the City of New Orleans. A regulator's jurisdiction over public utilities in this state has been labeled by the Louisiana Supreme Court as "plenary,"¹⁰⁶ and the Council is entitled to deference in its interpretation of its own rules and regulations;¹⁰⁷ and

WHEREAS, specifically, with respect to regulatory authority, Article III, Section 3-130

(1) of the Charter provides:

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.
(Emphasis added).

Section 3-130 (7) states;

The orders of the Council shall be enforced by the imposition of such reasonable penalties **as the Council may provide**, and any party in interest may appeal from orders of the Council to the Civil District Court for the Parish of Orleans by filing suit against the Council within thirty (30) days from the date of the order of the Council, and not thereafter (emphasis added); and

WHEREAS, this Charter provision clearly empowers the Council to impose reasonable penalties on all regulated utilities operating in the City and, contrary to ENO's characterization of the Council's authority, the language is clear and unambiguous; and

¹⁰⁴ *Id.* at 242, citing *State ex rel. Guste v. Council of City of New Orleans*, 309 So.2d 290, 294 (La.1975).

¹⁰⁵ Home Rule Charter of the City of New Orleans section 3-130, et seq.

¹⁰⁶ *Entergy Louisiana, LLC v. Louisiana Pub. Serv. Comm'n*, 2008-0284 (La. 7/1/08), 990 So. 2d 716, 723.

¹⁰⁷ *Gordon v. Council of City of New Orleans*, 2008-0929 (La. 4/3/09), 9 So. 3d 63, 72.

WHEREAS, as stated in Resolution R-18-474, Code Section 158-52 also allows for the imposition of penalties upon anyone who intentionally or through gross negligence makes or causes false or misleading representations of fact in any utility rate-related proceeding before the Council;¹⁰⁸ and

WHEREAS, the Charter and City Code unequivocally authorize the imposition of penalties upon ENO for its actions and inaction related to paid individuals who deceptively supported NOPS, deceiving the general public and the Council at a public hearing and UCTTC meeting conducted pursuant to the Code and applicable Council resolutions; and

WHEREAS, the authority of public utility regulatory bodies to impose penalties upon utilities within its regulatory jurisdiction has been recognized by other courts in similar circumstances; and

WHEREAS, a California appellate court has ruled that the state Public Utilities Commission (PUC) did not exceed its regulatory jurisdiction in sanctioning a wireless telecommunications carrier for unjust and unreasonable practices;¹⁰⁹ and

WHEREAS, the PUC imposed a multimillion dollar fine against a wireless telephone service provider for two interrelated unjust and unreasonable practices: charging its customers early termination fees (“ETF”) to cancel contract without permitting grace period, and failing to disclose to customers known network problems and misleading customers regarding network’s coverage and service. Cingular argued the Commission lacked jurisdiction to impose a penalty; and

WHEREAS, the court explained that “the courts of this state have held that the powers of the Commission within its province are broad. As our Supreme Court has explained: ‘The

¹⁰⁸ Code of the City of New Orleans, Section 158-52.

¹⁰⁹ *Pacific Bell Wireless, LLC v. Public Utilities Com.*, 140 Cal.App.4th 718 (2006).

commission is a state agency of constitutional origin with far-reaching duties, functions and powers....[t]he Constitution confers broad authority on the commission to regulate utilities, including the power to fix rates, establish rules, hold various types of hearings, award reparation, and establish its own procedures.”¹¹⁰ The court further confirmed that the PUC had “broad authority to levy fines and penalties on public utilities”¹¹¹; and

WHEREAS, with respect to ENO’s argument that the Council’s imposition of penalties violates the Company’s Due Process rights because ENO did not receive notice of a prohibition on the conduct (paid individuals deceptively supporting NOPS) or the penalties that could result from such behavior;¹¹² and

WHEREAS, the Council rejects this argument as well. On numerous occasions as early as October 3, 2017, and clearly after the October 16, 2017 public hearing, through social media and other means, ENO was made aware of credible allegations regarding paid individuals deceptively and fraudulently supporting NOPS at the hearing and yet the Company made no meaningful attempt to determine whether the allegations were true in order to ameliorate harm and to prevent the conduct from recurring; and

WHEREAS, upon ENO being alerted to these credible allegations, the Company received the requisite knowledge and notice that it could be subjected to penalties for making false or misleading representations to the Council as provided in the Code and Charter; and

WHEREAS, the *Pacific Bell* court made a similar finding and rejected Cingular’s argument that it had not received notice of a potential violation of the PUC’s order;¹¹³ and

¹¹⁰ *Id.* at 736.

¹¹¹ *Id.* at 737.

¹¹² ENO Response to Show Cause at p. 26.

¹¹³ *Pacific Bell Wireless, LLC v. Public Utilities Com.*, 140 Cal.App.4th at 740.

WHEREAS, Cingular, just as ENO has claimed in this matter, argued that the Commission order that it had been charged with violating was so broad that Cingular could not anticipate that its actions violated the regulator's rules.¹¹⁴ The court concluded that [e]ven in the absence of a specific statute, rule, or order barring the imposition of an ETF without a grace period, or barring the specific nondisclosures identified by the Commission in this case, Cingular can be charged with knowing its actions violated" the requirement that it provide "adequate, efficient, just, and reasonable service" to its customers;¹¹⁵ and

WHEREAS, the Council concludes that ENO had sufficient notice that the deceptive conduct consisting of paying individuals to feign support for NOPS at a Council hearing and UCTTC meeting could reasonably lead to penalties pursuant to existing City Code and Charter provisions; and

WHEREAS, the Council finds that ENO is incorrect that City Code Section 158-52 limits a penalty for misleading the Council to the fine for a misdemeanor because the section that penalizes such conduct says such conduct "shall be unlawful and a misdemeanor..." (emphasis added). The violation triggers two bases for imposing a penalty: unlawfulness and a misdemeanor, which are disjunctive, either of which would support the penalty; and

WHEREAS, ENO incorrectly cites City Code section 1-13 as a limitation on penalties to \$300.00 for violations of ordinances and code provisions, the Council's regulatory authority, including its authority to impose penalties, emanates from the City's Home Rule Charter,¹¹⁶ which is not limited by the general provisions of Section 1-13; and

¹¹⁴ *Id.*

¹¹⁵ *Pacific Bell Wireless, LLC v. Public Utilities Com.*, 140 Cal.App.4th at 740.

¹¹⁶ Home Rule Charter of the City of New Orleans, Section 3-130 (7).

ENO'S ACTIONS AND/OR INACTION ARE NOT PROTECTED BY THE FIRST AMENDMENT

WHEREAS, ENO audaciously claims that the Council's imposition of penalties on the Company for paying people to deceive the Council by lying to the Council, violates ENO's First Amendment rights to free speech; and

WHEREAS, it is ironic that ENO has steadfastly attempted to distance itself from the actions of its contractor and claim that it did not pay or direct people to provide false support for its NOPS proposal at Council hearings, but now conveniently claims First Amendment protection for public statements made by those same individuals; and

WHEREAS, this Council recognizes that certain speech is afforded First Amendment protection. However, as there is "no constitutional value in false statements of fact; neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues;"¹¹⁷ and

WHEREAS, commercial speech is afforded less protection than non-commercial speech and "[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake;"¹¹⁸ and

WHEREAS, the United States Supreme Court has stated that commercial speech is speech that proposes a commercial transaction,¹¹⁹ in addition, commercial speech that is false or misleading is not entitled to First Amendment protection and "may be prohibited entirely;"¹²⁰ and

WHEREAS, in this matter, the penalty imposed by the Council punishes ENO for the misleading and deceitful practice of providing people who were paid to feign their support for the

¹¹⁷ *Gertz v. Robert Welch, Inc.*, (1974) 418 U.S. 323, 340, 94 S.Ct. 2997, 41 L.Ed.2d 789.

¹¹⁸ *Va. Pharmacy Bd. v. Va. Consumer Council*, (1976) 425 U.S. 748, 770, 96 S.Ct. 1817, 48 L.Ed.2d 346.

¹¹⁹ *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 340, 106 S. Ct. 2968, 2976, 92 L. Ed. 2d 266 (1986).

¹²⁰ *In re R.M.J.*, (1982) 455 U.S. 191, 203, 102 S.Ct. 929, 71 L.Ed.2d 64.

NOPS proposal, with the clear intent to deceive. The penalty is also calculated to deter such conduct before the Council. ENO, a regulated monopoly public utility subject to ordinances, rules and orders of the Council governing the provision of electric and gas service in the City of New Orleans, simply cannot mislead and deceive the City Council, directly or indirectly, and expect the First Amendment will allow it to escape responsibility; and

WHEREAS, such illogical positions taken by ENO are not only unsupported and unlawful, but also harmful to its customers and not in the public interest; and

WHEREAS, even assuming that ENO had a right to First Amendment protection in these circumstances, which it does not, the Company mistakes the Council's penalty as a suppression of speech. The penalty imposed punishes the regulated utility, not the speaker, for violating one of the most basic tenants of interacting with its regulator--a requirement of honest representations of fact in matters of utility regulation; and

WHEREAS, given that the express purpose of the October 16, 2017 hearing, held under Section 158-431(b) was to allow members of the public at large who are not parties of record to be heard, and that individuals were instead paid to speak at that hearing on behalf of ENO, a party of record to the case, who had multiple other opportunities to express its opinion to the Council in the procedural schedule, and that the record shows that whether or not ENO knew the speakers were paid, ENO deliberately attempted to pay to have seats filled with its supporters at that hearing to prevent members of the public at large who opposed its proposal from having an opportunity to speak, ENO's argument that its First Amendment rights are being infringed upon is disingenuous at best; and

THE COUNCIL'S PENALTIES IMPOSED IN THIS PROCEEDING ARE REASONABLE AND DO NOT VIOLATE THE EIGHTH AMENDMENT TO THE U. S. CONSTITUTION

WHEREAS, with respect to ENO's argument that the penalties imposed by the Council in this case are excessive and therefore violate the Eighth Amendment to the United States Constitution, the Home Rule Charter and the City Code expressly authorize fines and other non-monetary, penalties as a consequence for ENO's egregious actions or inaction in the NOPS proceeding; and

WHEREAS, specifically, Charter Section 3-130 (7) clearly states;

The orders of the Council shall be enforced by the imposition of such reasonable **penalties as the Council may provide**, and any party in interest may appeal from orders of the Council to the Civil District Court for the Parish of Orleans by filing suit against the Council within thirty (30) days from the date of the order of the Council, and not thereafter;¹²¹ and

WHEREAS, Section 158-52 of the City Code also unequivocally prohibits the conduct at issue in this proceeding and specifically provides;

It shall be unlawful and a misdemeanor for any person to **intentionally or through gross negligence to make or to cause to be made any false or misleading representations** of fact in **any application or filing** made under this article or in any proceeding, rate case, or other matter commenced by an application or filing under this article;¹²² and

WHEREAS, contrary to ENO's self-serving argument attempting to either dismiss or limit the Council's regulatory authority, the Charter grants the Council the exact authority that ENO claims does not exist; and

WHEREAS, the express language of the Charter allows the Council to impose "reasonable penalties as the Council may provide;" and

¹²¹ Home Rule Charter of the City of New Orleans, Article III, Section 1-130(7).

¹²² New Orleans City Code Section 158-52.

WHEREAS, contrary to ENO's position, nothing in the City Charter or the City Code require the Council to employ any specific calculation, formula or other financial analysis in order to impose reasonable penalties; and

WHEREAS, as the United States Supreme Court has decided, "[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish;"¹²³ and

WHEREAS, the courts have also concluded that "a penalty that bears a significant relationship to the seriousness of the offense and is in the lowest quintile of the available range easily satisfies the proportionality test;"¹²⁴ and

WHEREAS, ENO relies heavily on *BMW of North America, Inc. v. Gore*¹²⁵ which does not support ENO's position and is inapposite to the facts of this case. *BMW* is a **tort** case where the Court reviewed the level of punitive damages awarded by a jury against BMW for failure to disclose certain safety details regarding repairs that had been made to the automobile prior to selling it to the customer. The jury awarded the plaintiff \$4,000 in compensatory damages and \$4 million in punitive damages. Without support ENO argues that the Court employed a **universal rule** requiring the application of three guideposts to determine whether damages are excessive. These guideposts have nothing to do with the regulatory authority of a utility regulator to impose regulatory penalties. Nonetheless, the three guideposts include (1) the degree of reprehensibility of the conduct, (2) the ratio of actual harm inflicted on the plaintiff, and (3) the difference between the remedy imposed and the civil penalties authorized in comparable cases;¹²⁶ and

¹²³ *Bajakajian*, 524 U.S. at 334, 118 S.Ct. 2028.

¹²⁴ *Roche v. Evans*, 249 F. Supp. 2d 47, 59 (D. Mass. 2003).

¹²⁵ *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

¹²⁶ *Id.* at 574-575.

WHEREAS, even if the Court intended that these three guideposts be utilized to examine regulatory penalties, which clearly is not what is intended by *BMW*, the application of *BMW* to ENO's reprehensible conduct would support the Council's broad discretion in imposing penalties in this case; and

WHEREAS, ENO fails to point out that the *BMW* Court very clearly stated that "the most important indicium of the reasonableness of a punitive damage award is the degree of reprehensibility" of the offender's conduct.¹²⁷ Similarly, "**trickery and deceit**" are "**more reprehensible than negligence**,"¹²⁸ and

WHEREAS, the Council finds that ENO's conduct in this matter is particularly reprehensible and is easily characterized as an attempt to trick and deceive the Council and the public into believing that certain public supporters for NOPS were in fact genuine supporters, as opposed to paid and indifferent operatives generated by ENO and its contractor to mislead the Council and the public; and

WHEREAS, with respect to the second guidepost, the disparity between the harm suffered and the penalty imposed, ENO's conduct has caused indefensible damage to the Council's regulatory process and to the decades of goodwill with the public that has supported that process. ENO's conduct has also severely damaged ENO's relationship with its regulator, the Council, and the general public, which is an impediment to the effective exercise of the Council's regulatory authority. One of the most basic tenets of the regulatory paradigm is the fundamental characteristics of trust and candor in the utility's interactions with its regulator, its customers and the general public. In this instance, the Council finds that ENO has failed to uphold those basic but critical characteristics by its action and/or inaction in this case; and

¹²⁷ *BMW of North America, Inc. v. Gore*, 517 U.S. 577 (1996).

¹²⁸ *Id.* at 1599.

WHEREAS, the penalty imposed by the Council is indisputably reasonable and is based upon ENO's substantial revenues and profits. It is vital to the regulatory process that any sanctions for improper conduct not simply become a "cost of doing business," but are actual **penalties** suited to the offense, **and an effective deterrent that would dissuade the utility from even considering engaging in bad conduct in the future**; and

WHEREAS, the third guidepost utilized by *BMW*, the difference between the penalty imposed and those authorized in other comparable cases, also supports the Council's remedies in this case; and

WHEREAS, as this Council stated in Resolution R-18-474, the Massachusetts Department of Public Utilities imposed a \$24.8 million penalty on a group of the state's utilities for their poor preparation for and response to Hurricanes Irene and Sandy. Similarly, the Federal Energy Regulatory Commission ("FERC") has the authority to punish an entity for "willingly and knowingly" reporting false information in connection with the sale of natural gas or electricity, which penalties can total up to \$1 million per day; and

WHEREAS, it is clear that utility regulators around the country and on the federal level recognize the critical importance of using significant penalties to sanction and deter bad conduct by utilities, which can have such far-reaching and potentially devastating impact on customers and communities; and

WHEREAS, this Council finds that even if *BMW* is applicable to this case, the Court's third guidepost is met and the Council's penalties imposed on ENO are consistent with the level of penalties either authorized or imposed in comparable cases; and

WHEREAS, the non-monetary penalties imposed by the Council are clearly within the Council's regulatory authority and are directly related to the improper conduct that is being sanctioned; and

WHEREAS, the Council rejects ENO's argument that the penalties issued by the Council are excessive and violate the Eighth Amendment. The behavior at issue is particularly reprehensible and the Council finds that the penalties imposed are proper in order to punish ENO for its past conduct and deter future attempts to mislead or deceive its regulator and its customers;

NOW THEREFORE,

BE IT RESOLVED BY THE COUNCIL OF THE CITY OF NEW ORLEANS THAT:

The Council hereby directs the following:

1. ENO's Response and all documents attached to ENO's Response are hereby admitted as part of the investigation record and Report;

The Council hereby finds the following:

1. ENO had ample information to determine that its contractor intended to and did pay individuals to falsely express support for the NOPS plant and was grossly negligent in not preventing or stopping the conduct;
2. ENO was grossly negligent in not taking any precautions to protect against such payments being made;
3. ENO was grossly negligent in failing to exercise prudent utility practices in contracting with Hawthorn and in preventing improper conduct.
4. ENO was grossly negligent in how it contracted with Hawthorn;
5. ENO was grossly negligent in its lack of diligence in a timely fashion investigating, allegations of the use of paid "supporters" to mislead the Council;

6. ENO knew or should have known that individuals, including actors were to be paid and, in fact, were paid to falsely support NOPS before the Council in two public meetings;

The Council hereby directs ENO to:

1. Make a one-time cash payment of \$5 million to be paid in accordance with and for purposes determined by the Council;
2. Within 60 days of the adoption of this resolution by the Council, certify that each ENO management level employee has or will complete a third-party ethics training course;
3. Within 90 days of the adoption of this resolution by the Council, submit for Council approval an ENO Code of Conduct, developed with special emphasis on its dealings with and before the Council, which includes credible oversight and enforcement provisions specifically designed to avoid a repeat of the glaring breaches of ENO's existing Entergy Values and Ethics Statement;
4. All costs associated with the Investigation incurred by ENO, including monetary penalties and costs of complying with non-monetary penalties, shall continue to be disallowed for recovery from ratepayers pursuant to Code of the City of New Orleans, Section 158-582 and Section 158-626.
5. All costs incurred by the Council in connection with any and all aspects of the Investigation shall continue to be reimbursed to the Council and shall be disallowed for recovery from ratepayers pursuant to Code of the City of New Orleans, Section 158-582 and Section 158-626.

6. All costs incurred by the utility Advisors in connection with any and all aspects of the Investigation, including, but not limited to, monitoring penalties and sanctions shall continue to be billed and reimbursed as usual, however these payments will not be recoverable from ratepayers and they shall be outside of and in addition to the Advisors' contract budgets, subject to normal Council review and oversight.
7. Shall exclude all costs and penalties associated with this resolution, as well as their related regulatory ratemaking effects, from prospective rate action filings and clearly demonstrate the methodology by which such have been excluded.
8. All other directives and provisions included in Resolution R-18-474 shall remain in full force and effect.

THE FOREGOING RESOLUTION WAS READ IN FULL, THE ROLL WAS CALLED ON THE ADOPTION THEREOF, AND RESULTED AS FOLLOWS:

YEAS:

NAYS:

ABSENT:

AND THE RESOLUTION WAS ADOPTED .