

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

**REVISED APPLICATION OF
ENTERGY NEW ORLEANS, LLC
FOR A CHANGE IN ELECTRIC AND
GAS RATES PURSUANT TO
COUNCIL RESOLUTIONS R-15-194
AND R-17-504 AND FOR RELATED
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DOCKET NO. UD-18-07

**MEMORANDUM IN SUPPORT OF ADVISORS' MOTION TO STRIKE PORTIONS OF
ENTERGY NEW ORLEANS, LLC'S REBUTTAL TESTIMONY**

On September 21, 2018, Entergy New Orleans, LLC ("ENO" or "Company") filed its Revised Application for a Change in Electric and Gas Rates Pursuant to Council Resolutions R-15-194 and R-17-504 and for Related Relief ("Revised Application").

Resolution R-18-434, adopted by the New Orleans City Council ("Council") on October 4, 2018, established Docket Number UD-18-07 for the purpose of evaluating the Company's Revised Application, allowing for interested parties to intervene in the proceeding, establishing a procedural schedule for conducting discovery and setting dates for written testimony and an Evidentiary Hearing. The Evidentiary Hearing which is set for June 10-14, 2019. On November 20, 2019, the Honorable Jeffrey S. Gulin issued a consent order modifying the procedural schedule in this proceeding, however, the June 10-14, 2019 hearing dates remained unchanged.

On February 1, 2019, the Advisors to the Council of the City of New Orleans ("Advisors") and other Intervenors filed direct testimony in this proceeding responding to certain positions taken by ENO's witnesses in support of ENO's Revised Application. The Company filed its rebuttal testimony on March 22, 2019 purportedly refuting the direct testimony filed by the other parties in this case, including the Council's Advisors.

LAW AND ARGUMENT

ENO's Return on Equity ("ROE") witness, Robert B. Hevert, filed Rebuttal Testimony responding to other ROE witnesses in this docket, including Advisors' witnesses James M. Proctor and Byron S. Watson. Included in Mr. Hevert's Rebuttal Testimony are several portions of new testimony and "updated" ROE analyses and results. The portions of testimony identified in this Motion to Strike fall well outside of the scope of permissible rebuttal testimony and as a result they should be stricken from the record in this proceeding.

According to Section 158-478 of the Code of the City of New Orleans, prepared testimony in the Council's utility regulatory proceedings that is outside the scope of the admissible testimony, such as the identified portions of Mr. Hevert's March 22, 2019 Rebuttal Testimony, is subject to a motion to strike in whole or in part.

Louisiana Code of Evidence art. 611 E gives a plaintiff the right to rebut evidence adduced by his opponents. Rebuttal evidence should be confined to matters raised by defendants. *Roberts v. Owens-Corning Fiberglas Corp.*, 2003-0248 (La. App. 1 Cir. 4/2/04), 878 So. 2d 631, 645, writ denied, 2004-1834 (La. 12/17/04), 888 So. 2d 863; citing *State ex rel. Guste v. Nicholls College Foundation*, 592 So.2d 419, 422 (La.App. 1 Cir.1991).

ENO's attempt to make significant additions and updates to its initial case through its rebuttal testimony is contrary to well established law. Evidence in rebuttal "should be confined" to matters brought out by the opposition.¹ **New evidence is not proper on rebuttal.**² **To allow new evidence on rebuttal would result in an abuse of discretion by the trier of fact.**³ The Advisors' direct testimony addressed the ROE issue in this case utilizing two industry accepted

¹ *State ex rel Guste v. Nicholls College Foundation*, 592 So.2d 419 (La. App. 1 Cir. 1991).

² 592 So.2d 419 at page 422.

³ *Id.*

modeling analyses in support of the Advisors' recommendation in this case. Mr. Watson employed the Discounted Cash Flow ("DCF") analysis in support of his recommendation that the Council adopt an ROE in this case of 8.93%. Mr. Proctor utilized the Capital Asset Pricing Model ("CAPM") to estimate ENO's ROE at a level of 8.42% in support of an overall Advisor recommendation of 8.93%. No Advisor witness employed the Empirical Capital Asset Pricing Model ("ECAPM") in their direct testimony. Mr. Hevert improperly attempts to introduce a completely new and distinct additional financial model in his rebuttal testimony which is characterized as a response to testimony provided by Advisor witness Proctor.⁴ However, Mr. Proctor does not employ, rely upon, or otherwise discuss the ECAPM financial model. Mr. Proctor utilizes the CAPM model which is conceptually distinct and widely accepted and used within the financial industry in assessing the relationship between business and financial risk and returns on and valuation of investments in assets and equity. In his direct testimony, Mr. Proctor clearly describes the components and inputs used in his analysis to employ the model which produced certain results that support his recommendations to the Council. The new ECAPM analysis put forth by Mr. Hevert is irrelevant to Mr. Proctor's work and ENO should not be allowed to use its rebuttal testimony for the purpose of adding additional modeling that could have been properly presented in the Company's direct case. ENO witness Hevert utilized three (3) financial models in his Revised Direct Testimony, not one of which included the ECAPM model. Specifically, he relied on (1) the DCF model, including the Constant Growth and Multi-Stage forms, (2) the CAPM model and (3) the Bond Yield Plus Risk Premium approach. In the absence of any meaningful criticism of the results of Mr. Proctor's CAPM analysis, Mr. Hevert employed a completely new financial model in rebuttal testimony disguised as a response to an argument or observation made

⁴ Rebuttal Testimony of Robert B. Hevert at 44.

by Advisor witness Proctor. All of Mr. Hevert's ECAPM testimony is well outside the scope of permissible rebuttal and should therefore be stricken from the record.

Another instance where Mr. Hevert attempts to impermissibly expand the scope of rebuttal testimony is on pages 68 through 71. Here, Mr. Hevert introduces for the first time new empirical methods and analyses to assess the effect of an event such as the Tax Cuts and Jobs Act ("TCJA") on utility stock performance. It should be noted that these new analyses could have been included in ENO's direct case but were not timely presented. Any objective reading of this portion of Mr. Hevert's Rebuttal Testimony, wherein he presents his new "event study" or "cumulative abnormal return" analysis could only be explained as a second bite at supporting ENO's arguments and recommendations made in their revised direct testimony. ENO should not be allowed to introduce completely new methods and analyses at this stage of the proceeding. In the absence of advancing any credible and persuasive rebuttal that addresses the actual testimony of the Advisors' witnesses, the Company instead seizes on an opportunity to provide additional support for its direct case. The method employed by ENO to respond to the Advisors' testimony is to provide new data and analyses as opposed to squarely addressing positions taken in the Advisors' Direct Testimony. This testimony, disguised as rebuttal, must therefore be rejected and stricken from the record.

Finally, Mr. Hevert includes a "Summary of Updated Results" and a corresponding "Table 11" on pages 153 and 154 of his rebuttal testimony. He clearly states that he has "updated many of the analyses contained in my Revised Direct Testimony..." This updated testimony includes new data as of February 28, 2019 and the new ECAPM model and other analyses described above. If this process were permitted, then parties would be allowed to submit updated data and new support for their direct case at each and every stage of the proceeding, which is inconsistent with the Council's regulatory rules and the Louisiana Code of Evidence.

CONCLUSION

The Company's tactic of adding new data and analyses in its rebuttal testimony to further support its case-in-chief is contrary to the Council's resolution establishing this docket, grossly inefficient, administratively costly to New Orleans ratepayers, and turns the structured regulatory process on its head. For these reasons, the Advisors' Motion to Strike should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served upon “The Official Service List” via electronic mail and/or U.S. Mail, postage properly affixed, this 3rd day of April 2019.

A handwritten signature in blue ink, appearing to read "Jay", enclosed in a rectangular box.

J. A. "Jay" Beatmann, Jr.