SUPREME COURT

STATE OF LOUISIANA

No. _____

ALLIANCE FOR AFFORDABLE ENERGY, DEEP SOUTH CENTER FOR ENVIRONMENTAL JUSTICE, 350 NEW ORLEANS, AND SIERRA CLUB
Petitioners-Applicants

VERSUS

THE COUNCIL OF THE CITY OF NEW ORLEANS
Defendant-Respondent

CIVIL PROCEEDING

On Application for Writ of Certiorari or Review from the Court of Appeal, Fourth Circuit, No. 2019-CA-0874, The Honorables James F. McKay III, Paula A. Brown and Dale N. Atkins, Judges; on appeal from the Parish of Orleans Civil District Court, 2018-3471, The Honorable Piper D. Griffin, Presiding

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APPLICATION FOR WRIT OF CERTIORARI OR REVIEW

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SUPREME COURT OF LOUISIANA
WRIT APPLICATION FILING SHEET

NO. _____

TO BE COMPLETED BY COUNSEL or PRO SE LITIGANT FILING APPLICATION

TITLE

Alliance for Affordable Energy et al

VS.

The Council of the City of New Orleans

Applicant: Alliance for Affordable Energy et al
Have there been any other filings in this Court in this matter? ☐ Yes ☒ No

Are you seeking a Stay Order? No
Priority Treatment? No
If so you MUST complete & attach a Priority Form

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Pleading being filed: ☒ In proper person, ☐ In Forma Pauperis

Attach a list of additional counsel/pro se litigants, their addresses, phone numbers and the parties they represent.

TYPE OF PLEADING

☒ Civil, ☐ Criminal, ☐ R.S. 46:1844 protection, ☐ Bar, ☐ Civil Juvenile, ☐ Criminal Juvenile, ☐ Other
☐ CINC, ☐ Termination, ☐ Surrender, ☐ Adoption, ☐ Child Custody

ADMINISTRATIVE OR MUNICIPAL COURT INFORMATION

Tribunal/Court: _____ Docket No. _____
Judge/Commissioner/Hearing Officer: _____ Ruling Date: _____

DISTRICT COURT INFORMATION

Parish and Judicial District Court: Civil District Court for Orleans Parish Docket Number: 2018-3471
Judge and Section: Hon. Piper Griffin, Division "I" Section 14 Date of Ruling/Judgment: June 14, 2019

APPELLATE COURT INFORMATION

Circuit: Fourth Docket No. 2019-CA-0874 Action: Opinion
Applicant in Appellate Court: Alliance for Affordable Energy et al Filing Date: Oct. 8, 2019
Ruling Date: Apr. 15, 2020 Panel of Judges: Hon. James McKay III, Hon. Paula Brown, Hon. Dale Atkins En Banc: ☐

REHEARING INFORMATION

Applicant: _____ Date Filed: _____ Action on Rehearing: _____
Ruling Date: _____ Panel of Judges: _____ En Banc: ☐

PRESENT STATUS

☐ Pre-Trial, Hearing/Trial Scheduled date: _____, ☐ Trial in Progress, ☒ Post Trial

Is there a stay now in effect? No. Has this pleading been filed simultaneously in any other court? No.

If so, explain briefly _____

_____.

VERIFICATION

I certify that the above information and all of the information contained in this application is true and correct to the best of my knowledge and that all relevant pleadings and rulings, as required by Supreme Court Rule X, are attached to this filing. I further certify that a copy of this application has been mailed or delivered to the appropriate court of appeal (if required), to the respondent judge in the case of a remedial writ, and to all other counsel and unrepresented parties.

June 16, 2020
DATE

Monique Harden
SIGNATURE

Attachment to Writ Application Filing Sheet

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MAY IT PLEASE THE COURT:

Petitioners-Applicants, the Alliance for Affordable Energy, Deep South Center for Environmental Justice, 350 New Orleans, and Sierra Club, respectfully petition this Court for certiorari review of the Opinion rendered by the Fourth Circuit Court of Appeal. If writ is denied, questions concerning the interpretation of constitutional due process and the correct standard of review a court should apply when the City Council abandons its own legally required analysis will remain unresolved.[1]

Petitioners-Applicants are public interest organizations who intervened in a proceeding conducted by The Council of the City of New Orleans ("City Council") to review an application by Entergy New Orleans, LLC ("Entergy" or "Company") for the construction of a gas plant in New Orleans East. Petitioner-Applicants intervened in opposition to the gas plant because construction of the gas plant would continue the injustice of racially disproportionate pollution burdens on predominantly African American and Vietnamese Americans residents; expose utility customers to higher electric bills; and set back local efforts to mitigate climate change with sustainable energy options.

Petitioners-Applicants are entitled to trust that the City Council will be a neutral decision-maker and hold a fair proceeding. However, much to the consternation of Petitioners-Applicants, they observed that the City Council's Advisors, who were a party to the proceeding and advocated in favor of Entergy's application for a gas plant, also advised the City Council regarding how it should resolve the issues presented during the proceeding and wrote the entire decision approving Entergy's application, which was adopted by the City Council. Petitioners-Applicants also discovered that the City Council had a binding agreement with Entergy for a new electric generating facility that matched the details of the gas plant Entergy proposed in its application. In this agreement, the City Council committed to agree with Entergy on all aspects of the gas plant prior to the proceeding. During the proceeding, Petitioners-Applicants repeatedly raised the issue of Entergy's failure to comply with the requirement enacted into law by City Council resolution, which directed the Company to evaluate three specific alternatives to the gas plant. However, the City Council approved the gas plant in complete disregard of this resolution and without offering any explanation for this change in policy.

STATEMENT OF WRIT CONSIDERATIONS

1. **The Fourth Circuit Opinion conflicts with the decision of this Court in *Allen v. Louisiana State Board of Dentistry*, and its own prior decisions by erroneously holding that the proceeding at issue, in which Advisors to the City Council held the dual role of advocating in favor of Entergy's application to construct a gas plant and writing the**

[1] Fourth Circuit Opinion, Case No. 2019-CA-0874 (Apr. 15, 2020) (App. A) ("Fourth Circuit Opinion"). In this COVID-19 pandemic, the Order of the Louisiana Supreme Court on June 5, 2020 extended the deadline for legal filings due on March 12, 2020 through June 15, 2020 to the date of June 16, 2020. Pursuant to the order, this application for writ of certiorari or review is timely filed.

entire decision approving it, did not violate the basic right to due process. 543 So. 2d 908 (La. 1989). Review is merited under La. S. Ct. Rule X, § 1(a)(1) and (4).

At issue in this appeal is the due process to be afforded to the people of New Orleans who intervene in adjudicative proceedings before the City Council. In this case, Petitioners-Applicants were denied their right to a fair trial in a fair tribunal as guaranteed by Article I, Section 2 of the Louisiana Constitution. Instead, they were subjected to a decision written by an adversarial party to the proceeding.

There is no dispute regarding the fact that the City Council's Advisors performed the dual role of advocating in favor of Entergy's application to construct a gas plant in the proceeding as well as writing the entire decision which the City Council adopted to approve the application.[2] Throughout the proceeding, the same Advisors also counseled the City Council on the course it should take on numerous issues regarding the application. This Court has denounced such commingling of roles:

> The idea of the same person serving as judge and prosecutor is anathema under our notions of due process. Such a scenario is devoid of the appearance of fairness.

Allen v. Louisiana State Bd. of Dentistry, 543 So. 2d 908, 916 (La. 1989).

It is settled law that, as a matter of due process, a party to an adjudicative proceeding is prohibited from performing the role of trier of fact or decision-maker. In *Allen*, this Court determined that a proceeding in which an adversarial party drafts the decision document violated due process.[3] According to *Allen*, a party in the role of an advocate has developed the "will to win" and cannot be considered neutral for purposes of drafting the decision document.[4] *See also Georgia Gulf Corp. v. Bd. of Ethics for Pub. Employees*, 96-1907 (La. 5/9/97); 694 So. 2d 173 ("*Georgia Gulf*") (affirming the interpretation of *Allen* to prohibit dual roles.)

However, in conflict with this Court's decisions in *Allen* and *Georgia Gulf*, the Fourth Circuit ruled that "the dual role of the Advisors did not violate Appellants' due process rights."[5] The Opinion rendered by the Fourth Circuit affirms the patent unfairness of a proceeding in which an adversarial party gets to write the decision. It strikes at the heart of this Court's jurisprudence that upholds the constitutional guarantee of a fair trial in a fair tribunal as a basic requirement of due process.

The Fourth Circuit reached the incorrect conclusion by erroneously determining that the City Council proceeding was legislative. The Fourth Circuit failed to follow the legal analysis established by this Court to properly determine the nature of the City Council proceeding at issue. In proceedings on utility matters, this Court distinguished an adjudicative proceeding, which prohibits dual roles, from a

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[2] Fourth Circuit Opinion, p. 6.
[3] *Allen*, 543 So. 2d 916.
[4] *Id.* at 914 (citing *Grolier, Inc. v. Fed. Trade Comm'n*, 615 F.2d 1215 (9th Cir. 1980)).
[5] Fourth Circuit Opinion, p. 8.

legislative proceeding that permits it. *Gulf States Utilities Co. v. Louisiana Pub. Serv. Comm'n*, 578 So. 2d 71, 83 (La. 1991) ("*Gulf States*") (citing *Allen v. Louisiana State Board of Dentistry*, 543 So. 2d 908 (La. 1989). Prior to the Fourth Circuit Opinion at issue, the Fourth Circuit determined that a legislative proceeding establishes rules, such as utility rates, for the future; in contrast, an adjudicative proceeding is based on declaring rights on past or present facts under existing laws. *Lowenburg v. Council of the City of New Orleans*, 2003-0809, p. 10–11 (La. App. 4 Cir. 10/8/03); 859 So. 2d 804, 810, *writ denied sub nom. Lowenburg v. Council of City of New Orleans*, 2003-3094 (La. 2/6/04); 865 So. 2d 744. In keeping with this Court's analysis in *Gulf States, Lowenburg* established that this distinction between adjudicative and legislative proceedings applied to utility matter determinations decided by the City Council. However, in this instance, the Fourth Circuit rendered an Opinion in conflict with the decisions of this Court and its own prior decision by failing to analyze whether the nature of the Council proceeding on Entergy's application to construct a gas plant was to either set a rule for the future or declare a right based on existing facts and law.

Furthermore, the Opinion conflicts with other Fourth Circuit decisions which have determined that City Council proceedings to determine a right based on existing fact and law are adjudicative. These decisions found that proceedings on construction applications were adjudicative. In *Williamson v. Williams*, the court explained that:

> . . . such action is not broad or general in scope and because the opportunity for favoritism or discriminatory treatment is easily directed towards an individual supplicant, the standard of review in such matters differs from that which is usually accorded to legislative decisions.

543 So. 2d 1339, 1344 (La. App. 4 Cir. 1988). In *State, Department of Social Services v. City of New Orleans*, the court determined that the City Council sat in a "quasi-judicial capacity" when it reviewed an application for a building permit. 95-1757, p. 1 (La. App. 4 Cir. 1996); 676 So. 2d 149, 151. The sole purpose of the City Council proceeding at issue was to decide a construction application.

Instead of conducting the appropriate legal analysis to determine whether the nature of the City Council proceeding at issue was adjudicative, the Fourth Circuit seized on what it believed made dual roles permissible. In six words, the Fourth Circuit Opinion provides that the City Council proceeding was "legislative"[6] because it "involved aspects of public utility ratemaking."[7] The record clearly establishes that the proceeding did not involve any utility ratemaking. First, the City Council declined to consider ratemaking in the proceeding and deferred Entergy's request to recover the cost of constructing the gas

[6] Fourth Circuit Opinion, p. 8.
[7] Fourth Circuit Opinion, p. 7.

plant to a future proceeding called the Combined Rate Case.[8] Second, the Advisors staked out a position opposing any discussion of ratemaking in the proceeding,[9] which contradicts the claim the Advisors now make in litigation.[10] Lastly, the record shows that even Entergy acknowledged that its application for the construction of a gas plant did not involve legislative action by the City Council, such as ratemaking.[11]

There is nothing in the Fourth Circuit Opinion that identifies or describes the occurrence of any purported "aspects of public utility ratemaking"[12] in the City Council proceeding. The flawed decision entirely rests on an excerpt of the last page of the 188-page decision drafted by the Advisors (City Council Resolution No. R-18-65), which is a one-paragraph order directing that the costs associated with the gas plant be deferred to a proceeding in the future called the Combined Rate Case for evaluation.[13] Far from supporting the Fourth Circuit's decision, the plain language of the Resolution approving Entergy's construction application and the entire underlying administrative record show the Council proceeding was adjudicative, and not legislative utility ratemaking.

Without review by this Court, questions pertaining to constitutional due process protection and the distinction between adjudicative and legislative proceedings will be unresolved. The Fourth Circuit Opinion calls into question the *Allen* prohibition against dual roles in an adjudicative proceeding as well as the legal analyses for determining the nature of a City Council utility proceeding established by *Gulf States* and prior Fourth Circuit decisions. The Fourth Circuit Opinion stands in conflict with long-established jurisprudence prohibiting dual roles in adjudicative proceedings as a violation of fundamental due process. Review by this Court is merited pursuant to La. Sup. Ct. R. X, §1(a)(1) and (4).

2. In conflict with the decision of this Court in *In the Matter of Rollins Environmental Services, Inc.*, 481 So. 2d 113 (La. 1985), and its own prior decisions, the Fourth Circuit erroneously ruled there was no due process violation in the City Council having a binding commitment to agree with Entergy on all aspects of a new power generating facility prior to approving Entergy's application to construct it. Review is merited under La. S. Ct. Rule X, § 1(a)(1) and (4).

The proceeding at issue is mired in the controversy of the City Council having made an advance commitment on the outcome of the decision on the Entergy's application to construct a gas plant. This

[8] City Council Resolution No. R-18-65, p. 178 (Mar. 8, 2018) ("Resolution No. R-18-65").
[9] *See* Post-Hearing Brief of the Advisors to the City Council of New Orleans, p. 130, Docket No. UD-16-02 (Jan. 19, 2018) ("Advisors' Post-Hearing Brief") and Resolution No. R-18-65, p. 175 (discussing the Advisors opposition to determining rates in the gas plant proceeding).
[10] *See* Original Brief of Defendants-Appellees [sic] the Council for the City of New Orleans, p. 7, Case No. 2019-CA-0874 (Nov. 25, 2019) (arguing in support of the "legislative nature of the proceedings and the propriety of the dual role of its consultants and staff") ("City Council Brief").
[11] 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, p. 24, ¶ XL, Docket No. UD-16-02 (July 6, 2017) ("Second Application").
[12] Fourth Circuit Opinion, p. 7.
[13] Fourth Circuit Opinion, p. 7.

advance commitment denied Petitioners-Applicants their right to a neutral decision maker as guaranteed by Article I, Section 2 of the Louisiana Constitution.

There is no dispute that the City Council and Entergy entered an agreement exclusive to themselves that sets forth the following terms in full:

> II. E. Agreements of Specified Parties with Respect to Certain Potential Future Generation in the City of New Orleans
>
> ENO and CCNO agree as follows:
>
> (1) ENO will use reasonable diligent efforts to pursue the development of at least 120 MW of new-build peaking generation capacity within the City of New Orleans. As part of this commitment, ENO will fully evaluate Michoud or Paterson, along with any other appropriate sites in the City of New Orleans, as the potential site for a combustion turbine ("CT") or other peaking unit to be owned by ENO, or by a third party with an agreed-to PPA to ENO. This evaluation will take into consideration, among other material considerations, the results of the Michoud site analysis that was completed in connection with the Summer 2014 RFP.
>
> (2) ENO commits to use diligent efforts to have at least one future generation facility located in the City of New Orleans.
>
> (3) **The commitments set forth in this Section II.E are subject to mutually satisfactory resolution of all material considerations**, including, without limitation: (a) financial feasibility for ENO; (b) affordability for ENO customers; (c) economic feasibility in comparison to other potential projects, locations, or alternatives; (d) timely rate recovery; (e) regulatory jurisdiction over such facility(ies) to the extent not owned by ENO; and (f) consistency with sound utility practice and planning principles.[14]

In the Matter of Rollins Environmental Services, Inc., this Court determined that an environmental agency official's public statements to shut down a facility prior to a compliance proceeding showed bias that foreordained the penalty "will be closure of the facility. 481 So. 2d 113, 121 (La. 1985) ("*Rollins*"). In reaching this decision, the Court found that the official's statement "made it extremely difficult for her to change her position even in the event that evidence adduced at the hearing should warrant it." *Id.*

As explained in the *Rollins* decision:

> an impartial decision maker is essential to due process and that this requirement applies to agencies and government hearing officers as well as judges.

Id. at 122. This Court in *Wilson v. City of New Orleans* determined that "the situation in which an official occupies two inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process." 479 So. 2d 891, 899 (La. 1985). *See also Rand v. City of New Orleans*, 2012-0348 (La. App. 4

[14] Entergy Arkansas, Inc., *et al.* – Settlement Agreement in Docket Nos. ER14-75-000, ER14-75-001, ER14-76-000, ER14-76-001, ER14-77-000, ER14-77-001, ER14-78-000, ER14-78-001, ER14-79-000, ER14-79-001, ER14-80-000, ER14-80-001, ER14-128-000, ER14-1328-000, and ER14-1329, pp. 13–14. (emphasis added). Excerpt (App. C) ("Settlement Agreement"). "CCNO" is an abbreviation for the Council of the City of New Orleans.

Cir. 12/13/12); 125 So. 3d 476 (holding the right to due process was violated by hearing officers serving inconsistent positions, one as prosecutor and one as the adjudicator).

In conflict with the decisions of this Court and its own prior decision, the Fourth Circuit held there was no due process violation arising from the binding agreement between the City Council and Entergy for a new generating facility prior to the proceeding in which the City Council approved Entergy's application to construct it.[15] The Fourth Circuit did not correctly view the City Council as having the inconsistent positions as partisan and decision maker in the proceeding.

Confoundingly, the Fourth Circuit read the City Council's prior agreement with Entergy to have no binding effect at all and "merely directed Entergy to explore the feasibility of a new power plant and to prepare a proposal for review by the Council."[16] The Fourth Circuit Opinion entirely omits section II.E(3) of the agreement (quoted above), which specifically binds the City Council to resolve all matters concerning a new power generating facility to Entergy's satisfaction. Through this omission, the Fourth Circuit fails to follow the legal analysis applied by this Court in *Rollins and Wilson,* which fully considered evidence in the record showing an advance commitment.[17]

This Court previously established that proof of a disqualifying bias is sufficient to show a decision maker cannot be neutral.[18] In the City Council proceeding at issue, the Petitioners-Applicants put forward evidence of disqualifying bias which included the document containing the City Council's binding agreement with Entergy as well as the sworn testimonies of then Entergy CEO Charles Rice and City Council Advisor Joseph Vumbaco, who each admitted to the existence of this agreement. The City Council and Entergy have not refuted this evidence but only present the similar, but false assertion that "[t]here was no 'prior binding agreement'" between the City Council and Entergy for a power generating facility.[19] In their mirror arguments to the Fourth Circuit, the City Council and Entergy both entirely omit section II.E(3) of their agreement that binds them to resolve all matters regarding a new power generating facility to their mutual satisfaction. The Fourth Circuit Opinion follows the City Council and Entergy's argument, which is not supported by the evidence, and rejects the substantial and unrefuted proof put

[15] Fourth Circuit Opinion, p. 10.
[16] Fourth Circuit Opinion, p. 10 (quoting the judgment of the District Court).
[17] *Rollins*, 481 So. 2d at 121 (examining in the record of evidence repeated statements by a governmental official avowing to shut down a facility as proof of a disqualifying bias); *Wilson*, 479 So. 2d at 901 (reviewing in the record of evidence proof of a financial interest that disqualified a company as a neutral decision maker).
[18] *Rollins*, 481 So. 2d at 121; *Wilson*, 479 So. 2d at 901–02.
[19] *See* Original Brief of Intervenor-Appellee Entergy New Orleans, LLC, p. 17, Case No. 2019-CA-0874 (Nov. 25, 2019) (falsely claiming "[t]here was no 'prior binding agreement") ("Entergy Brief"). *See also* City Council Brief, p. 12 (falsely asserting there was no "commitment" regarding a power generating).

forward by the Petitioners-Applicants that demonstrates the City Council conducted a proceeding in which the decision maker is partisan by the terms of its agreement with Entergy.

In conflict with the decisions of this Court and its own prior decisions, the Fourth Circuit determined that there was no due process violation arising from the City Council's inconsistent positions. The record shows that the City Council was both a party to an agreement with Entergy bound to support a new gas plant and also the decision maker in an adjudicative process to review Entergy application to build the gas plant. Review by this Court is merited pursuant to La. Sup. Ct. R. X, § 1(a)(1) and (4).

3. In conflict with this Court's decision in *Alma Plantation v. Louisiana Pub. Serv. Comm'n*, the Fourth Circuit incorrectly applied the standard of review and did not consider the record of evidence showing that the City Council acted arbitrarily and capriciously in failing to enforce its own resolution requiring the evaluation of three specific alternatives to Entergy's proposed gas plant, and rendered a decision that fails to meet the public interest test for a utility decision. 96-1423 (La. 1/14/97); 685 So. 2d 107. Review is merited under La. S. Ct. Rule X § 1(a)(1).

This Court holds that a reviewing court must overturn a decision by a governmental body if "it is shown to be arbitrary, capricious, a clear abuse of authority, or not reasonably based upon the factual evidence." *Alma Plantation v. Louisiana Pub. Serv. Comm'n*, 96-1423, p. 5 (La. 1/14/97); 685 So. 2d 107, 110 (citing *Washington St. Tammany Electrical Coop., Inc., v. Louisiana Public Service Comm'n*, 95-1932 (La. 4/8/96), 671 So. 2d 908, 912).

The Fourth Circuit Opinion conflicts with this Court's decisions by not reviewing the evidence presented by the Petitioner-Applicants of the City Council's arbitrary and capricious decision-making. The evidentiary record shows that: (1) the City Council enacted into law by Resolution No. R-16-506 a requirement for the purpose of determining whether Entergy's gas plant application was in the public interest;[20] (2) this resolution required Entergy to evaluate the proposed gas plant and three specific alternative energy options -- transmission upgrades, solar battery storage, and an expanded energy efficiency program -- (a total of four scenarios) using a specialized computer modeling program called Aurora; [21] (3) this resolution also required Entergy to report the results of this computer modeling and evaluation to the City Council by November 18, 2016;[22] (4) Entergy never conducted the evaluation;[23]

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[20] City Council Resolution No. R-16-506, p. 8 (Nov. 13, 2016) ("Resolution No. R-16-506").
[21] Resolution No. R-16-506, p. 9. The three alternatives and the gas plant are specified in the September 19, 2016 written request by the City Council's Advisors, which is referenced in Resolution No. R-16-506, p. 9. The written request was provided to Petitioners-Applicants only after Petitioners-Applicants submitted a discovery request for the information and incorporated in the Post-Hearing Brief by the Alliance for Affordable Energy, Deep South Center for Environmental Justice, Inc., 350 – New Orleans, and Sierra Club, p. 94, Docket No. UD-16-02 (Jan. 19, 2018) ("Alliance Post-Hearing Brief").
[22] Resolution No. R-16-509, p. 9.
[23] The sworn testimonies by one of the City Council's Advisors and an Entergy executive recognize that Entergy did not conduct the required evaluations. Public Transcript of the Evidentiary Hearing at 85:13–17, 182:5–9, 182:18–20, Docket No. UD-16-02 (Dec. 21, 2017) (Cross-Examination of Joseph A. Vumbaco) and Public Transcript of the Evidentiary Hearing at 216:9 and 218:21-219:1, Docket No. UD-16-02 (Dec. 15, 2017) (Cross-Examination of Charles W. Long). Petitioners-Applicants have brought to

and (5) the City Council approved Entergy's gas plant application without the legally required evaluation and without explanation regarding why the City Council abandoned its previously adopted requirement[24] Based on this evidence, the Fourth Circuit should have overturned the City Council's decision.

In two paragraphs, the Fourth Circuit incorrectly determined that the City Council's decision was "reasonably based on the factual evidence presented".[25] The Fourth Circuit inappropriately applied an evidence test rather than the arbitrary and capricious test called for by Petitioners-Applicants allegations. The issue presented was the City Council's unexplained reversal of its previously adopted policy regarding the need for specific evaluations to establish that the construction of the gas plant is in the public interest. Any other evidence presented by the parties is irrelevant to the Fourth Circuit's consideration of this issue.

This Court holds that governmental bodies with regulatory authority over utility matters are required to render decisions that are in the public interest in order "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." *City of Plaquemine v. Louisiana Pub. Serv. Comm'n*, 282 So. 2d 440, 443 (La. 1973). Moreover, this Court has ruled that City Council decisions must not be based on a whim, but follow established standards. *McCauley v. Albert E. Briede & Son*, 231 La. 36 (La. 1956); 90 So. 2d 78. In conflict with these decisions, the Fourth Circuit Opinion erroneously affirms the City Council abandoning, without explanation, the only legal standard it expressly adopted for determining whether the Entergy gas plant is in the public interest.[26]

The Fourth Circuit Opinion did not correctly apply the standard of review and did not consider the evidence presented by Petitioners-Applicants, as required by this Court in *Alma Plantation*. Simply put, the issue raised by the Petitioners-Applicants was whether the City Council acts in an arbitrary and capricious manner when it issues a directive to the regulated utility and later abandons that directive without explanation. The Fourth Circuit's conclusion with regard to the evidence presented by the parties is irrelevant because the Court failed to answer the question presented. The Fourth Circuit's conclusion is contrary to this Court's decision in *McCauley*. Moreover, the Fourth Circuit Opinion incorrectly affirms a decision by the City Council that failed to meet the public interest test established by this Court in *City of Plaquemine*, 282 So. 2d at 443.

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the City Council's attention the failure of Entergy to conduct the computer evaluations. Alliance Post-Hearing Brief, pp. 92–96.

[24] Resolution No. R-18-65.

[25] Fourth Circuit Opinion, p. 11.

[26] Resolution No. R-16-506, p. 8.

The City Council arbitrarily and capriciously did not enforce the legal requirement of Resolution No. R-16-506 and, instead, approved Entergy's gas plant application without the evaluation of the legally required alternatives, analysis the City Council itself declared was necessary to resolve whether the construction of the gas plant is in the public interest. The City Council took no action to rescind or otherwise amend this legal requirement. The Fourth Circuit Opinion clearly misinterprets Resolution No. R-16-506 and affirms the decision by the City Council to approve the gas plant without any of the legally required consideration of the alternatives, which is demonstrably not in the public interest.

The failure of the City Council to explain the abandonment of this directive is arbitrary and capricious. The significance of the City Council's error and the Fourth Circuit Opinion will cause material injustice and significantly affect the public interest. Review by this Court is merited pursuant to La. Sup. Ct. R. X, § 1(a)(1) and (4).

STATEMENT OF THE CASE

1. Factual Background.

On August 14, 2015, the City Council and Entergy entered into a binding agreement in which they committed to "have at least one future generation facility in the City of New Orleans" with a capacity "of at least 120 megawatts"[27] on "Michoud . . . as the potential site."[28] According to this agreement, the City Council and Entergy committed to:

> [M]utually satisfactory resolution of all material considerations, including, without limitation: (a) financial feasibility for ENO; (b) affordability for ENO customers; (c) economic feasibility in comparison to other potential projects, locations, or alternatives; (d) timely rate recovery; (e) regulatory jurisdiction over such facility(ies) to the extent not owned by ENO; and (f) consistency with sound utility practice and planning principles.[29]

On June 16, 2016, Entergy filed an application seeking approval of the City Council to construct a 226-megawatt gas plant on the Michoud site in New Orleans East. Entergy claimed that customer demand for electricity would increase, and the gas plant was planned to meet the demand. On August 11, 2016, the City Council issued Resolution No. R-16-332, establishing a proceeding on the Entergy's gas plant application, which designated the Advisors as a party to the proceeding.

By September 11, 2016, Petitioners-Applicants intervened in the City Council proceeding. Over the course of the proceeding, they submitted documents into the record, filed testimonies by expert witnesses, and presented research at meetings of the City Council and Utility, Cable, Telecommunications and Technology Committee ("Utility Committee") that analyzed the adverse impacts of the proposed gas plant.

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[27] Settlement Agreement, pp. 13–14.
[28] *Id.*
[29] *Id.*

On November 3, 2016, the City Council issued Resolution No. 16-506, which ordered Entergy to supplement its application to address the impacts on air quality, flood risk, and land subsidence. This resolution also ordered Entergy to evaluate alternatives to the gas plant using the Aurora computer modeling program to evaluate the gas plant and three alternative energy options - transmission upgrades, solar energy battery storage, and an expanded energy efficiency program, which are specified in the document referenced in Resolution No. R-16-506.

On November 8, 2016, Entergy filed supplemental testimony. In this testimony, Entergy did not include any data or report from computer modeling that evaluated the gas plant and the three alternative energy options, as the Company was required to do pursuant to Resolution No. R-16-506.

On January 6, 2017, Petitioners-Appellants and other Intervenors filed testimony by expert witnesses. In this testimony, Petitioners-Applicants expressly noted Entergy's failure to conduct the legally required evaluations of the alternative energy options to the gas plant.[30]

On February 14, 2017, Entergy filed a motion to suspend the City Council proceeding. This was followed by Entergy submitting documents to the parties showing an updated forecast of lower customer demand, which contradicted the primary justification for the proposed gas plant.

On July 6, 2017, Entergy filed a supplemental and amending application that proposed two gas plant options -- the original 226-megawatt gas plant and a 128-megawatt that used different technologies for using gas to generate electricity. Entergy changed its justification for the new gas plant from an emphasis on increased capacity demand to a scenario involving a loss of power due to two outages occurring simultaneously on two transmission lines.

On October 16, 2017, Petitioners-Appellants filed supplemental testimony by eight expert witnesses that included testimony by Dr. Beverly Wright which discussed, for the first time in the proceeding, the City Council's binding commitment to Entergy to support a new electric generating facility and to address all matters regarding the facility to their mutual satisfaction and its impact on the proceeding.[31] Dr. Wright testified, from her perspective as an expert called to advise governmental agencies, such as the U.S. Environmental Protection Agency, on how to conduct open and transparent public proceedings that meaningfully engage stakeholders.[32]

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[30] *See, e.g.*, Direct Testimony and Exhibits of Robert M. Fagan, pp. 8:19–9:5; 39:4–11, Docket No. UD-16-02 (Oct. 16, 2017).
[31] Pre-filed Supplemental Testimony of Dr. Beverly Wright, pp. 3:22–6:19, Docket No. UD-16-02 (Oct. 16, 2017).
[32] *Id.* at pp. 1:16–2:13.

On November 16, 2017, the Advisors to the City Council filed a motion to strike the portion of Dr. Wright's testimony in which she discussed the City Council's binding agreement with Entergy and its impact on the proceeding.[33]

On November 20, 2017, the Advisors filed testimony recommending approval of Entergy's second option to construct a 128-megawatt gas plant on the Michoud site in New Orleans East.

On November 30, 2017, Entergy filed rebuttal testimony, which did not include the computer modeling evaluation of the gas plant and the three specific alternative energy options, as directed by Resolution No. R-16-506.

On December 15–21, 2017, the parties took part in an evidentiary hearing on the gas plant that included the direct and cross-examination of witnesses and evidence. This was followed by Petitioners-Applicants and other parties' submission of post-hearing briefs. Once again, Petitioners-Applicants discussed the unfairness of the prior binding agreement between the City Council and Entergy and Entergy's failure to provide the computer evaluation of the gas plant and three specific alternative energy options.[34]

On February 21, 2018, the City Council Utility Committee held a public meeting where the parties, including the Advisors, delivered closing arguments before public comments. The Advisors then answered a series of questions from the council members, questions the other parties were not permitted to answer. At this hearing, Petitioners-Advisors learned that the Advisors wrote the draft resolution that became the decision to approve Entergy's construction of the 128-Megawatt gas plant on the Michoud site at New Orleans East. The Utility Committee voted 4-1 in favor of the draft resolution written by the Advisors.

On March 8, 2018, the City Council held a public meeting in which it considered and adopted Resolution No. R-85-65 by a vote of 6 to 1.

On April 9, 2018, Petitioners-Appellants filed a petition for rehearing to the City Council and also filed a Petition for Judicial Review in the Civil District Court of Orleans Parish (2018-3471, Section 14, Div. "I"). On April 26, 2018, Entergy filed a Petition of Intervention in the matter. On May 10, 2018, Petitioners filed an Amended Petition for Judicial Review. After briefing by the parties, on March 26, 2019, the District Court held a hearing for oral argument. On June 14, 2019, the District Court issued

[33] The Administrative Law Judge granted the Advisors' motion to strike the portion of Dr. Wright's testimony on November 24, 2017. Petitioners-Applicants filed an offer of proof of Dr. Wright's excluded testimony to the City Council on December 21, 2017.
[34] Alliance Post-Hearing Brief, pp. 92–96.

Judgment affirming the City Council's decision to approve Entergy's application to construct the gas plant.

On July 16, 2019, Petitioners-Applicants filed their motion for appeal to the Louisiana Court of Appeal, Fourth Circuit.

On November 14, 2019, Petitioners-Applicants filed a Motion to Correct and Supplement the Record that requested the Fourth Circuit to direct the Clerk of the Orleans Parish Civil District Court to correct and supplement the record on appeal to include the administrative record of the City Council proceeding.

On December 30, 2019, the Fourth Circuit issued an Order granting Petitioners-Applicants Motion to Correct and Supplement the Record.

On April 15, 2020, The Fourth Circuit issued its Opinion affirming the decision of the District Court. Prior to this Opinion.

ASSIGNMENT OF ERRORS

1. The Fourth Circuit erred in its decision that there is no due process violation caused by the dual roles performed by the City Council's Advisors as both party advocate in support of Entergy's application for a gas plant and Advisors who, among other things, were the sole drafters of the decision approving the application that was adopted by the City Council.
2. The Fourth Circuit erred in its decision that the City Council's prior written commitment to agree with Entergy on all matters involving a new power generating facility did not have a prejudicial effect on the City Council's ability to be a neutral decision-maker.
3. The Fourth Circuit incorrectly applied the standard of review by not considering the record evidence showing that the City Council acted arbitrarily and capriciously in approving a Entergy's gas plant application without following the law it enacted in a resolution requiring the evaluation of the gas plant as compared to specific alternative energy options to determine whether the plant is in the public interest.

SUMMARY OF THE ARGUMENT

This case involves a City Council proceeding in which the rights of Petitioners-Appellants to a fair trial as well as a neutral decision maker, as guaranteed by Article I, Section 2 of the Louisiana Constitution, were violated. In this proceeding, the City Council rendered an arbitrary and capricious decision by approving the Entergy gas plant application without requiring Entergy to meet the legal

requirement that the Company evaluate three specific alternatives to the proposed plant and provide this analysis to the City Council.

1. Dual Roles in an Adjudicative Proceeding Violate Due Process.

It is undisputed that the City Council's Advisors performed the dual roles of party advocate in favor of Entergy's gas plant application as well as acting as advisors to the City Council; advisors who wrote the entire decision approving the gas plant application. However, the Fourth Circuit ruled that "the dual role of the Advisors did not violate Appellants' due process rights."[35] If allowed to stand, this ruling would eviscerate basic rights to due process in adjudicative proceedings before the City Council and administrative bodies.

As a matter of due process, a party to an adjudicative proceeding is prohibited from performing the role of trier of fact or decision-maker. *See Allen*, 543 So. 2d at 914 (explaining that a party to a proceeding could not be considered neutral; his role was that of advocate, one who has developed the "will to win"). *Georgia Gulf*, 96-1907 (La. 5/9/97); 694 So. 2d 173 (holding that basic due process rights were violated in an administrative proceeding where the same person who acted as prosecutor also drafted the findings of facts). *See also Haygood v. La. State Bd. of Dentistry*, 2011-1327, p. 1 (La. App. 4 Cir. 9/26/12); 101 So. 3d 90, 92 (holding that dual roles in an adjudicative proceeding violate the due process right to a neutral adjudicator and a fair hearing).

Petitioners-Applicants recognize that, in some cases, dual roles are permissible. These cases are limited to legislative proceedings, which include utility ratemaking. S*ee Gulf States Utils. Co. v. La. Pub. Serv. Comm'n*, 578 So. 2d 71, 82 (La. 1991). However, in the proceeding at issue, the City Council expressly declined to consider utility rates.[36] Additionally, the Council deferred the issue of Entergy recovering the cost of the gas plant construction to a future ratemaking proceeding called the Combined Rate Case.[37] During the proceeding, none of the litigants claimed that the City Council proceeding on Entergy's application to construct a gas plant was a utility ratemaking process.[38] Based on the record of evidence, it is impossible for the Fourth Circuit to conclude, as it did, that the City Council proceeding on Entergy's application to construct a gas plant was "legislative in nature."[39]

Furthermore, the Fourth Circuit has no basis in law to support its view that the City Council proceeding was legislative. This Court determined that a utility proceeding is adjudicative if it declares a

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[35] Fourth Circuit opinion, p. 8.
[36] Second Application, p. 24, ¶ XL.
[37] Resolution No. R-18-65, p. 18.
[38] Advisors Post-Hearing Brief, p. 130, Public Interest Intervenors Post-Hearing Brief, p. 104; Air Products Post-Hearing Brief, pp. 3–4 and New Orleans Cold Storage & Warehouse Co. Ltd. Post-Hearing Brief, pp. 26–28.
[39] Fourth Circuit Opinion, p. 8.

right based on existing facts and law. *See Gulf States*, 578 So. 2d at 79. The Fourth Circuit decision in *Lowenburg*[40] is in keeping with this Court's decision in *Gulf States*. Other Fourth Circuit decisions recognize City Council proceedings on construction applications to be adjudicative, not legislative. *Williamson*, 543 So. 2d at 1344; *City of New Orleans*, 95-1757, p. 1. Under these court decisions, the City Council proceeding to determine whether Entergy would receive approval to construct a gas plant was clearly adjudicative, not legislative.

The Fourth Circuit's decision removes the fundamental right to a fair trial in a fair tribunal, as guaranteed by Article I, Section 2 of the Louisiana Constitution. This decision stands in conflict with the decisions of this Court and the Fourth Circuit's own case law, which have prohibited dual roles in adjudicative proceedings as a violation of fundamental due process.

2. Due Process in an Adjudicative Proceeding Is Violated when a Decision Maker Is Partisan.

Prior to the proceeding at issue, the City Council and Entergy entered a binding agreement to resolve all matters concerning a new power generation facility in New Orleans to their mutual satisfaction.[41] Under this agreement, the City Council is necessarily partisan, which is inconsistent with its role as the decision maker of an adjudicative proceeding on Entergy's gas plant application. This Court determined that repeated statements by a governmental official avowing to shut down a regulated facility prior to a compliance proceeding were an "advance commitment" that showed disqualifying bias in violation of due process. *Rollins* 481 So. 2d at 121. This Court also determined that a situation in which an official is both partisan and the decision maker "necessarily involves a lack of due process." *Wilson*, 479 So. 2d at 899.

The Fourth Circuit erroneously held that there was no violation of due process in the City Council proceeding on Entergy's gas plant application arising from the City Council's binding commitment with Entergy.[42] The Fourth Circuit omits Section II.E(3) of the agreement from its decision, which sets forth the binding terms, and misread the agreement to have "merely directed Entergy to explore the feasibility of a new power plant and to prepare a proposal for review by the Council."[43] To the contrary, this agreement is an advance commitment that restricted the City Council from making a decision regarding Entergy's gas plant application that was not to Entergy's satisfaction. Even consideration of whether the gas plant is "consistent with sound utility practice and planning principles" -- a domain that is exclusive

[40] *Lowenburg*, 2003-0809, p. 10–11 (La. App. 4 Cir. 10/8/03); 859 So. 2d at 810.
[41] Settlement Agreement, pp. 13–14.
[42] Fourth Circuit Opinion, p. 10.
[43] *Id.* (quoting the judgment of the District Court).

to the City Council as the utility regulator – is required by Section II.E(3)(f) of the agreement to be resolved to the satisfaction of Entergy – the regulated company

The Fourth Circuit Opinion has no factual or legal basis to support its holding that there was no due process violation arising from the inconsistent positions held by the City Council as both a partisan and decision maker. The record shows that the City Council was both a party to an agreement with Entergy, who was bound to support a new generating facility and also the decision maker in the adjudicative process to review Entergy application to build the facility.

3. A City Council Decision that Disregards Its Own Legal Requirement for Evaluation of Alternatives Is Arbitrary and Capricious and is Contrary to this Court's Public Interest Test.

In this proceeding, the City Council enacted into the law Resolution No. R-16-506, which imposed the legal requirement on Entergy to evaluate the gas plant and three specific alternatives to the gas plant -- a total of four scenarios -- using specialized computer modeling program called Aurora and report the results to the City Council by November 18, 2016.[44] The Resolution references a document that identifies the three specific alternatives to the gas plant as transmission upgrades, solar battery storage, and an expanded energy efficiency program.[45]

This Court determined that a utility regulator must pass the public interest test "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." *City of Plaquemine*, 282 So. 2d at 443. This Court also determined that the City Council should have established standards to ensure its decision making is not made arbitrarily or capriciously. *McCauley*, 231 La. 36 (La. 1956); 90 S.2d 78.

Resolution No. R-16-506 was a standard for decision making in the City Council proceeding that was consistent with this Court's decisions. Petitioners-Applicants right to a decision that meets the public interest test and is not made on a whim was denied by the Council when it abandoned the resolution by approving the Entergy gas plant application without an evaluation of the three alternatives, as mandated by the resolution.

The Fourth Circuit erroneously determined that it could find no violation of the legal requirement in Resolution No. R-16-506 "based on its review of the record as a whole."[46] However, the record shows that Entergy never conducted the legally required computer modeling of the scenarios, as ordered in

[44] Resolution No. R-16-506, p. 9.
[45] *Id.*
[46] Fourth Circuit Opinion, p. 11.

Resolution No. R-16-506.[47] This record includes the City Council's Advisors acknowledging Entergy's failure to prepare a transmission alternative as the Company was directed to do by the resolution.[48] Entergy's Director of Transmission Planning admitted under cross-examination that Entergy never developed complete studies of the transmission options because ENO was committed to building the gas plant instead.[49]

This Court should find that the Fourth Circuit applied the wrong standard of review to the issue raised by Petitioners-Applicants. Simply put, this issue is whether the City Council acted in an arbitrary and capricious manner when it abandoned without explanation the law it enacted Resolution and Order 16-506. The Fourth Circuit entirely disregarded this issue. Instead, the Court addressed a question that Petitioners-Applicants did not raise. Petitioners-Applicants' appeal on this issue is based on the City Council's arbitrarily and capriciously abandoning without explanation the legal standard it established in Resolution No. R-16-506 for considering alternatives to the proposed gas plant. Rather than address the question raised, the Fourth Circuit erroneously applied a substantial evidence test.[50] The Fourth Circuit's conclusion with regard to substantial evidence is irrelevant because the court of appeal failed to answer whether the City Council acted arbitrarily and capriciously when it decided to approve Entergy's gas plant application without receiving and considering its own legally mandated evaluation of alternatives.

Second, this Court should find that the City Council arbitrarily and capriciously approved Entergy's gas plant application without the legally required evaluation of the alternatives, analysis the City Council itself declared was necessary to resolve whether the construction of the gas plant is in the public interest. The City Council took no action to rescind or otherwise amend this legal requirement in Resolution No. R-16-506. The Fourth Circuit Opinion clearly misinterprets Resolution No. R-16-506 and affirms the decision by the City Council to approve the gas plant without any of the legally required consideration of the alternatives, which is demonstrably not in the public interest. The failure of the City Council to explain the abandonment of this directive is arbitrary and capricious.

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[47] Entergy witness Seth Cureington confirmed on cross-examination that Entergy did not run the analysis as directed by the City Council. Public Transcript of the Evidentiary Hearing at 139:16-139:8; 140:13-15, 117:9, Docket No. UD-16-02 (Dec. 18, 2017).

[48] Public Transcript of the Evidentiary Hearing at 85:13–17, 182:5–9, 182:18–20, Docket No. UD-16-02 (Dec. 21, 2017) (Cross Examination of Joseph A. Vumbaco).

[49] Public Transcript of the Evidentiary Hearing at 216:9 and 218:22-219:1 (Dec. 15, 2017) (Cross Examination of Charles W. Long). *See also* Supplemental and Amending Direct Testimony of Charles W. Long at 16:20–17:11 (July 6, 2017).

[50] Fourth Circuit Opinion, p. 11. ("We find that the decision of the Council was reasonably based on the factual evidence presented.").

LAW AND ARGUMENT

This Court has applied the Constitution and laws of this state to require fair governmental proceedings and reasonable decision making. Chief among these requirements is the protection of due process. Article I, Section 2 of the Louisiana Constitution, like the 14th Amendment to the United States Constitution, guarantees the right to due process, including the right to a fair trial. In upholding this constitutional right, this Court has consistently held that a fair trial in a fair tribunal is a basic requirement of due process. *Georgia Gulf*, 96-1907, p. 7. In determining claims of due process, this Court has carefully examined governmental proceedings to hold that dual roles performed by one person in an adjudicative proceeding as both party advocate and decision maker violate due process;[51] and that a decision maker who makes an advance commitment to the outcome of an adjudicative proceeding does so in violation of the due process requirement of impartiality.[52] For governmental bodies with regulatory authority over utility matters and building projects, this Court has required their decisions to be reasonable;[53] and serve the public interest.[54] The clear directive from this Court's holdings is sought by Petitioners-Applicants, whose rights to due process and a remedy for arbitrary and capricious decision-making by the City Council have been denied by the Fourth Circuit.

1. The Fourth Circuit Opinion will eviscerate constitutional due process protections by affirming an adjudicative proceeding in which a party to an adversarial case writes the decision.

It is well-settled law that due process is violated in an adjudicative proceeding where one person performs the dual roles of party advocate and decision maker. *Allen*, 543 So. 2d. In keeping with this case, previous decisions of the Fourth Circuit have found dual roles to violate due process. *Rand*, 2012-0348; *Haygood*, 2011-1327, p. 1.

In contrast to an adjudicative proceeding, dual roles performed in a legislative proceeding have been determined not to violate due process. *Lowenburg*, 2003-0809, p. 13, *writ denied sub nom. Lowenburg*, 2003-3094.

There is no dispute that the Advisors to the City Council performed dual roles in Council proceeding to review and decide Entergy's application to construct a gas plant. The Advisors were a party to the proceeding in which they advocated in favor of Entergy's application. The Advisors also

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[51] *See Allen*, 543 So. 2d (holding that the Board violated due process by requesting an investigator/prosecutor draft the decision document).
[52] *Rollins*, 481 So. 2d; *see also Wilson*, 479 So. 2d at 899 (ruling that "the situation in which an official occupies two inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process.").
[53] *See McCauley*, 231 La. at 49 (ruling that the City Council does not have the authority to approve a proposed development that is unsupported by reasons).
[54] *See City of Plaquemine*, 282 So. 2d at 443 (requiring action by a utility regulator to be in the public interest).

wrote the entire decision approving Entergy's application, which a majority of the City Council passed as Resolution No. R-18-65.

The Opinion of the Fourth Circuit rests on mischaracterizing the City Council's adjudicative process as a legislative ratemaking case in order to reach the conclusion that the dual roles performed by the Advisors did not violate due process.[55] This Opinion will eviscerate due process protections by permitting dual roles in adjudicative proceedings.

a. There is no legal or factual basis to support the Fourth Circuit's ruling that the City Council proceeding at issue was a legislative ratemaking case.

To avoid the clear due process violation of dual roles performed by its Advisors, the City Council claimed without legal and factual support that its proceeding was legislative, not adjudicative. The Fourth Circuit agreed with the City Council and went further to assert that the City Council proceeding was legislative ratemaking.[56] Nonetheless, this patently false notion was propped up solely by a quote from the last page of the decision written by the City Council's Advisors.[57] However, the Fourth Circuit misreads this statement, which presents a clear instruction that the costs of Entergy's gas plant and associated ratemaking would all be decided in a future proceeding called the Combined Rate Case.

The administrative record, which was not lodged with the Fourth Circuit prior to its decision, shows the City Council decided to exclude all costs and ratemaking considerations from its proceeding on the Entergy gas plant application.[58] The Advisors to the City Council are on the record making arguments for and ultimately prevailing in keeping all rate matters out of the proceeding.[59] Entergy is also on the record acknowledging that its application for construction of the gas plant does not involve legislative action by the City Council, such as ratemaking.[60]

The Fourth Circuit's decision is not supported by its own jurisprudence which recognizes proceedings on construction applications as adjudicative, not legislative. *Williamson*, 543 So. 2d at 1344; *City of New Orleans*, 95-1757, p. 1. It is an outlier from cases in which this Court and its own previous decision carefully drew the distinction between utility cases that are legislative and those that are adjudicative for the sole purpose of protecting due process and prohibiting dual roles in an adjudicative proceeding on a utility matter. *See Georgia Gulf*, 96-1907, p. 12 ("[T]he approved procedure in a rate case is inapplicable to the evaluation of procedural due process in other administrative law settings.");

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[55] Fourth Circuit Opinion pp. 7–8.
[56] Fourth Circuit Opinion, p. 7.
[57] *Id.*
[58] Resolution No. R-18-65, pp. 178, 188.
[59] *See* Advisors' Post-Hearing Brief, p. 130 and Resolution No. R-18-65, p. 175 (discussing the Advisors opposition to determining rates in the gas plant proceeding).
[60] Second Application, p. 24, ¶ XL.

Lowenburg, 2003-0809, p. 13, *writ denied sub nom. Lowenburg*, 2003-3094 (recognizing that a utility proceeding by the Council is adjudicative if based on declaring rights on past or present facts under existing laws).

b. On the law and the facts, the City Council proceeding was adjudicative and the dual roles performed by Advisors as party advocates who wrote the decision violated the due process rights of Petitioners-Applicants.

This Court has drawn the distinction between utility matters that are legislative from those that are adjudicative. *See Georgia Gulf*, 96-1907, p. 12 (explaining that "the approved procedure in a rate case is inapplicable to the evaluation of procedural due process in other administrative law settings").

In keeping with this Court's decision in *Georgia Gulf* and the U.S. Supreme Court decision in *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 369–70 (1989), the Fourth Circuit previously recognized that a utility proceeding by the Council is adjudicative if based on declaring rights on past or present facts under existing laws. *Lowenburg*, 2003-0809, p. 13, *writ denied sub nom. Lowenburg*, 2003-3094.

In this case, City Council proceeding on Entergy's gas plant application was adjudicative. It was based on determining whether Entergy should be given the right to build a gas plant that involved past and present facts, data, and analysis filed in the administrative record under applicable laws in effect. This proceeding did not have any of the elements that courts have defined as legislative. It did not involve making new rules. *Id*.

On the basis of the law and facts, the City Council proceeding was an adjudicative proceeding. Therefore, the Advisors' dual role as party advocates who wrote the decision violated the due process rights of Petitioners-Applicants.

2. The Fourth Circuit's Opinion will allow adjudicative proceedings in which the decision maker is not neutral and has an advance commitment to the outcome.

The proceeding at issue is mired in the controversy of the City Council having made an advance commitment on the outcome of the proceeding on the Entergy gas plant application. This advance commitment denied Petitioners-Applicants their right to neutral decision maker as guaranteed by Article I, Section 2 of the Louisiana Constitution.

There is no dispute that the City Council and Entergy entered an agreement exclusive to themselves that set forth the following terms in full:

> II. E. Agreements of Specified Parties with Respect to Certain Potential Future Generation in the City of New Orleans
>
> ENO and CCNO agree as follows:
>
> (1) ENO will use reasonable diligent efforts to pursue the development of at least 120 MW of new-build peaking generation capacity within the City of New Orleans. As part

> of this commitment, ENO will fully evaluate Michoud or Paterson, along with any other appropriate sites in the City of New Orleans, as the potential site for a combustion turbine ("CT") or other peaking unit to be owned by ENO, or by a third party with an agreed-to PPA to ENO. This evaluation will take into consideration, among other material considerations, the results of the Michoud site analysis that was completed in connection with the Summer 2014 RFP.
>
> (2) ENO commits to use diligent efforts to have at least one future generation facility located in the City of New Orleans.
>
> (3) The commitments set forth in this Section II.E are subject to mutually satisfactory resolution of all material considerations, including, without limitation: (a) financial feasibility for ENO; (b) affordability for ENO customers; (c) economic feasibility in comparison to other potential projects, locations, or alternatives; (d) timely rate recovery; (e) regulatory jurisdiction over such facility(ies) to the extent not owned by ENO; and (f) consistency with sound utility practice and planning principles.[61]

Rollins, 481 So. 2d. This Court determined that public statements made by an environmental agency official to shut down a facility prior to a proceeding to decide whether the facility complied with environmental regulations showed bias that "the penalty . . . will be closure of the facility." *Id.* at 121. In reaching this decision, the Court found that the official's statement "made it extremely difficult for her to change her position even in the event that evidence adduced at the hearing should warrant it." As explained in the *Rollins* decision:

> [A]n impartial decision maker is essential to due process and that this requirement applies to agencies and government hearing officers as well as judges.

Rollins, 481 So. 2d at 122. This Court in *Wilson*, 479 So. 2d at 899 determined that "the situation in which an official occupies two inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process." *See also Rand*, 2012-0348 (holding the right to due process was violated by hearing officers serving inconsistent positions, one as prosecutor and one as the adjudicator).

In conflict with the decisions of this Court, the Fourth Circuit held there was no due process violation arising from the binding agreement between the City Council and Entergy for a new generating facility prior to the proceeding in which the City Council approved Entergy's application to construct it.[62] The Fourth Circuit did not view the City Council as having the inconsistent positions as partisan and decision maker in the proceeding.

The Fourth Circuit misread the City Council's prior agreement with Entergy to have no binding effect and "merely direct[ing] Entergy to explore the feasibility of a new power plant and to prepare a proposal for review by the Council."[63] The Fourth Circuit Opinion entirely omits subsection 3 of the agreement (quoted above), the provision which specifically binds the City Council to resolve all matters concerning a new power generating facility to Entergy's satisfaction. This omission fails to follow the

[61] Settlement Agreement, p. 13–14.
[62] Fourth Circuit Opinion, p. 10.
[63] Fourth Circuit Opinion, p. 10 (quoting the judgment of the District Court).

legal analysis applied by this Court in *Rollins* and *Wilson*, which fully considered evidence in the record showing an advance commitment.[64]

This Court previously established that proof of a disqualifying bias is sufficient to show a decision maker cannot be neutral.[65] In the City Council proceeding at issue, the Petitioners-Applicants put forward evidence of disqualifying bias which included the document containing the City Council's binding agreement with Entergy as well as the sworn testimonies of then Entergy CEO Charles Rice and City Council Advisor Joseph Vumbaco, who each admitted to the existence of this agreement. The City Council and Entergy have not refuted this evidence but only present the similar, but false assertion that "[t]here was no 'prior binding agreement'" between the City Council and Entergy for a power generating facility.[66] In their mirror arguments to the Fourth Circuit, the City Council and Entergy both entirely omit subsection 3 of their agreement that binds them to resolve all matters regarding a new power generating facility to their mutual satisfaction. The Fourth Circuit Opinion follows their argument, which is not supported by the evidence, and rejects the substantial and unrefuted proof put forward by the Petitioners-Applicants of the City Council conducting a proceeding in which it was partisan by the terms of its agreement with Entergy and also the decision maker.

In conflict with the decisions of this Court and other courts of appeal, the Fourth Circuit Opinion determined that there was no due process violation arising from the City Council's inconsistent positions. The record shows that the City Council was both a party to an agreement with Entergy bound to support a new gas plant and the decision maker in an adjudicative process to review Entergy application to build the gas plant.

3. The Fourth Circuit incorrectly applied the standard of review and affirmed a decision by the City Council that is arbitrary and capricious and contrary to the public interest.

This Court has established that a reviewing court is to consider the record evidence to determine whether a decision "was arbitrary, capricious, a clear abuse of authority, or not based on factual evidence." *Alma*, 685 So. 2d at 110.

The Fourth Circuit did not review the record evidence showing the City Council acted arbitrarily and capriciously when it approved Entergy's gas plant application without the legally required evaluation of the gas plant and three specific alternative energy options -- solar battery storage, expanded energy

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[64] *Rollins*, 481 So. 2d at 121 (examining in the record of evidence repeated statements by a governmental official avowing to shut down a facility as proof of a disqualifying bias); *Wilson*, 479 So. 2d at 901 (reviewing in the record of evidence proof of a financial interest that disqualified a company as a neutral decision maker).

[65] *Rollins*, 481 So. 2d at 121; *Wilson*, 479 So. 2d at 901–902.

[66] *See* Entergy Brief, p. 17 (falsely claiming "[t]here was no 'prior binding agreement"). *See also* City Council Brief, p. 10 (falsely asserting there was no "commitment" regarding a power generating).

efficiency program, and transmission upgrades -- as enacted into law by Resolution No. R-16-506. The Fourth Circuit erred by concluding that the "decision of the Council was reasonably based on the factual evidence presented"[67] when none of this evidence included the legally required evaluation using computer modeling. The Fourth Circuit neither considered the evidence showing that the purpose of the resolution was to determine whether the gas plant is in the public interest[68] nor reviewed the unrefuted evidence that Entergy never conducted the evaluation.[69]

Had the Fourth Circuit applied the correct standard of review it would have concluded that the City Council decision to approve Entergy's gas plant application was arbitrary and capricious and failed to meet the public interest test. The fundamental issue before the City Council was whether construction of Entergy's proposed gas plant is in the "public interest." The public interest test is meant "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." *City of Plaquemine*, 282 So. 2d at 443. The City Council expressly found that this public interest determination required evaluation using computer modeling of the proposed gas plant and three alternative energy options;[70] but then, without explanation, the City Council subsequently abandoned this requirement which was enacted into law by Resolution No. R-16-506.

This Court has established that the City Council is required to make decisions based on standards or else decisions will be made on a whim. *McCauley*, 231 La. at 49. This decision has application in the context of utility regulation. A "full and rational explanation" becomes "especially important" when, as here, a regulatory body elects to "shift [its] policy." *Great Lakes Gas Transmission Ltd. P'ship v. FERC*, 984 F.2d 426, 433 (D.C. Cir. 1993). The regulatory body must at least acknowledge its seemingly inconsistent precedents and explain its apparent rejection of their previous approach. *Tennessee Gas Pipeline Co. v. FERC*, 867 F.2d 688, 692 (D.C. Cir. 1989). The regulatory body may not "gloss[ ] over or swerve[ ] from prior precedents without discussion." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970). This Court should find that the Council's abandonment of its directive that ENO provide analysis of specific alternatives without explanation was arbitrary and capricious.

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[67] Fourth Circuit Opinion, p. 11.
[68] *Id.*
[69] *Id.* Entergy witness Seth Cureington confirmed on cross-examination that Entergy did not run the analysis as directed by the City Council. Public Transcript of the Evidentiary Hearing at 139:16–139:8; 140:13–15, Docket No. UD-16-02 (Dec. 18, 2017) (Cross-Examination of Seth Cureington). Public Transcript of the Evidentiary Hearing at 85:13–17, 182:5–9, 182:18–20, Docket No. UD-16-02 (Dec. 21, 2017) (Cross-Examination of Joseph A. Vumbaco).
[70] Resolution No. R-16-506, p. 9. The City Council stated that analyses were intended "to assist the Council in determining whether the construction of NOPS is necessary and in the public interest." Resolution No. R-18-65.

The Fourth Circuit erred in affirming the City Council decision because the decision was arbitrary and capricious and, therefore, not in the public interest. In Resolution No. R-18-65, the City Council declared the Entergy gas plant to be the best option for New Orleans in complete disregard of its previous determination in Resolution No. R-16-506 that the gas plant must be evaluated against three alternative energy options in order to determine if the construction of the gas plant is in the public interest.

Through Resolution No. R-16-506, the City Council enacted the legal standard by which it would judge whether the Entergy gas plant or one of three alternative energy options would be in the public interest. The Resolution required Entergy to use a computer modeling program known as Aurora to compare the gas plant against solar with battery storage, transmission upgrades, and an expanded energy efficiency program, which were identified in the document referenced in the resolution. The Resolution instructed Entergy to file a report on the modeling analysis by November 18, 2016.

The record shows Entergy did not comply with Resolution No. R-16-506. Testimony by an Advisor and an Entergy executive recognized that Entergy did not conduct the required evaluations.[71] The record also shows that Entergy created its own alternatives to evaluate, which all turned out to be inferior to its preferred gas plant. While the Advisors in the draft of Resolution No. R-18-65 wrote about the opinions and views of parties and witnesses, they failed to acknowledge in the decision that the legally required evaluation of the gas plant and the alternative energy options was never conducted.

The City Council simply abandoned its own standard for decision-making without explanation. Prior to the City Council 6-1 vote to approve the Entergy gas plant, then Councilmember Stacy Head expressed well-founded concern about the Council's failure to consider appropriate alternatives, leaving the Council with only "one option":

> Over the last two and a half years, there's been I don't believe any real consideration of alternative solutions to meet the reliability need of the ENO transmission system. The system agreement laid out a starting point that pushed the Council toward a local generation option as the only real solution to the reliability problem, and as I read the language, the alternatives and other potential projects feel to me and appear to me only as afterthoughts. Our real opportunity and the real opportunity of the intervenors to require ENO to consider viable alternative solutions…The Council could have required clearer and firmer commitments by ENO in the settlement agreement to present all potentially viable options to satisfy the 128 megawatt reliability need. We could have several times since ENO filed its initial CT application pushed back on ENO's filings in an aggressive and pointed way to point out the deficiencies and require in-depth analysis of all viable options.[72]

[71] Public Transcript of the Evidentiary Hearing at 85:13–17, 182:5–9, 182:18–20, Docket No. UD-16-02 (Dec. 21, 2017) (Cross-Examination of Joseph A. Vumbaco) and Public Transcript of the Evidentiary Hearing at 216:9 and 218:22–219:1 (Cross-Examination of Charles W. Long).
[72] *See* City Council, *Utility, Cable, Telecommunications and Technology Meeting*, p. 324:10–325:13 (Statement of Councilmember Head) (Feb. 21, 2018).

In two paragraphs, the Fourth Circuit erroneously determined that it could find no violation of the legal requirement in Resolution No. R-16-506 "based on [its] review of the record as a whole."[73] This conclusion runs counter to the fact that Entergy never complied with the legal requirement and the fact that the City Council arbitrarily and capriciously abandoned this legal requirement without explanation.

Although the Fourth Circuit decision quotes the legal requirement in Resolution No. R-16-506,[74] there was no review of the record in which the Fourth Circuit attempted to address the evidence demonstrating that Entergy never conducted the required evaluation. Instead, the Fourth Circuit seized on the views and opinions of the parties and witnesses as providing a reasonable basis for the City Council's decision.[75]

The Fourth Circuit erred by failing to address the issue actually raised by the Petitioners-Applicants. The issue raised was whether the City Council's action in approving the gas plant application was arbitrary and capricious, the Petitioners-Applicants did not raise the reasonableness of the evidence issue resolved by the Fourth Circuit.

First, this Court should find that the Fourth Circuit incorrectly applied the standard of review to the issue raised by Petitioners-Applicants. The Fourth Circuit did not review whether it was arbitrary and capricious for the City Council to abandon, without explanation, the requirement that Entergy perform sophisticated computer modeling, and evaluation of the gas plant as compared to three alternatives to determine whether construction of the gas plant is in the public interest. Rather than address the question raised and review the evidence presented, the Fourth Circuit erroneously applied a reasonableness of the evidence test and concluded that the opinions and debates among the parties provided the factual evidence necessary for the City Council to render a decision regarding the construction of the gas plant. This is analogous to asking a weatherman if it is going to rain tomorrow and having him respond, "it will be windy tomorrow." Whether the response is correct or not is irrelevant because it does not address the question asked. Similarly, the Fourth Circuit's conclusion with regard to the reasonableness of the evidence is irrelevant because the Court failed to answer the question presented.

Second, the Court should find that the City Council acted arbitrarily and capriciously in approving Entergy's gas plant application without the legally required evaluation of the alternatives, analysis the City Council itself declared was necessary to resolve whether the construction of the gas plant is in the public interest. The City Council took no action to rescind or otherwise amend this legal requirement in subsequent resolutions.

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[73] Fourth Circuit Opinion, p. 11.
[74] Fourth Circuit Opinion, p. 2.
[75] Fourth Circuit Opinion, p. 10–11.

The Fourth Circuit clearly misinterprets Resolution No. R-16-506. The Court did not consider or address the arbitrary and capricious issue raised by Petitioners-Applicants. Instead, the Fourth Circuit affirmed the decision by the City Council to approve the gas plant without any of the legally required evaluation of the alternatives, which is demonstrably not in the public interest. In the decision adopted by the City Council, there is no explanation, or even acknowledgement, regarding why the City Council abandoned Resolution No. R-16-506. The Council's unexplained failure to enforce the resolution is arbitrary and capricious and warrants reversal of the Fourth Circuit's decision.

This Court should review this matter as it shows that the Fourth Circuit decision will allow a utility decision to stand that was rendered in an arbitrary and capricious manner and is not in the public interest. The significance of the City Council's error and the Fourth Circuit's decision will cause material injustice and significantly affect the public interest.

CONCLUSION

The basic right of New Orleans residents to a fair proceeding before the City Council is now called into question in the Opinion rendered by the Fourth Circuit Court of Appeal. Review by this Court is warranted to resolve this question.

WHEREFORE, for the foregoing reasons, Petitioners-Applicants respectfully pray that the Louisiana Supreme Court grant a writ of certiorari or review pursuant to La. S. Ct. Rule X, § 1(a)(1) and (4).

Respectfully submitted by on this day of June 16, 2020.

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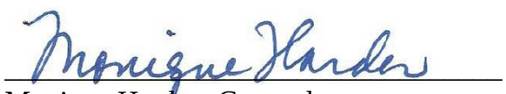
CERTIFICATE OF SERVICE

I hereby certify that I have, on this 16th day of June 2020, served a copy of the foregoing to the Louisiana Court of Appeal, Fourth Circuit via its E-Court website and to all known counsel of record in this matter via electronic mail.



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RULE XLII, § 5 Statement

I am authorized by Co-Counsel, Ms. Susan Stevens Miller, to submit this Application for Writ of Certiorari or Review as an electronically filed document to the Louisiana Supreme Court on her behalf.

/s/ Monique Harden
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Appendix to Petitioners-Applicants' Application for Writ of Certiorari or Review

Appendix A
Court of Appeal, Fourth Circuit, Opinion rendered on Case No. 2019-CA-0874 (April 15, 2020)

ALLIANCE FOR AFFORDABLE ENERGY, DEEP SOUTH CENTER FOR ENVIRONMENTAL JUSTICE, 350 NEW ORLEANS AND SIERRA CLUB	*	**NO. 2019-CA-0874**
	*	**COURT OF APPEAL**
	*	**FOURTH CIRCUIT**
VERSUS	*	**STATE OF LOUISIANA**
THE COUNCIL OF THE CITY OF NEW ORLEANS	* * * * * * *	

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2018-03471, DIVISION "I-14"
Honorable Piper D. Griffin, Judge
* * * * * *

JAMES F. MCKAY III
CHIEF JUDGE
* * * * * *

(Court composed of Chief Judge James F. McKay III, Judge Paula A. Brown, Judge Dale N. Atkins)

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AFFIRMED

APRIL 15, 2020

JFM
PAB
DNA

Alliance for Affordable Energy, Deep South Center for Environmental Justice, 350 New Orleans, and Sierra Club ("Appellants"), seek review of the district court's June 14, 2019 judgment. The judgment denied Appellants' petition for judicial review of the decision of the Council of the City of New Orleans ("Council"), adopting Resolution No. 18-65 to approve the Entergy New Orleans, LLC ("ENO") application to build the New Orleans Power Station ("NOPS"). ENO has intervened in this action, requesting affirmation of the judgment. For the reasons set forth below, we affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The following timeline of events is pertinent to this discussion:

June 20, 2016 ENO filed an application ("Original Application") with the Council, seeking approval to construct a 226 Megawatt ("MW") gas plant in New Orleans East at the site of the deactivated Michoud gas plant.

August 11, 2016 The Council issued Resolution No. 16-332, appointing Jeffrey S. Gulin ("Judge Gulin") as Hearing Officer. The resolution further provided that ENO, the Alliance for Affordable Energy, Posigen, and the Counci';'s Utility Advisors ("Advisors") were designated as parties to the proceedings.

November 3, 2016 The Council issued Resolution No. 16-506, directing ENO to:

> make a supplemental filing on or before November 18, 2016, which filing must include supporting testimony related to: (i) any and all analyses, data, sources, assumptions and results, including calculating and supporting workpapers in their native electronic format (e.g., Excel) related to the values presented therein for each of the four proposed Aurora modeling production runs requested by the Council's Advisors on September 19, 2016; (ii) groundwater withdrawal and subsidence at its Michoud site and surrounding area(s); (iii) air quality effects of the proposed NOPS; (iv) such other matters as ENO deems relevant to support its Application....

Resolution No. 16-506 further stated that "the Council intends to provide the residents of the City of New Orleans with an open and transparent process that will allow for multiple opportunities for the public to communicate its views to ENO and the Council as they relate to the construction of the proposed project...."

November 18, 2016 ENO filed supplemental testimony and analysis as requested by the Council.

January 6, 2017 Appellants intervened in the action and filed witness testimony addressing the economic, technical, environmental and social justice issues in connection with the proposed plant.

July 6, 2017 ENO filed a supplemental and amending application ("Supplemental Application"), proposing an alternative smaller 128 MW reciprocating internal combustion engine ("RICE") power station at the Michoud site.

August 10, 2017 The Council adopted Resolution No. 17-426, establishing a procedural schedule to examine ENO's supplemental application. This Resolution required ENO to conduct no less than five advertised public outreach meetings and for the Council Utilities Regulatory Office to conduct one public meeting in the Council's chambers.

October 16, 2017 Appellants filed the supplemental testimony of eight witnesses. The Council Utility Regulatory Office held a public hearing on ENO's Supplemental Application.

November 20, 2017 The Council's Advisors filed testimony of five witnesses.

November 30, 2017 ENO filed rebuttal testimony on the Council's request for additional analysis of alternatives.

December 15-21, 2017 Judge Gulin held an evidentiary hearing. All parties were represented, and witnesses were called to testify.

January 22, 2018 Judge Gulin certified the Administrative Record to the Council.

February 21, 2018 The Council's Utility, Cable, Telecommunications and Technology Committee ("UCTTC") held a public hearing on proposed Resolution No. 18-65, which was drafted by the Council's Advisors to approve the RICE power plant. The UCTTC voted 4-1 to adopt the resolution.

March 8, 2018 The full Council held a public hearing on proposed Resolution No. 18-65. The Council voted 6-1 to adopt the resolution, approving the RICE power plant.

April 9, 2018 Appellants filed a Petition for Rehearing with the Council. Appellants filed a Petition for Judicial Review in the Civil District Court, appealing the Council's adoption of Resolution No. 18-65.

April 18, 2018 Appellants filed a request for hearing on the Petition for Rehearing.

April 19, 2018 The Council summarily denied Appellants' Petition for Rehearing at their regular public meeting.

March 26, 2019 The district court heard oral argument on the matter.

June 14, 2019 Judgment was rendered, denying Appellants' Petition for Judicial Review. Appellants' timely appeal followed.

LAW AND ANALYSIS

On appeal, Appellants assert that the district court committed the following assignments of error:

1. Failed to apply the correct standard of review.

2. Failed to follow judicial precedent that prohibits dual roles in an adjudicative proceeding, and wrongly concluded that the Council proceeding was not adjudicative and that the Advisors' dual role did not violate due process.

3. Wrongly concluded that the Council's prior binding agreement with ENO to resolve all issues regarding a new gas plant to their mutual satisfaction did not prejudge the outcome of the Council proceeding because there was a public record of the agreement.

4. Failed to reverse the Council decision based on record evidence that the decision violated Resolution No. 16-506 requiring ENO to evaluate alternatives to its proposed gas plant, which ENO failed to perform.

5. Failed to reverse the Council decision based on record evidence that the decision was made in violation of a municipal ordinance that requires a certain elevated level for all new construction that was not met by ENO's proposed gas plant.

6. Failed to reverse the Council decision based on record evidence that the Council dismissed social justice issues in violation of Resolution No. 17-100, which requires the full vetting of social justice issues.

7. Failed to reverse the Council decision as arbitrary and capricious based on the Council's unexplained decision to abandon its own resolutions, Resolution Nos. 16-506 and 17-100, which were enacted by the Council to govern the ENO gas plant application proceeding.

8. Misinterpreted Council Regulation 1, which establishes the right to a hearing before the Council when requested by letter addressed to the Clerk of Council, and erroneously affirmed the Council's decision to ignore Plaintiffs' request for a hearing.

Assignment of Error No. 1. Failure to apply the correct standard of review.

In *Gordon v. Council of the City of New Orleans*, 2008-0929, p. 12 (La. 4/3/09), 9 So.3d 63, 72, the Supreme Court explained the standard of review in cases such as the one before us, as follows:

> Just as the [Louisiana Public Service Commission] has exclusive statewide regulatory and rate making powers over public utilities, the Council has exclusive regulatory and rate making authority over public utilities in New Orleans. This Court has stated that the proper standard of review over the Council's decisions in this regard is the arbitrary and capricious standard. *Alliance For Affordable Energy v. Council of City of New Orleans*, 96-0700 (La. 7/2/96), 677 So.2d 424, 434. Regarding the regulatory and rate making authority of the Council, we have held that "[r]ecognition of that authority requires that we limit our review to a determination of whether [the decision] is reasonable and refrain from merely substituting our judgment for that of the Council." *State ex rel. Guste, supra* at 294. As both the LPSC and the Council are regulators of public utilities and experts in their knowledge of that field, we apply the same standard of review to the Council as we do to the LPSC.

The Court in *Gordon* further stated:

> The LPSC is entitled to deference in its interpretation of its own rules and regulations, **though not in its interpretations of statutes and judicial decisions.** *Id.* (*citing Alma Plantation v. Louisiana*

> *Public Service Com'n*, 96-1423 (La. 1/14/97), 685 So.2d 107, 110). The LPSC's interpretation and application of its own orders deserve great weight because the LPSC is in the best position to apply them. *Id.* (*citing Dixie Elec. Membership Corp. v. Louisiana Public Service Com'n,* 441 So.2d 1208, 1211 (La. 1983)).

Id.

It is well established that "[t]he function of the reviewing court is not to reevaluate and re-weigh the evidence, or to substitute its judgment for that of the Commission." *Entergy Louisiana, LLC v. Louisiana Public Service Comm'n,* 2008-0284, p. 11 (La. 4/3/09), 990 So.2d 716, 723 (citing *Washington St. Tammany Electrical Coop., Inc. v. Louisiana Public Service Comm'n,* 1995-1932, p. 5 (La. 4/8/96), 671 So.2d 908, 912).

Here, Appellants acknowledge the arbitrary and capricious standard of review as set forth above. However, Appellants argue that the district court improperly applied that standard of review to the distinct *legal errors* (violations of constitutional due process, municipal ordinances and previous Council resolutions) alleged in their petition. In support of this position, Appellants rely on the holding in *Gordon*, that a utility regulator is not entitled to deference "in its interpretations of statutes and judicial decisions." *See Gordon*, 2008-0929, p. 12, 9 So.3d at 72.

It is clear from our review of the record that the district court applied the proper standards in reviewing the Council's decision. The judgment provides that "the action taken by the City Council in approving Resolution 18-65 did not violate due process and was not arbitrary and capricious in light of the evidence presented." Furthermore, the Reasons for Judgment demonstrate that the district court thoroughly and separately reviewed each of Appellants' allegations of legal errors and constitutional violations in finding that Appellants failed to show legal error on the part of the Council. We find no merit in this assignment of error.

Assignment of Error No. 2. Failure to find that the dual role of the Council's Advisors violated Appellants' due process rights.

Appellants assert that the Council's Advisors acted as both fact finders and advisors, which is prohibited in an adjudicative or quasi-judicial proceeding such as the present matter. The district court acknowledged that the Council's Advisors acted in a dual role. However, the court determined that the proceedings before the Council were legislative, not adjudicative; and thus, the dual role of the Advisors did not violate due process. As the court recognized, this comingling of functions does not violate due process when the regulatory agency is acting in a legislative capacity (citing *Gulf States Util. Co. v. Louisiana Pub. Serv. Comm'n*, 578 So.2d 71 (La. 1991); *Alliance for Affordable Energy, Inc. v. Council of City of New Orleans*, 578 So.2d 949 (La. App. 4 Cir. 1991), *vacated as moot on other grounds*, 588 So.2d 89 (La. 1991)).

Our jurisprudence has established that public utility ratemaking cases are essentially a legislative function. In *Gulf States*, 578 So.2d at 79, the Supreme Court explained that:

> [R]atemaking is often particular in its application, in that the regulatory authority must determine what rates a specific utility may charge, based on factors which are unique to that utility. However, the predominant weight of opinion views the ratemaking process as legislative, because it looks to the future and changes existing conditions by making a new rule that prescribes future patterns of conduct.

In *Lowenburg v. Council of the City of New Orleans*, 2003-0809, p. 11 (La. App. 4 Cir. 10/8/03), 859 So.2d 804, 810, this Court stated that "[w]hile the proceedings through which the Council establishes utility rates have similarities to judicial proceedings, and are referred to informally as 'rate cases,' they remain essentially legislative."

While the case before us is not a conventional ratemaking case, the district court found that ENO's application to construct the power plant is "akin" to ratemaking, "especially considering the fact that a major part of the application deals with a rate increase." We find no error in this determination. The Council proceedings clearly involved aspects of public utility ratemaking. It is undisputed that the construction costs for NOPS were to be recovered from ENO customers in future rate adjustments. Page 188 of Resolution No. 18-65 specifically provides that the cost recovery:

> shall be evaluated during the Council's consideration of the Combined Rate Case to be filed in 2018, and cost recovery shall be accommodated through a two-step rate adjustment as recommended by the Advisors. After the Council's complete vetting of the revenue requirement impacts of the NOPS project relative to total ENO operations in the Combined Rate Case, the Council will decide the timing of any step rate adjustments to reflect NOPS cost recovery that may be appropriate to correlate with NOPS date of commercial operation.

In *Gulf States*, a ratemaking case before the LPSC, the Supreme Court found no violation of due process where the Commission's staff members took an adversarial stance in the hearings and then advised the Commission regarding its decision. As the Court explained, "[t]he Commission is statutorily permitted to retain special counsel, engineers, consultants, etc. to assist its economics and rate analysis division in 'evaluating, reviewing, and representing the commission in matters affecting services and rates charged by public utilities to Louisiana consumers or the judicial review thereof.' LSA–R.S. 45:1163.3." *Gulf States*, 578 So.2d at 82.

Similarly, in *Alliance*, a utility rate proceeding before the Council, the utility company argued that it was denied due process because the Council used its legal and technical staff during both the evidentiary and the decisional phases of the

hearing process. The Court rejected the argument, reiterating that "state and federal law do not require a separation of functions in legislative or rulemaking proceedings." *Alliance,* 578 So.2d at 969.

Considering the record, and the above cited jurisprudence, we find, as did the district court, that the Council proceedings were legislative in nature and that the dual role of the Advisors did not violate Appellants' due process rights. This assignment of error is without merit.

Assignment of Error No. 3: Failure to find that the Council's prior binding agreement with ENO did not prejudge the outcome of the Council proceeding.

Appellants' petition alleges that "[t]he Advisors' pre-determined position was the continuation of a prior agreement that they negotiated with Entergy outside of the Council's adjudication proceeding on the Entergy gas plant application." Regarding that prior agreement, the record reflects that, in August 2015, following negotiations before the Federal Entergy Regulatory Commission ("FERC"), ENO entered into a settlement agreement ("Settlement Agreement") with the Council to pursue the construction of a power plant. The Settlement Agreement provided, in pertinent part:

> ENO will use reasonable diligent efforts to pursue the development of at least 120 MW of new-build peaking generation capacity within the City of New Orleans. As part of this commitment, ENO will fully evaluate Michoud or Paterson, along with any other appropriate sites in the City of New Orleans, as the potential site for a combustion turbine ("CT") or other peaking unit to be owned by ENO, or of a third party with an agreed-to PPO to ENO. . . .
>
> ENO commits to use diligent efforts to have at least one future generation facility located in the City of New Orleans. . . .

Appellants argued before the district court that the Council violated their due process rights by failing to disclose the prior agreement during the course of the NOPS proceedings. The district court rejected that argument, finding that "it is

disingenuous to suggest that the Council withheld evidence of a settlement approval that was the subject of multiple public hearings." The court further noted that Appellants did not cite any legal authority to support the contention that the Council had a duty to disclose prior public documents that may be relevant to a subsequent proceeding.

Resolution No. 18-65 indicates that "public meetings were held by the … UCTTC and the full Council on September 30 and November 5, 2015, respectively, where the Settlement Agreement was considered. No party or member of the public opposed the Settlement Agreement." Clearly, the Settlement Agreement was made public.

In this assignment of error, Appellants appear to have abandoned their "duty to disclose" argument that they urged in the district court. They now argue that the district court neglected to review whether the Council was a neutral decision-maker. This argument is meritless.

In *Lowenburg*, the plaintiffs raised a similar argument, asserting that the Council and its Advisors could not be fair and impartial because they were bound by the provisions of a previous settlement. Rejecting that argument, this Court held:

> For this Court to determine that another branch of government has pre-determined a legislative matter and is not in a position to consider fairly the issues presented to it by plaintiffs requires credible evidence. Plaintiffs have not supplied such evidence. To the contrary, the record shows that the Council has conducted and will continue to conduct hearings on the issues plaintiffs raised. The Council has not indicated in any way that it will not consider plaintiffs' arguments concerning the effect, *vel non*, of the 1922 resolution on the 1991 settlement agreement. Nor is there any evidence that the Council has interpreted the 1991 agreement as prohibiting it from consideration of the issues raised by plaintiffs and seeking the Council's legislative action to rescind the 1991 agreement. Furthermore, the Council has set a discovery schedule and evidentiary

> hearing in order that all the facts relevant to its ultimate legislative determination will be brought forth. These are not the actions of a body that has pre-determined the outcome of its procedure. On the facts of record we cannot find any evidence prejudice against plaintiffs on the part of the Council.

Lowenburg, 2003-0809, pp. 15-16, 859 So.2d at 813.

In the present case, the district court expressly determined that the Settlement Agreement "did not pre-approve Entergy's application for a power plant; it merely directed Entergy to explore the feasibility of a new power plant and to prepare a proposal for review by the Council." Moreover, the record reflects that, after the Settlement Agreement, ENO filed a new application on June 20, 2016. On November 3, 2016, the Council issued Resolution No. 16-506, directing ENO to supplement the record with supporting testimony on the project. ENO complied. On July 6, 2017, ENO filed its Supplemental Application, proposing a smaller power station, *i.e.*, the RICE alternative. The Council held public hearings, considered witness testimony presented by Appellants and the Advisors, and ultimately approved ENO's alternative proposal.

Appellants have failed to present any credible evidence to show that the Council's decision was pre-determined. Accordingly, we find that the district court properly rejected Appellants' due process claim.

Assignment of Error No. 4: Failure to reverse the Council decision based on record evidence that the decision violated Resolution No. R-16-506 requiring ENO to evaluate alternatives to its proposed gas plant, which ENO failed to perform.

Appellants argue that the Council failed to study and analyze alternative energy options. Specifically, they assert that the Council failed to consider the feasibility of upgrades to ENO's transmission lines, which Appellants contend was a lower-cost alternative. The record does not support this assertion. Rather, as comprehensively documented in Resolution No. 16-506, it is evident that the

Council considered a substantial amount of evidence on the pros and cons of transmission upgrades as well as other alternatives proposed by Appellants. After considering the evidence and testimony presented by all the parties, the Council approved the RICE alternative.

In its review of the record, the district court determined that, on the evidence presented, "the Council did not act arbitrarily and capriciously in regards to the consideration of reasonable alternatives." We agree. Based on our review of the record as a whole, we find that the decision of the Council was reasonably based on the factual evidence presented. This assignment of error is without merit.

Assignment of Error No. 5: Failure to find that the Council decision violated a municipal ordinance that requires a certain elevated level for all new construction that was not met by ENO's proposed gas plant.

Appellants assert that the Council's decision failed to comply with the Flood Damage Prevention Ordinance enacted in November 2017. New Orleans City Code § 78-81(a) establishes the legal requirement that all new construction "must, at a minimum, be elevated to one foot above the BFE [base flood elevation] . . ., or three feet above the highest adjacent curb (in the absence of curbing, three feet above the crown of the adjacent roadway), which is higher." Appellants maintain that the Advisors did not consider this ordinance in their recommendation to the Council.

First, there is no evidence in the record that the Advisors failed to consider New Orleans City Code § 78-81. Second, the record does not demonstrate that the ordinance has been violated.

As stated in Resolution No. 18-65,

> [T]he Council finds that that the evidence indicates that significant mitigation of the potential for flooding at the Michoud site has occurred, in particular the HSDRRS [Hurricane and Storm

> Damage Risk Reduction System] and the raising of the Top of Concrete level above both the FEMA guidance and level of flooding seen during Katrina, and the Council finds the CPRA 2017 Master Plan prediction of no flooding at the site under the worst-case scenario to be persuasive.

In rendering its opinion regarding flood elevations, the Council relied on ENO's calculations that the Top of the Concrete elevation in its design plan exceeds FEMA guidelines for the Michoud site in that it is 2.5 feet higher than the FEMA advisors' recommendations. In addition, the Advisors determined "the appropriate Top of the Concrete level to be 3.5 feet above sea level, which is 2.5 feet higher than the FEMA Advisory recommendation and one foot higher than the observed Hurricane Katrina flooding."

The district court concluded that "the evidence presented confirms that the Council seriously considered all important issues related to the construction of the proposed plant." The court further noted that:

> [T]he construction of the plant, though approved in part by Resolution 18-65, is still conditioned on ENO's compliance with all applicable laws and regulations. It was reasonable for the Council to conclude that flood risks will be mitigated, and therefore the Court finds that he Council did not act arbitrarily and capriciously in regards to ensuring safe and reliable service pursuant to the aforementioned City Code Sections.

Upon review of the record, we do not find that the Council's decision to adopt Resolution No. 18-65 was in violation of the Flood Damage Prevention Ordinance.

Assignment of Error No. 6: Failure to find that the Council dismissed social justice issues in violation of Resolution No. 17- 100, which requires the full vetting of social justice issues.

In this assignment of error, Appellants argue that the Council dismissed the social justice issue that it previously ordered to be fully vetted in Resolution No. 17-100. Appellants suggest that the Council "turned away" from evaluating the

social justice issue of racially[1] disproportionate pollution burden and risk impacts of the gas plant.

The district court rejected Appellants' argument, finding that Resolution No. 18-65 "is replete with the Council's consideration of the social justice impacts of the proposed power plant." The court further noted that the resolution "contains at least 13 full pages of what the Council considered from both Petitioners, ENO, and the Council's Advisors regarding air emissions and social justice."

We agree with this finding. Based on our review of the record, we reject Appellants' conclusory argument that the Council failed to consider the social justice issues.

Resolution No. 18-65 demonstrates that the Council heard expert testimony on both sides of this issue and considered the expertise of the U.S. Environmental Protection Agency ("EPA") and the Louisiana Department of Environmental Quality ("LDEQ"), before finding that the environmental impact on the area would be significantly reduced compared to the previous Michoud plant. The Council further concluded, based on the evidence presented, that "there is no perpetuation of racial injustice where a new plant is sited on the location of a prior plant that had higher emissions than the new plant."[2] Finally, the record reflects that the Council considered the fact that there is, at a minimum, .75 miles between the plant and the closest residential neighborhood (ENO's expert found the distance to be one mile).

The Council conditioned the approval of the plant "upon ENO demonstrating compliance with all EPA and LDEQ regulations and requirements."

---

[1] Appellants argued that the location of the plant disproportionately affects the predominately poor and/or African-American and Vietnamese population in the area.

[2] Here, the Council relied on *North Baton Rouge Environmental Association v. Louisiana Department of Environmental Quality*, 2000-1878 (La. App. 1 Cir. 11/14/01), 805 So. 2d 255.

In light of that constraint, the Council determined that "there is no potential for a disproportionate adverse impact on minority neighborhoods in New Orleans East." The Council also makes note of the "substantial economic benefits that the project will bring to New Orleans, from which the New Orleans East residents will benefit."

It is readily apparent from the record that the Council thoroughly considered all evidence presented on the social justice issue raised by the Appellants. This assignment of error is wholly without merit.

Assignment of Error No. 7: Failure to find that the Council decision was arbitrary and capricious based on the Council's unexplained decision to abandon its own resolutions, Resolution Nos. R-16-506 and R-17-100, which were enacted by the Council to govern the ENO gas plant application proceeding.

This assignment of error is repetitive. As stated above, the record does not support Appellants' argument that the Council abandoned its own resolutions. Consequently, we pretermit any further discussion on this issue.

Assignment of Error No. 8: Erroneously affirmed the Council's decision to ignore Appellants' request for a hearing.

After the Council adopted Resolution No. 18-65 on March 8, 2018, Appellants filed a petition for rehearing on April 9, 2018. The petition did not include a request for a hearing. The Council's agenda, published on April 18, 2018, for the Council's regular meeting on April 19, 2018, included Appellants' petition for a rehearing. Notice of the agenda was posted on the Council's website. On the afternoon of April 18, 2018, Appellants filed a written request for a hearing. The Council summarily denied the petition for a rehearing at the April 19, 2018 meeting.

Appellants argued before the district court that the Council's actions violated Regulations 1 and 2 of the Rules and Regulations of the Council. Regulation 1

provides that any person is entitled to a reasonable hearing on any motion. It further provides that "[p]ersons desiring such a hearing must request same in writing from the Clerk of the Council in sufficient time to permit the notice required by Regulation Number 2." Regulation 2 states that "[b]efore a hearing is held, all interested parties, including proponents, opponents, the Mayor or the Chief Administrative Officer, and members of the Council shall be notified by the Clerk of Council at least twenty-four (24) hours prior to the hearing."

The Council argued at trial that Appellants did not timely submit their request for hearing twenty-four hours prior to the Council's publication of its meeting agenda. The district court agreed, finding that Appellants' request for a hearing was untimely. Specifically, the court found that Appellants "did not request a hearing on their motion with sufficient time for the Clerk of Council to provide notice to all interested parties. The request for hearing was not filed until 10 days after the motion for rehearing, and less than twenty-four hours before the Council's meeting on April 19, 2018." The Council also relied on New Orleans City Code, Section 158-485, which provides that the issue whether the Council grants a rehearing on utility regulatory matters is within the Council's discretion.

The record demonstrates that Appellants' request for a hearing was untimely. Clearly, the request made on the afternoon before the Council meeting did not comply with Regulations 1 and 2. Moreover, Appellants had notice (and an opportunity to be heard) that their petition for rehearing was on the Council's agenda for April 19, 2018. The district court correctly determined that Appellants' request was untimely. This assignment of error is without merit.

CONCLUSION

On the evidence presented, we find that Appellants failed to carry their burden of showing that the Council's decision to adopt Resolution No. 18-65 was arbitrary and capricious. In addition, for the reasons expressed above, we find that the district court applied the correct standard in reviewing the legal errors raised by Appellants to conclude that the Council did not violate Appellants' due process rights. Accordingly, we affirm the June 14, 2019 judgment.

AFFIRMED

Appendix B
Orleans Parish Civil District Court, Judgment in Case No. 18-3471 (June 14, 2019)

Civil District Court for the Parish of Orleans
STATE OF LOUISIANA

No: 2018 - 03471

Division/Section: I-14

ALLIANCE FOR AFFORDABLE ENERGY ET AL

versus

THE COUNCIL OF THE CITY OF NEW ORLEANS ET AL

Date Case Filed: 4/9/2018

NOTICE OF SIGNING OF JUDGMENT

TO:

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New Orleans, LA 70118-1015

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In accordance with Article 1913 C.C.P., you are hereby notified that Judgment in the above entitled and numbered cause was signed on June 14, 2019

New Orleans, Louisiana
June 14, 2019

MINUTE CLERK

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

CASE NO.: 2018-3471 **DIVISION: "I-14"**

ALLIANCE FOR AFFORDABLE ENERGY, ET AL

V.

THE COUNCIL OF THE CITY OF NEW ORLEANS

_____ _____

DATE FILED **DEPUTY CLERK**

JUDGMENT

This matter came before the Court on March 26, 2019 on a *Petition for Judicial Review* as well as a *Motion to Correct the Record* filed by Petitioners, Alliance for Affordable Energy, Deep South Center for Environmental Justice, 350-New Orleans, and Sierra Club.

Present at the hearing on March 26, 2019:

- Monique Harden and Susan Stevens Miller on behalf of Petitioners, Alliance for Affordable Energy, Deep South Center for Environmental Justice, 350-New Orleans, and Sierra Club;
- Basile Uddo and Pressley Reed, Jr. on behalf of Defendant, Council of the City of New Orleans;
- W. Raley Alford on behalf of Intervenor, Entergy New Orleans, LLC.

The Court thereafter took both matters under advisement. After considering the briefs, arguments of counsel, and evidence presented, the Court finds that the record was complete. Furthermore, the Court finds that the action taken by the City Council in approving Resolution 18-65 did not violate due process and was not arbitrary and capricious in light of the evidence presented.

Therefore, **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the *Motion to Correct the Record,* filed by Petitioners, Alliance for Affordable Energy, Deep South Center for Environmental Justice, 350-New Orleans, and Sierra Club, be and is hereby **DENIED.**

IT IS FURTHER ORDERED that the *Petition for Judicial Review,* filed by Petitioners, Alliance for Affordable Energy, Deep South Center for Environmental Justice, 350-New Orleans, and Sierra Club, be and is hereby **DENIED**.

SIGNED this 14th day of June, 2019, in New Orleans, Louisiana.

JUDGE PIPER D. GRIFFIN
DIVISION "I"

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

CASE NO.: 2018-3471 **DIVISION: "I-14"**

ALLIANCE FOR AFFORDABLE ENERGY, ET AL

V.

THE COUNCIL OF THE CITY OF NEW ORLEANS

_____ _____

DATE FILED **DEPUTY CLERK**

REASONS FOR JUDGMENT

This matter came before the Court on March 26, 2019 on a Petition for Judicial Review filed by The Alliance for Affordable Energy, Deep South Center for Environmental Justice, 350-New Orleans, and Sierra Club (collectively referred to as "Petitioners"). Petitioners sought to overturn the City Council's Resolution 18-65 dated March 8, 2018, which approved Entergy New Orleans' application to construct a new power plant in New Orleans East. Following receipt of briefs and arguments of counsel, this Court took the matter under advisement.

I. Facts and Procedural History

A. Background

The facts of this case have their genesis almost 20 years before the present date. At the core of those facts is the operational structure of Entergy, Inc. and how the changing of that structure led to consequences that are still not fully resolved. Entergy's structure will be explored in more detail below, but it is clear from the established facts that the decisions of Entergy New Orleans and the City Council were precipitated by many years of planning, negotiation, trial and error, and compromise.

Much of the early history of this case can be found in the Council's resolution dated November 5, 2015. (Res. No. R-15-524). That Resolution establishes that, since 1951, Entergy's six wholly-owned subsidiaries operated more or less as a single, integrated unit, sharing costs, resources, and profits. However, as early as 2000, multiple entities noticed that the sharing was not equal. Entergy New Orleans (hereinafter "ENO") and Entergy Louisiana (hereinafter "ELA")

produced energy from natural gas, which had a higher production cost than energy from coal (as utilized by Entergy Arkansas). The result was that Entergy Arkansas (and to a lesser extent, Entergy Texas) had a higher financial burden than the other subsidiaries.

In 2001, the City Council and the Louisiana Public Service Commission (on behalf of ENO and ELA) filed a petition with the Federal Energy Regulatory Commission, seeking a modification of the system agreement to more evenly allocate resources. The petition resulted in an agreement whereby each company's production costs were required to be within 11 percent of the system average. In other words, companies with lower operating costs (Entergy Arkansas and Entergy Texas) were required to make payments to companies with higher operating costs. Arkansas utility regulators, along with Entergy Arkansas, felt that sharing a disproportionate financial burden was unfair and unduly burdensome on Arkansas ratepayers. Arkansas claimed that it was paying over $200 Million per year to the Louisiana companies.

Thus, on December 19, 2005, Entergy Arkansas sent a notice of its intent to withdraw from the system agreement and, in effect, operate independently. The withdrawal would take effect on December 18, 2013 (under the system agreement, companies were required to give 8 years notice to the other companies before withdrawing). The other companies followed soon after. The City Council recognized that Entergy New Orleans would be most affected by the termination of the system agreement.

In 2013, the parent company filed a notice with FERC for the purpose of amending the system agreement. Several utility regulators intervened in the proceeding in order to represent each jurisdiction's interests in the future of Entergy. The City Council of New Orleans was among these intervenors. After two years of discussions, the companies and regulators entered into a settlement which essentially dissolved the system agreement. The settlement was filed by the parent company on August 14, 2015 and approved by the City Council on November 5, 2015. As far as New Orleans was concerned, the settlement mandated that ENO would (1) have the option to buy power from plants built or acquired by ELA in the future, and (2) evaluate and consider building a power plant in the city of New Orleans. It is this second directive that concerns us in the instant case.

B. Procedural History

On June 20, 2016, Entergy New Orleans filed an Application for Approval to Construct New Orleans Power Station and Request for Cost Recovery and Timely Relief (hereinafter referred to as the "Initial Application" or simply "the Application"), seeking approval to build a 226 Megawatt (MW) combustion turbine (CT) in New Orleans East. ENO also sought permission to recover the cost of the power station, projected to be over $200 Million, from the ratepayers through an increase in utility bills. At the time, ENO's main justification for building the plant was to support a forecasted increase in energy demand over the next 20 years; however, Petitioners assert that ENO did not add system reliability as a concern until later. ENO also modified its request in two ways: (1) the company would seek to build a 128 MW station because of new forecasts that showed a less drastic increase in demand, and (2) the plant would feature "reciprocating internal combustion engines" (RICE units) that were smaller and more efficient than CT units.

On November 3, 2016, the Council directed ENO to file supplemental testimony to address several issues raised by the construction of the new plant, including air quality, subsidence, and modeling. Entergy provided the testimony of two witnesses on November 18, 2016. On January 6, 2017, Petitioners presented the testimony of four witnesses who addressed, economic, technical, environmental, and social justice issues related to the construction of the plant.

Over the months and years that followed, the Council held approximately 21 public meetings related to ENO's Application. The following list includes events relevant to this Court's review of the underlying proceedings:

1. December 12, 2016, meeting of the Council Utility Regulatory Office on ENO's Initial Application;
2. February 14, 2017, ENO's filing of a motion to suspend the procedural schedule to reevaluate its Application in light of new forecasts of energy demand;
3. July 6, 2017, ENO's filing of a Supplemental and Amending Application (the "Amended Application") proposing a 128 MW station as opposed to a 226 MW station;

4. October 16, 2017, Petitioner's filing of supplemental testimony of 8 witnesses, as well as the Council Utility Regulatory Office's public hearing on ENO's Amended Application;
5. November 16, 2017, Advisors' filing of a motion to strike portions of testimony filed by Dr. Beverly Wright, expert witness for Petitioners;
6. November 20, 2017, Advisors' filing of testimony of five witnesses;
7. November 24, 2017, Administrative Law Judge Gulin's granting of Advisors' motion to strike;
8. November 30, 2017, ENO's filing rebuttal testimony regarding Council's request for additional analysis of alternatives;
9. December 15-21, 2017, a five-day evidentiary hearing before Administrative Law Judge Gulin, where all parties cross-examined the other parties' witnesses;
10. January 22, 2018, Judge Gulin's filing of a Memorandum for the Record, closing the record and sending it to the Council;
11. February 21, 2018, the Council's Utility, Cable, Telecommunications and Technology ("UCTT") Committee's public hearing on a resolution drafted by the Council's advisors to approve the power plant, where the UCTT committee voted 4-1 in favor of the resolution;
12. March 8, 2018, public hearing by the full City Council in consideration of the resolution, where the Council voted 6-1 in favor of adopting Resolution 18-65, approving the 128-MW RICE unit plant;
13. April 9, 2018, Petitioners' filing of a Petition for Rehearing;
14. April 18, 2019, Petitioners' filing of a request for hearing on the Petition for Rehearing;
15. April 19, 2018, City Council public meeting, summarily denying Petitioners' Petition for Rehearing.

The result of the March 8 hearing was a 188-page resolution, in which the Council explained their rationale for approving the power station. In addition to the actions taken above, the Council claims to have reviewed over 3,000 pages of testimony, documentary evidence, and post-hearing briefs.

On April 9, 2018, Petitioners timely filed a Petition for Judicial Review in this Court pursuant to Section 3-130(7) of the Home Rule Charter of the City of New Orleans. It is that request for review which is currently before the Court.

II. Motion to Correct the Record

Petitioners filed a Motion to Correct the Record on March 6, 2019. The Court heard argument on that motion on March 26, 2019 (the same day as oral argument on the Petition for Judicial Review) and thereafter took both matters under advisement.

As a preliminary matter, the Court must consider the Motion to Correct the Record. In that regard, petitioners seek to have certain documents included in the record on appeal that were not initially included when the record was certified by Administrative Law Judge Gulin. Petitioners argued that it was necessary to include these documents in the record on appeal in order to have a "complete record" as required by *Lowenburg v. City of New Orleans*, 859 So.2d 904, 810 (La. App. 4 Cir. 2003). These documents include:

1. A transcript of the UCTT Committee hearing on February 21, 2018;
2. A transcript of the full City Council hearing on March 8, 2018;
3. A letter from Charles Rice, then-CEO of Entergy New Orleans, to City Council President Jason Williams (and served on all parties) dated March 5, 2018;
4. A letter from Petitioners in response to Mr. Rice's letter (served on all parties) dated March 7, 2018;
5. A letter from Petitioners to the Clerk of Council requesting a hearing on their Motion for Rehearing); and
6. A motion by the City Council on April 19, 2018 (M-18-137) denying the request for hearing.

The Council did not object to the assertion that Council Motion M-18-137 is part of the record; as an order of the Council, it is automatically part of the record on appeal. However, the Council opposed the introduction of the other documents based on both Petitioners' untimeliness in filing the motion and the City Code.

This Court finds that the documents were properly excluded from the record. First, the transcripts from February 21, 2018 and March 8, 2018 were excluded on the basis of City Code regulations that expressly deal with this issue. City Code Section 158-431(b) states that no statements made by "members of the public at large who are not parties of record . . . shall, in legal

terms, form (and such matter shall not form) the basis of any council decision in a contested proceeding." New Orleans City Code, Chap. 158, Art. III, Div. 6, § 158-431(b). Petitioners' motion explicitly states that Petitioners seek to introduce statements made by Councilmembers expressing concerns about the power plant. However, those Councilmembers were not parties to the underlying proceedings (even though the Council is a party to the instant appeal). Second, the letters sent by the CEO of Entergy New Orleans and subsequently by Petitioners constitute hearsay. The letters do not include sworn testimony and no party had the chance to cross-examine the authors of the letters. Although the purpose of the letters was indeed discussed during the hearing[1], the letters themselves were properly excluded from the record on appeal. Finally, the Council's decision to deny Petitioners a rehearing has no bearing on this Court's review of Resolution R-18-65.

[1] The letters to the Council concerned the possibility and feasibility of the imposition of a cost cap on the power plant in order to protect ratepayers from an increasingly expensive project.

III. Assignments of Error in Petition for Judicial Review

Petitioners list nine assignments of error in three broad categories: (1) the Council violated due process, (2) the Council violated the City Code and the Council's own regulations, and (3) the Council's decision to approve ENO's Application was arbitrary and capricious.

Specifically, Petitioners assert that the Council erred by taking the following actions:

1. The Council deprived Petitioners of their constitutional rights to due process when the Council allowed its Advisors to act in a dual capacity as advocates for ENO;
2. The Council also deprived Petitioners their due process rights when the Council failed to disclose details of a prior agreement with ENO, namely the 2015 settlement agreement;
3. The Council violated the City Code by failing to secure the participation of the City's Department of Finance;
4. The Council violated its own regulations when it denied Petitioners' request for a hearing on the Petition for Rehearing; and
5. The Council acted arbitrarily and capriciously by:
    a. Approving the application without meaningfully evaluating reasonable alternatives;
    b. Concluding that ENO established a need for the plant based on either reliability or capacity;
    c. Refusing to establish a maximum cost for the project to protect ratepayers;
    d. Denying ratepayers safe and reliable service as required by the City Code; and
    e. Failing to fully examine the social justice issues related to the plant's effect upon citizens living near the plant.

IV. Standard of Review

"As authorized by the Louisiana Constitution and pursuant to the Home Rule Charter of the City of New Orleans, all legislative powers of the City are vested in the Council. La. Const. Art. 6, §§ 4–6 (1974), Home Rule Charter 3–101(1). Among the legislative powers exclusively granted to the Council are the powers of "supervision, regulation, and control" over those utility companies that furnish services within the City of New Orleans. Home Rule Charter 3–130(1); *see*

also State ex rel. Guste v. Council of City of New Orleans, 309 So.2d 290, 293 (La. 1975)." *Gordon v. Council of City of New Orleans*, 9 So.3d 63, 71 (La. 2009).

City Council decisions regarding public utilities should not be overturned unless one of three things is found: (1) the decision was arbitrary and capricious; (2) the decision represented a clear abuse of authority; or (3) the decision was not reasonably based upon the factual evidence presented. *Gordon*, 9 So.3d at 72. Reviewing courts must limit their review "to a determination of whether the decision is reasonable and refrain from merely substituting our judgment for that of the Council." *Gordon*, 9 So.3d at 72 (quoting *State ex rel. Guste*, 309 So.2d at 294).

This Court will not decide whether the Council's decision was right or wrong; or whether they were correct in weighing certain pieces of evidence more heavily than others; or whether the Council's decision was the best decision available. This Court will only decide if the Council had sufficient evidence to come to a decision and whether that decision was actually reasonable based on the evidence presented.

In taking this into consideration, the Court will now examine the individual assignments of error raised by Petitioners.

V. Procedural Issues

A. Advisors' dual role as advocate for Entergy New Orleans and advisor to the Council

Both the United States Constitution and the Louisiana Constitution guarantee the fundamental right to due process, which includes the right to a fair and impartial trial. U.S. Const. amend. XIV, § 1; La. Const. art. I, § 2. The right to a fair trial is violated when there is a high probability of bias on the part of the decision maker. *See Withrow v. Larkin*, 421 U.S. 45, 47 (1975).

Administrative agencies such as the City Council can act in both legislative and quasi-judicial capacities. The distinction is subtle but important. This case involves "advisors" who have both advocated on behalf of Entergy New Orleans and advised the City Council in reaching a decision. In this sense, they have acted in a dual role as advocate and *de facto* fact-finder. Louisiana Courts have held that, when the agency is acting in a quasi-judicial capacity, this dual role violates a party's right to a fair and impartial trial. *See Allen v. Louisiana State Board of Dentistry*, 543 So.2d 908 (La. 1989); *Georgia Gulf Corp. v. Board of Ethics for Public Employees*, 694 So.2d 173 (La. 1997). However, Louisiana courts have also held that this commingling of functions is permissible and does not violate due process when the regulatory agency is acting in a legislative capacity. *See Gulf States Utils. Co. v. Louisiana Pub. Serv. Comm'n*, 578 So.2d 71 (La. 1991); *Alliance for Affordable Energy, Inc. v. Council of City of New Orleans*, 578 So.2d 949 (La. App. 4 Cir. 1991), *vacated as moot on other grounds*, 588 So.2d 89 (La. 1991).

At the heart of this particular issue is whether the City Council was acting in a legislative or quasi-judicial/adjudicatory capacity. Both parties have cited cases to support their contentions, but a review of the jurisprudence shows that no Louisiana courts have definitively ruled on this issue (when a regulatory body rules on an application by a public utility to build new facilities).

The cases cited by Petitioners deal with an agency's role as adjudicator. In *Allen*, the Louisiana Supreme Court reviewed the Dentistry Board's decision to suspend a dentist's license to practice for ten years. The Board hired an attorney to investigate and prosecute the charges against the dentist, and later asked the same individual to prepare findings of fact and conclusions for the committee. *Allen*, 543 So.2d at 913. The Court reversed the Board's decision, holding that

the dentist's right to a fair and impartial trial was violated when the Board's advisor "put himself in the position of adjudicator" by drafting the committee's findings. *Id.* At 914.

In *Georgia Gulf Corp.*, the state's Ethics Commission filed charges against a former employee of the Department of Revenue who later contracted with a company the Department was auditing. 694 So.2d at 174. The Commission appointed the executive secretary to investigate and prosecute the ethical violation, and later instructed the prosecutor and his staff to prepare an opinion on the matter. *Id.* at 174-75. The Court held that, as in *Allen*, the administrative agency was prohibited from using a third party as both prosecutor and fact finder, even when the board gave the accused an opportunity to oppose the opinion in a noticed hearing (in contrast to *Allen* where the opinion was drafted and issued *ex parte*). *Id.* at 180.

The Petitioners also cite cases which suggest that the Council's decisions on applications for construction projects are quasi-judicial. *See Williamson v. Williams*, 543 So.2d 1339, 1334 (La. App. 4 Cir. 1988) (stating that "the City Council, when considering the appeal of an individual property owner for a waiver of the restrictions of a temporary moratorium, is not acting in a legislative capacity but is acting in a quasi-judicial or administrative capacity. Because such action is not broad or general in scope and because the opportunity for favoritism or discriminatory treatment is easily directed towards an individual supplicant, the standard of review in such matters differs from that which is usually accorded to legislative decisions."). *See also State, Dept. of Social Servs. v. City of New Orleans*, 676 So.2d 149 (La. App. 4 Cir. 1996) (holding that a review of an application for a construction permit is adjudicatory and not legislative).

All of these cases involve specific determinations of an individual's rights pursuant to existing law in a trial-like setting. *Allen* and *Georgia Gulf Corp.* involved quasi-criminal proceedings, and *Williamson* and *Department of Social Services* involved permit applications for private exemptions from zoning ordinances. These cases do not exactly line up with the instant proceeding. The Council's decisions as a regulator of zoning law are not the same as its decisions as a regulator of public utilities. Both the Council and Entergy New Orleans cite cases to support their contention that the instant proceeding was legislative in nature, in which case the use of advisors in a dual capacity is expressly allowed by law.

In *Gulf States*, the Supreme Court explicitly recognized that the Council's decisions regarding public utilities enjoys a different standard of review regarding the dual roles of advisors and consultants. In that case, the Louisiana Public Service Commission (LPSC) partially denied Gulf States' application to increase rates relative to a large investment in a nuclear plant. The Commission allowed Gulf States to recover $1.6 Billion as opposed to the $3 Billion requested. Furthermore, the Commission limited the first-year recovery to $63 Million. Gulf States appealed, alleging inter alia that the Commission violated the appellant's due process rights by issuing an opinion authored by the Commission counsel and consultants who had acted as Gulf States' adversaries during the hearings. The Court held that ratemaking for public utilities, while particular in its application involving many trial-like aspects, is a legislative function. The key distinction is that adjudications are primarily based on the law applicable to actions already made, whereas legislative decisions look to the future.

The Court noted several federal cases where courts have found that due process is not violated when dual roles are utilized in public utility cases. *See Wilson & Co. v. United States*, 335 F.2d 788, 796 (7th Cir. 1964) (holding that "it was proper for members of the Commission's Common Carrier Bureau who were counsel of record in the hearing before the Commission to participate in the decisional process that led to the orders under review; and that this conduct did not violate section 3(a) of the Administrative Procedure Act, . . . the Commission's own rules, as well as constitutional due process."); *American Telephone & Telegraph Co. v. F.C.C.*, 449 F.2d 439 (D.C. Cir. 1979). Finally, the Court notes that the Administrative Procedures Act explicitly addresses the dual-role issue: "An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. *This subsection does not apply . . . to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers.*" 5 U.S.C. § 544(d). The Court ultimately held that the use of advisors or consultants as both advocate and advisor did not violate due process in ratemaking case. *See also Alliance for Affordable Energy, Inc.*, 578 So.2d at 968 (holding that ratemaking is a legislative proceeding where due process is not violated by advisors acting in a dual capacity).

Petitioners have asserted that *Gulf States* and its progeny only apply to rate-making, and is inapplicable to the instant proceeding (an application for a public utility to construct a new power plant). Any statement in those cases purporting to apply the rule in *Gulf States* to such an application, according to Petitioners, is dicta. On the other hand, Respondents argue that Williamson is inapplicable because a private construction permit is fundamentally different from a public utility construction permit. Accepting Petitioners' argument as true, the Court notes that this issue is a case of first impression.

The Court, having reviewed the applicable law, finds that *Gulf States* is still persuasive authority and that its holding applies to the instant case. Entergy's application to construct a power plant is much more akin to ratemaking than private construction (especially considering the fact that a major part of the application deals with a rate increase). The Council in this case was not merely adjudicating a quasi-criminal charge against an individual or exempting a single construction project from a zoning ordinance. The Council was tasked with making a decision about both the short-term and long-term stability of the city's infrastructure. This decision was and is one that will impact every citizen of the area and has infinitely more importance to the city's economic and structural health than the decisions in *Allen*, *Georgia Gulf Corp.*, or *Williamson*. A review of the record shows that, while the Council leaned heavily on the advisors' expertise and knowledge, it cannot be said that the Council did not make its own decision. Applying the rule to the instant case, the Court finds that the Council did not violate Petitioners' due process rights by allowing its advisors to act in a dual capacity.

B. The Council's "Failure to Provide Evidence" of its Prior Agreement with Entergy New Orleans

Petitioners assert that their due process rights were also violated when the City Council failed to disclose a deal purportedly made between it and Entergy New Orleans to pursue the construction of a plant as early as August 2015, approximately 10 months before Entergy actually submitted the application. Petitioners argue that this undisclosed agreement essentially predetermined the outcome of the City's decision such that the Council was biased from the very beginning. Petitioners further assert that the Council and Entergy sought to suppress their efforts

to address the prior agreement during the proceedings at issue. The facts stated above help illuminate the background of the settlement.

The FERC proceeding at issue was filed because of several companies' dissatisfaction with the state of affairs regarding cost equalization. The purpose of the FERC filing was essentially a concursus proceeding: FERC allowed all interested parties to participate and represent their interests. Notably, the City Council for New Orleans participated in the FERC proceedings as an interested party (because New Orleans arguably had the most to lose from the termination of the service agreement). In August of 2015, the companies filed a joint settlement agreement resolving their issues. The gist of that settlement was that each company would create and pay for its own energy. The City Council and Entergy New Orleans made two key findings: (1) Entergy New Orleans would have to buy and "import" energy from the other operating companies in the short term and (2) Entergy New Orleans would need to build its own power plant within the city for long term stability and cost savings.

The Court notes that the City's resolution adopting the Settlement Agreement was the subject of two public hearings at which no comment or opposition was made. Also, the agreement and resolution did not pre-approve Entergy's application for a power plant; it merely directed Entergy to explore the feasibility of a new power plant and to prepare a proposal for review by the Council.

Petitioners argue that their due process rights were violated because the Council did not disclose the details of the Settlement Agreement during the proceedings at issue. They also argue that they should not be burdened by having to participate in all Council meetings in order to have notice and input related to "matters whose import may not be foreseeably relevant to their interests or concerns in other Council proceedings." In other words, Petitioners believe that the Council had a duty to disclose and discuss a document that was already public. The Court finds that this argument is without merit. Petitioners had notice of the instant proceedings and were allowed to give input on the Council's decision to approve Entergy's power plant. It is disingenuous to suggest that the Council withheld evidence of a settlement approval that was the subject of multiple public hearings. The Court also notes that Petitioners do not cite to any legal authority to support

the contention that a body such as the City Council has duty to explicitly disclose prior, public documents that may be relevant to another proceeding.

Furthermore, Petitioners suggest that evidence related to the agreement was suppressed when the issue was raised by Petitioners. They argue that Dr. Beverly Wright was not allowed to testify about the agreement once Petitioners discovered its existence. Dr. Wright is an expert in advising administrative agencies on best practices for public participation in governmental decision making. Dr. Wright attempted to testify about the dual role of the Council's advisors (discussed above) and about the impact of the settlement agreement on due process. Dr. Wright was not allowed to testify in response to a motion by the Advisors. More specifically, it was determined that she was a non-attorney rendering a legal conclusion. Pretermitting a discussion on Dr. Wright's qualifications regarding public participation in governmental action, the question of whether certain governmental actions violate due process is a strictly legal question, and it was proper for the Council to strike Dr. Wright's conclusions.

The Court therefore finds that the City Council did not violate Petitioners' right to due process by not disclosing the settlement agreement during the proceedings at issue.

C. The Department of Finance's Failure to Participate in the Proceedings

Petitioners assert the City's Department of Finance's failure to participate voids the action taken by the Council. Petitioners cite the City Code, which states:

> The department of finance through the director of the department of finance, shall be, ex officio, a party to all matters governed under this article, in which capacity he shall represent and shall make recommendations as to the best interests of the city as a municipal corporation, e.g., to assert the city's interest as an energy consumer.
>
> New Orleans City Code § 158-286.

Petitioners argued that the Department of Finance's non-participation was analogous to the absence of an indispensable party at trial in an ordinary proceeding (in which case, a judgment

would be set aside as absolutely null). *See, e.g., Terrebonne Par. Sch. Bd. v. Bass Enter.*, 852 So.2d 541, 546 (La. App. 1 Cir. 2003).

The Council argued that its decision should not be voided based on the Department of Finance's failure to represent the city's interests. Such a position would, in effect, create a "pocket veto" whereby the Department could defeat any unfavorable actions of the Council by simply refusing to participate. The Council further argued that the Department of Finance was not prohibited from participating; the Council included the Department on the service list for all pleadings and the Department was, in all relevant respects, treated as a party to the proceedings. Notably, the Department has yet to raise any objection or sought to undo the Council's decision based on an alleged violation of City Code Section 158-286.

The applicable City Code provision does not explicitly state the consequences of the Department's failure to participate in the Council's energy regulatory proceedings. Despite the language requiring the Department to assert the City's interests, this Court does not find that the Council violated City Code Section 158-286. The Council should not be restricted from carrying out its duty to regulate public utilities simply because the Department of Finance did not participate. Contrary to Petitioners' argument, the Department of Finance is not an indispensable party; it is one of many parties with an interest in the outcome of the Council's decision. The Council gave the Department of Finance an opportunity to have the City's voice heard, and the Department chose not to exercise its rights under the City Code. The Council's resolution will not be voided under City Code Section 158-286.

D. The Council's Denial of Petitioners' Request for a Hearing on their Motion for Rehearing

After the Council's March 8, 2018 adoption of Resolution 18-65, Petitioners filed a Motion for Rehearing with the Council on April 9, 2018 "pursuant to New Orleans City Code § 158-485."[2] Petitioners filed a request for a hearing on their motion on April 18, 2018. However, the Council summarily denied the motion the next day, April 19, without a hearing. Petitioners argued that the

[2] Pet. Brief at p. 11. New Orleans City Code § 158-485 provides that a rehearing on an order of the Council may be held either on the Council's motion or "on motion of any party **provided said motion is received within ten days of the mailing of the order, rule, or other action complained of.**" (emphasis added). The Court notes that Petitioners filed their Motion for Rehearing, approximately 30 days after the resolution was adopted.

denial of their motion without a hearing violates Regulations 1 and 2 of the *Rules and Regulations of the Council of the City of New Orleans*.

Regulation 1 states:

> "[a]ny person shall be entitled to a reasonable hearing on a) any proposed ordinance, motion or resolution . . . presented to the Council as long as the subject matter is one upon which the Council has legislative and regulatory authority. **Persons desiring such a hearing must request same in writing from the Clerk of Council in sufficient time to permit the notice required by Regulation Number 2.**" (emphasis added).

Regulation 2 states:

> "Before a hearing is held, all interested parties, including proponents, opponents, the Mayor or the Chief Administrative Officer, and members of the Council shall be notified by the Clerk of Council at least twenty-four (24) hours prior to the hearing."

The Council asserts that it put Petitioners' Motion for Rehearing on the Agenda for April 19, 2018. The Council further asserts that the only notice given of agenda items is a posting of the agenda on the Council's website the day before the meeting. The Council asserts that it provided sufficient notice that Petitioners' motion was on the agenda but that Petitioners' untimely filed a request for hearing.

It seems clear that Petitioners did not request a hearing on their motion with sufficient time for the Clerk of Council to provide notice to all interested parties. The request for hearing was not filed until 10 days after the motion for rehearing, and less than 24 hours before the Council's meeting on April 19, 2018. The Court will not comment on the pragmatism of the Council's method for publishing its agenda; however, the Court finds that Petitioners failed to request a hearing on their motion in timely fashion. The Council's denial of the motion was within its discretion, and Regulations 1 and 2 were not violated.

VI. Substantive Issues

After reviewing the procedural aspects of the Council's decisions, the crux of this case rests on the question of whether the proposed power plant is in the public interest. Petitioners assert, generally, that the Council acted arbitrarily and capriciously in approving ENO's application because the ENO had not sufficiently established that the plant was in the public interest.

Specifically, Petitioners pointed out 5 areas where they assert the Council acted arbitrarily and capriciously:

1. The Council failed to meaningfully evaluate reasonable alternatives;
2. The Council's conclusion that ENO established a capacity or reliability need for the power plant was not supported by the evidence;
3. The Council refused to establish cost conditions to protect ratepayers;
4. The Council denied ratepayers safe and reliable service pursuant to New Orleans City Code §§ 158-1045, 78-1 *et seq.*; and
5. The Council failed to fully examine the social justice issues.

The Court will address each of the aforementioned points of error in turn.

A. Council's Evaluation of Reasonable Alternatives

Petitioners assert that the Council's failure to meaningfully evaluate reasonable alternatives was arbitrary and capricious. Petitioners rely on *City of Plaquemine v. Louisiana Pub. Serv. Comm'n*, 282 So.2d 440, 443 (La. 1973) to support the argument that the City Council was required "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." They argue that this mandate requires the Council to meaningfully evaluate all reasonable alternatives and choose the one in the public's best interest.

Petitioners assert that the Council failed to evaluate reasonable alternatives; specifically, the Council failed to consider the feasibility of upgrades to ENO's transmission lines. Petitioners argued that transmission upgrades would solve ENO's reliability and capacity needs at a lower

cost than the proposed power plant. Thus, the Council's resolution approving the plant is based on incomplete information. The Council directed ENO in 2016 to evaluate four resource portfolio alternatives, including (1) transmission upgrades, (2) 100 MW solar power upgrade, (3) the Council's 2 percent energy efficiency goal, and (4) battery storage. Petitioners assert that ENO never evaluated these alternatives; the company simply made conclusory allegations that the alternatives were not feasible without running modelling to prove such.

ENO and the Council assert that they did consider alternatives to the proposed power plant; although ENO may not have run the specific models requested by the Council, they did evaluate the feasibility of alternative options. In fact, it was this evaluation that led to a fundamental change in the application, a departure from a 226 MW CT plant to a 128 MW RICE plant. The amendment was based on new information obtained about load forecasts and market conditions. ENO argued two main positions in relation to the transmission upgrades: (1) Petitioners' argument that the upgrades were a lower-cost alternative was based on speculation that energy prices would remain low, and (2) the evidence showed that transmission upgrades alone would not solve the existing capacity and reliability needs.

Before adopting Resolution 18-65, the Council considered evidence in the form of (1) screening analyses of alternatives from the original application, (2) supplemental testimony in response to the 2016 request for run models of the four portfolio alternatives, and (3) analyses included with the supplemental application. The Council also heard testimony from a number of witnesses for both Petitioners and ENO, including:

- Peter Lanzalotta;
- Robert Fagan
- Seth Cureington;
- Dr. Elizabeth Stanton;
- Joseph Vumbaco
- Joseph Rogers
- Philip Movish
- Charles Long

The Court again notes its role in this proceeding. More specifically, this Court is not tasked with second-guessing the City Council to determine if its decision to adopt Resolution 18-65 was right or wrong. This Court can only examine the record to determine whether the Council had sufficient evidence to make a reasonable decision. Although ENO did not run the specific models requested, and although the evidence was not presented perfectly on either side, evidence was presented and testimony was heard. Upon review of the record presented, it cannot be said that the Council did not consider the feasibility of alternative solutions. Furthermore, the Council was not tasked with only considering the lowest cost option; the Council had to choose the option it felt was in the best interest for the long-term health and stability of the City. The Court finds that the Council did not act arbitrarily and capriciously in regards to the consideration of reasonable alternatives.

B. Council's Finding that ENO established a Capacity or Reliability Need

For the reasons expressed above, the Court also finds that the Council was not arbitrary and capricious in finding that ENO established a need for the proposed power plant based on capacity and reliability.

In terms of capacity, Petitioners' argument is that ENO seeks substantially more capacity than it needs to fulfill demand requirements. Petitioners cite several witnesses who testified to this assertion, including Dr. Stanton, Mr. Vumbaco, and Maurice Brubaker. Generally, Petitioners asserted that ENO underestimated the effect of alternative energy sources and overestimated the future demand for energy.

ENO argued that, notwithstanding the fact that the power plant would create an immediate and short-term surplus of capacity, the evidence presented showed that the City would face a deficit in the long term. Furthermore, this deficit would be exacerbated by the fact that even more generators outside the city are being retired (increasing the need for local generation). ENO argued, and the Council concluded, that the effect of a surplus of capacity was preferable to the consequences of not having enough. Additionally, the transmission-only solution would not solve the capacity issued. ENO also criticized Petitioners plans on the same basis that Petitioners had argued; ENO asserted that Petitioners overestimated the effect that solar power sources would address the needs of the city.

Regarding reliability, Petitioners argued that all issues could be resolved by a combination of energy efficiency measures, solar generation, and limited transmission upgrades—all at a price cheaper than the cost of the proposed power plant. Meanwhile, ENO argued that New Orleans unique geographical location provided significant challenges to implementing the proposed alternatives—challenges ENO asserted were not considered by the witnesses for Petitioners. Essentially, ENO pointed out that almost all power being utilized is currently being "imported" from a single direction, over a small amount of land. In other words, all of ENO's eggs are currently in the same basket. A witness for ENO, Charles Long, testified that "the loss of even a portion of these transmission facilities delivering energy from the West into the City would likely prevent the Company from serving its entire load." Clearly this suggests a problem with reliability.

Regarding the contentions considered and evaluated by the Council, the Court looks to the explicit language of Resolution 18-65:

> [N]o party has rebutted ENO's contention that there are significant, and possibly insurmountable challenges associated with any transmission construction, whether it involves upgrades to existing lines or construction of new facilities. ***No party has refuted ENO's claim that it would take longer to plan and implement transmission upgrades than to construct NOPS on a site that ENO already owns.*** No party has refuted that there is a real likelihood that ENO would not be able to get the outages it would need to make any upgrades, and even if it did, the upgrades could take many years to complete. No party has refuted ENO's assertion that there is a serious risk of a P6 event occurring while any upgrades are being done because of the constraints on the system. Opponents of NOPS who support a transmission-only solution acknowledged the challenges ENO would face if it were to attempt to construct new facilities, particularly challenges in obtaining rights of way.

(Emphasis added). The resolution is replete with examples of the competing views considered by the Council. The Council spent a substantial amount of time considering the implications of its

decision and the possible alternatives available. Reviewing the record and evidence, it cannot be said that the Council's decision was unreasonable in light of all the information presented. Therefore, the Court finds that the Council did not act arbitrarily and capriciously in finding that ENO established a need for the power plant.

C. Council's Refusal to Establish Cost Conditions

Petitioners argue the Council acted arbitrarily and capriciously in refusing to set a cost limitation on the proposed power plant. Because the Council has approved ENO's request to pass the costs of the construction to ratepayers, Petitioners argue the lack of cost conditions exposes those ratepayers to unfettered increases in their energy bills. Petitioners point out that low-income ratepayers in New Orleans already bear a disproportionate burden in energy bills compared to the rest of the nation, and this would only be exacerbated by the construction of the proposed plant. Petitioners argue that part of the burden borne by ratepayers is highly dependent on speculative estimates of the future energy market.

Respondents assert that the issue of cost conditions was not raised until the "eleventh hour," and no party submitted credible evidence that such conditions were appropriate, feasible, necessary, or legal. Respondents also point out that, while the Council did not establish an explicit cap on costs incurred for the project, the Council did approve a monitoring plan. This plan would include periodic updates about the construction and any changes in budget; the Council would then have the ability to evaluate all costs incurred for prudence and allow recuperation of only those costs prudently incurred.

The resolution clearly states the Council's thoughts on the economic effect of the proposed plant. First, regarding the original application for a 226-MW CT plant, the resolution states,

> the CT would fully mitigate ENO's transmission reliability need over the planning period; however[,] the Council believes that the proposed size of the facility is excessive given ENO's load forecast, and that it would subject New Orleans customers to the risk of exposure to unpredictable MISO capacity market revenues. As the Advisors have demonstrated, if ENO's highly optimistic predictions

> about prices in the MISO capacity market prove incorrect, ENO will not be able to offset a sufficient amount of costs to make the CT economic for ratepayers.

This shows that the Council had already considered both the excess capacity issue and the economic impact issue. It is for this reason that the Council decided to approve the smaller 128-MW RICE plant. The Council clearly understood that the RICE option would involve similar risks as the CT option, but found that those risks would be more reasonable given the evidence presented. Regarding economic impact of the revised proposal, the resolution further states that the Council explicitly found "no evidence in the record that the conditions requested by the Joint Intervenors will result in a just and reasonable rate that is fair to ratepayers and allows the utility to recover its prudently incurred costs and a reasonable rate of return on its investment."

The Court finds that the Council did not act arbitrarily and capriciously in refusing to establish strict cost conditions on the construction of the proposed plant, particularly in light of the Council's implementation of a monitoring plan to evaluate the reasonability of all costs incurred.

D. The Council's Consideration of Flood Risks

Petitioners argue that the Council acted arbitrarily and capriciously in failing to comply with City Code Sections 158-1045 and 78-1, which require the Council to ensure safe and reliable service. Petitioners contend that the location of the proposed power plant (land already owned by ENO) is classified by FEMA as a high-risk flood hazard area. Petitioners assert that FEMA discourages construction of power plants in high risk areas, and argues that this policy evidences capriciousness on the part of the Council in approving construction at the location. Petitioners explicitly state that the resolution "entirely fails to address evidence in the record that both regional and federal governmental agencies responsible for flood protection in New Orleans recognize the flood risks that are inherent to the location and part of the operation of Entergy's proposed gas plant."

However, the resolution considers flood risk in many areas. It explicitly states that ENO presented multiple witnesses who testified that the proposed plant design, in conjunction with

ating flood risk reduction measures, would fully mitigate any flood risk. Specifically, the solution states that

> [T]he ENOI's project team took additional steps in the design and planning for NINPS to minimize the risk of NINPS being impacted by flooding, because the Company uses a Top of Concrete elevation in the design plans that exceeds FEMA guidance for the Michaud site in that it is 2.5 feet higher than the FEMA advisory [sic] recommendation.

The petitioners presented evidence that the Council seriously considered all important issues related to the construction of the proposed plant. While it may not have decided in Petitioners' favor, it cannot be said that the Council did not consider the respective arguments and evidence in conjunction with all applicable laws. Furthermore, though the Council considered the risk of flooding heralded by the events of Hurricane Katrina, the Council also considered the predictions of the Coastal Protection Restoration Authority. This prediction notes a number of facts that differentiate the present situation from the one 14 years ago, including (1) the closure of the Mississippi River Gulf Outlet, (2) the improvements to the levee system in St. Bernard Parish, (3) the installation of the Lake Borne Surge Barrier, and (4) the completion of the Seabrook Bridge Floodgate on Lake Pontchartrain near the proposed site of the power station.

The Court notes that the construction of the plant, though approved in part by Resolution R-05, is still conditioned on ENO's compliance with all applicable laws and regulations. It was reasonable for the Council to conclude that flood risks will be mitigated, and therefore the Court finds that the Council did not act arbitrarily and capriciously in regards to ensuring safe and reliable service pursuant to the aforementioned City Code Sections.

ii. The Council's Examination of Social Justice Issues

Finally, Petitioners argue that the Council failed to fully and meaningfully examine the social justice issues created by the power plant. Petitioners assert that the location of the plant disproportionately affects the predominately poor and/or African American and Vietnamese population of Michaud. Petitioners argue that, even if ENO complies with all EPA regulations, there is still a disproportionate risk of toxic pollution borne by Black and Vietnamese citizens

living near the plant. In other words, the EPA standards should be disregarded in terms of the social justice impact. Petitioners argue that "[t]he Council has not acknowledged much less analyzed or fully vetted the adverse impacts" posed by the plant.

However, ENO submitted evidence and testimony from a scientific expert that established that the emissions from this plant would not disproportionately affect the health of the population at issue. In fact, the emissions from the proposed plant would be substantially less than the emissions from the former Michoud units that were retired in 2016 (ENO claims there will be a 77.3% reduction from the previous units). There was also a dispute as to how far the nearest residences were located but no parties dispute that there are no residences at the "fence line" of the plant. The nearest residences are at least three-fourths of a mile to 1 mile away from the plant.

Yet again, Resolution 18-65 is replete with the Council's consideration of the social justice impacts of the proposed power plant. It states so explicitly in several places:

- WHEREAS, the Joint Intervenors argue that each of ENO's proposed gas-fired generation options would create racially disproportionate environmental burdens on predominately African American and Vietnamese neighborhoods in New Orleans East . . . ;
- WHEREAS, the Joint Intervenors argue that in its application, ENO does not examine, or even consider, the racially-disproportionate environmental burdens of operating a power plant in close geographic proximity to predominately African-American and Vietnamese-American neighborhoods;
- WHEREAS, the Joint Intervenors argue that the poor are especially at risk from air pollution, and older adults and children are also at greater risk . . . ;

Far from Petitioners' assertion that "[t]he Council has not acknowledged much less analyzed or fully vetted the adverse impacts" posed by the plant, it is ***abundantly clear*** from the language of the resolution that the Council did, in fact, acknowledge and consider the social justice ramifications of its decision. The 188-page resolution contains at least 13 full pages of what the Council considered from both Petitioners, ENO, and the Council's Advisors regarding air emissions and social justice issues.

Therefore, the Court finds that the Council did not act arbitrarily and capriciously in regards to examining the social justice issues posed by the proposed plant and its location.

VI. Conclusion

For the aforementioned reasons, the Court finds that the Council of the City of New Orleans did not deprive Petitioners of their constitutional rights to due process. Furthermore, under *Gordon*, the Council's decision (1) was not arbitrary and capricious; (2) was not a clear abuse of authority; and (3) was reasonably based upon the factual evidence presented. The Council's decision to adopt Resolution 18-65, conditionally approving ENO's application for a 128-MW RICE power plant, is **AFFIRMED ON THESE GROUNDS**.

SIGNED this 14th day of June, 2019, in New Orleans, Louisiana.

JUDGE PIPER D. GRIFFIN

DIVISION "I"

A TRUE COPY

DEPUTY CLERK OF CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LA

Appendix C
Excerpt of Settlement Agreement filed in Entergy Arkansas, Inc., et al. – Settlement Agreement in Docket Nos. ER14-75-000, ER14-75-001, ER14-76-000, ER14-76-001, ER14-77-000, ER14-77-001, ER14-78-000, ER14-78-001, ER14-79-000, ER14-79-001, ER14-80-000, ER14-80-001, ER14-128-000, ER14-1328-000, and ER14-1329

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Karis Anne Gong Parnham
Senior Counsel
Federal Energy Regulatory Affairs

August 14, 2015

Via eFiling

FILING INCLUDES REQUEST FOR LIMITED PARTIAL WAIVER OF ETARIFF FILING REQUIREMENTS

The Honorable Kimberly Bose
Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426

Re: *Entergy Arkansas, Inc., et al.* – Settlement Agreement in Docket Nos. ER14-75-000, ER14-75-001, ER14-76-000, ER14-76-001, ER14-77-000, ER14-77-001, ER14-78-000, ER14-78-001, ER14-79-000, ER14-79-001, ER14-80-000, ER14-80-001, ER14-128-000, ER14-1328-000, and ER14-1329

Dear Ms. Bose:

Pursuant to Rule 602 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the "Commission"), 18 C.F.R. § 385.602 (2015), Entergy Services, Inc. ("ESI") hereby submits for filing in the above-referenced dockets a settlement agreement to resolve issues in Docket Nos. ER14-75-000, ER14-75-001, ER14-76-000, ER14-76-001, ER14-77-000, ER14-77-001, ER14-78-000, ER14-78-001, ER14-79-000, ER14-79-001, ER14-80-000, ER14-80-001, ER14-128-000, ER14-1328-000, and ER14-1329. The Settlement Agreement resolves all outstanding issues among the Settling Parties[1] in those dockets. Also included with this filing are the following:

[1] ESI is authorized to represent that the following parties collectively and individually support this Settlement Agreement as in the public interest, and are "Settling Parties": Entergy Texas, Inc. ("ETI"), Entergy Louisiana, LLC ("ELL"), Entergy Gulf States Louisiana, L.L.C. ("EGSL"), Entergy New Orleans, Inc. ("ENO") (ETI, ELL, EGSL, and ENO are also referred to herein as the "Entergy Operating Companies" or the "Operating Companies"), and ESI. The Louisiana Public Service Commission ("LPSC"), the Council for the City of New Orleans ("CCNO") and the Public Utility Commission of Texas ("PUCT") actively participated in settlement negotiations and are included as Settling Parties, but cannot vote on approval of the Settlement Agreement until certain procedures before them, including further approvals, have been completed. The Staffs and outside counsel for the LPSC, CCNO, and PUCT have negotiated this Settlement Agreement, but are not authorized to bind such entities. This filing is being made so that each entity may initiate such proceedings as are necessary to allow each to duly consider and act on the Settlement Agreement without being constrained by the confidentiality applicable to ongoing settlement negotiations. The statement of LPSC's, CCNO's, and PUCT's support for the Settlement Agreement, and references to each of these entities as a Settling Party, is thus conditioned on each of these entities voting to approve the Settlement Agreement. By October 31, 2015, counsel for LPSC, CCNO, and PUCT each agree to provide the Commission with a report regarding the final status of whether the LPSC, CCNO, and the PUCT have approved the Settlement Agreement, and if not, the status and anticipated timing to complete such approval process.

(1) Explanatory Statement in Support of Settlement;
(2) Draft Commission order approving the settlement;
(3) Exhibits A and B[2] – *Pro Forma* Versions of Redline and Clean revisions to Section 1.01 of the Entergy System Agreement;
(4) Exhibits C and D – Forms of Amended Notices of Termination of ETI and ELL/EGSL;
(5) Exhibit E – Form of Second Amended Joint Pricing Zone Revenue Allocation Agreement; and
(6) Exhibit F – Form of Settlement Payment Agreement.

In Exhibits A and B, ESI submits proposed revisions to the Entergy System Agreement on a *pro forma* basis and respectfully requests limited partial waiver of of the Commission's eTariff filing requirements under Order No. 714 and Sections 35.7 and 35.9 of the Commission's regulations. ESI requests such limited partial waiver of the eTariff filing requirements to permit deferral of the obligation to file the revisions to the System Agreement, which is in the Commission's eTariff system, until after the Commission acts on the Settlement Agreement. The waiver request is limited and partial in that the ESI is only seeking a deferral of the eTariff filing requirements. The requested waiver will promote administrative efficiency by obviating the need to make an eTariff filing before the Commission rules on the merits of the Settlement Agreement. If the waiver is granted, ESI will file the revisions to the Entergy System Agreement within thirty (30) days following the Commission's approval of the Settlement Agreement. Thus, good cause exists for the Commission to grant the requested limited and partial waiver.

In accordance with Rule 602(f)(2), ESI hereby informs all participants that initial comments on the Settlement Agreement are due by September 3, 2015, and reply comments are due by September 14, 2015. 18 C.F.R. § 385.602(f)(2) (2015).

Respectfully submitted,

/s/

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[2] Exhibits A through F are illustrative forms of certain anticipated filings and notices required by Settlement Agreement Section II.A(2). They are subject to change as necessary when the final versions are prepared for filing with the Commission.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Entergy Arkansas, Inc.	)	Docket Nos. ER14-75-000
	)	ER14-75-001
	)	
Entergy Gulf States Louisiana, L.L.C.	)	ER14-76-000
	)	ER14-76-001
	)	
Entergy Louisiana, LLC	)	ER14-77-000
	)	ER14-77-001
	)	
Entergy Mississippi, Inc.	)	ER14-78-000
	)	ER14-78-001
	)	
Entergy New Orleans, Inc.	)	ER14-79-000
	)	ER14-79-001
	)	
Entergy Texas, Inc.	)	ER14-80-000
	)	ER14-80-001
	)	(Consolidated)
	)	
Entergy Texas, Inc.	)	ER14-128-000
	)	
Entergy Louisiana, LLC	)	ER14-1328-000
	)	
Entergy Gulf States Louisiana, L.L.C.	)	ER14-1329-000

SETTLEMENT AGREEMENT

Pursuant to Rule 602 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the "Commission"), 18 C.F.R. § 385.602 (2015), Entergy Services, Inc. ("ESI"), as agent for the Entergy Operating Companies,[1] hereby submits this Settlement

[1] The Entergy Operating Companies that are participating in this Settlement are: Entergy Gulf States Louisiana, L.L.C., Entergy Louisiana, LLC, Entergy New Orleans, Inc. and Entergy Texas, Inc.

Agreement that resolves all outstanding issues among Settling Parties[2] in the above-captioned proceedings.

I. INTRODUCTION

On October 11, 2013, pursuant to section 205 of the Federal Power Act ("FPA"),[3] ESI, as agent and on behalf of the Entergy Operating Companies, submitted a proposed amendment to revise section 1.01 of the Entergy System Agreement ("System Agreement")[4] by changing the notice period for an Operating Company to terminate its participation in the System Agreement from 96 months (8 years) to 60 months (5 years) ("Notice Filing"). ESI requested an effective date of October 12, 2013 for the Notice Filing. The Notice Filing was originally submitted in Docket Nos. ER14-75-000, ER14-76-000, ER14-77-000, ER14-78-000, ER14-79-000, and ER14-80-000.

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[2] ESI is authorized to represent that the following parties collectively and individually support this Settlement Agreement as in the public interest, and are "Settling Parties": Entergy Texas, Inc. ("ETI"), Entergy Louisiana, LLC ("ELL"), Entergy Gulf States Louisiana, L.L.C. ("EGSL"), Entergy New Orleans, Inc. ("ENO") (ETI, ELL, EGSL, and ENO are also referred to herein as the "Entergy Operating Companies" or the "Operating Companies"), and ESI. ELL and EGSL are presently pursuing a transaction to combine their respective assets and liabilities into one consolidated utility operating company. It is currently expected that this transaction may be closed during the period of performance of this Settlement Agreement. It is understood by the Settling Parties that references to ELL and/or EGSL in the Settlement Agreement should be construed to encompass the eventual combined entity as appropriate.

The Louisiana Public Service Commission ("LPSC"), the Council for the City of New Orleans ("CCNO") and the Public Utility Commission of Texas ("PUCT") actively participated in settlement negotiations and are included as Settling Parties, but cannot vote on approval of the Settlement Agreement until certain procedures before them, including further approvals, have been completed. The Staffs and outside counsel for the LPSC, CCNO, and PUCT have negotiated this Settlement Agreement, but are not authorized to bind such entities. This filing is being made so that each entity may initiate such proceedings as are necessary to allow each to duly consider and act on the Settlement Agreement without being constrained by the confidentiality applicable to ongoing settlement negotiations. The statement of LPSC's, CCNO's, and PUCT's support for the Settlement Agreement, and references to each of these entities as a Settling Party, is thus conditioned on each of these entities voting to approve the Settlement Agreement. By October 31, 2015, counsel for LPSC, CCNO, and PUCT each agree to provide the Commission with a report regarding the final status of whether the LPSC, CCNO, and the PUCT have approved the Settlement Agreement, and if not, the status and anticipated timing to complete such approval process.

[3] 16 U.S.C. § 824d.

[4] The System Agreement is a FERC-approved rate schedule filed with and subject to the exclusive jurisdiction of the Commission. The System Agreement allocates among the participating Entergy Operating Companies the benefits and costs of coordinated operations of those Entergy Operating Companies' generation and bulk transmission facilities. The System Agreement is administered by the Operating Committee, which is comprised of the presidents of the Operating Companies and a representative from Entergy Corporation.

On October 18, 2013, pursuant to FPA section 205, ETI filed in Docket No. ER14-128-000 a notice to withdraw from the System Agreement with a requested effective date of October 18, 2018, or an effective date consistent with the Commission's ruling on the Notice Filing. On February 14, 2014, ELL and EGSL filed in Docket Nos. ER14-1328-000 and ER14-1329-000 notices to withdraw from the System Agreement, with a requested effective date of February 14, 2019, or an effective date consistent with the ruling in the Notice Filing. These notices to withdraw are referred to as the "Withdrawal Filings."

Comments and interventions in the Notice Filing dockets were due on or before November 12, 2013. Timely interventions and protests were filed by the PUCT, CCNO, and LPSC. PUCT supported a shortened notice requirement, as requested by the Notice Filing, but argued that sixty months would still be too long. CCNO and LPSC argued that the proposed sixty-month notice period was not adequately supported. CCNO asked the Commission to either reject the Notice Filing or to set it for hearing. LPSC sought a hearing to address the reasonableness of the System Agreement in the MISO environment, among other issues, and sought consolidation of the Notice Filing dockets with ETI's Withdrawal Filing. The Arkansas Public Service Commission ("APSC") and the Mississippi Public Service Commission filed late interventions. On November 26, 2013, ESI filed a motion for leave to answer and answer to the State Commissions' protests. On December 9, 2013, PUCT filed a motion for leave to answer and answer to ESI's November 26 answer. On December 11, 2013, CCNO filed a motion for leave to respond and response to ESI's November 26 answer. On April 1, 2014, CCNO filed a motion for leave to file supplemental response and renewed motion for hearing.

Comments and interventions addressing ETI's Withdrawal Filing were due on November 8, 2013. Each of the active State Commissions filed timely interventions and comments. PUCT

supported ETI's Withdrawal Filing. CCNO and LPSC protested ETI's Withdrawal Filing. LPSC sought to consolidate ETI's Withdrawal Filing with the Notice Filing and two other dockets (Docket Nos. ER13-432-000 and ER14-73-000). The APSC filed a late conditional intervention and objected to the LPSC's request to consolidate the ETI Withdrawal Filing with Docket Nos. ER13-432-000 and ER14-73-000. On November 25, 2013, ETI filed a motion for leave to answer and answer to CCNO and LPSC's protests.

Comments and interventions addressing ELL's and EGSL's Withdrawal Filings were due on March 7, 2014. CCNO filed a timely intervention and comments, seeking either acceptance of ELL's and EGSL's Withdrawal Filings with an effective date of ninety-six months or consolidation of ELL's and EGSL's Withdrawal Filings with the Notice Filing dockets and ETI's Withdrawal Filing. On March 24, 2014, ELL and EGSL filed an answer to CCNO's comments. On April 1, 2014, CCNO filed a motion for leave to answer and answer to ELL's and EGSL's answer.

On December 18, 2014, the Commission issued an order (1) accepting the Notice Filing, effective October 12, 2013, subject to refund, (2) establishing hearing and settlement judge procedures, and (3) consolidating the Notice Filing proceedings for the purpose of settlement, hearing and decision. *Entergy Arkansas, Inc.*, 149 FERC ¶ 61,262 at P 1 (2014). The Commission also (4) "conditionally accept[ed] the Withdrawal Filings, to be effective on the dates requested in the respective filings, subject to the outcome of the Notice Filing proceedings." *Id.*

On January 5, 2015, the Chief Administrative Law Judge appointed the Honorable John P. Dring to serve as Settlement Judge in the proceeding. The parties and the Commission's Trial Staff participated in a formal settlement discussion with Judge Dring on January 22, 2015, April

2, 2015, June 3, 2015, and July 9, 2015. Following the July 9, 2015 Settlement Conference, representatives of the Settling Parties reached agreement on a settlement in principle, subject to the final approval of the LPSC, CCNO, and PUCT. The terms of that settlement in principle are detailed below.

II. SETTLEMENT AGREEMENT

A. Agreements of All Settling Parties

Each of the Settling Parties agrees as follows:

(1) The System Agreement shall terminate, effective August 31, 2016 at 11:59:59 PM Central Daylight Time (the "System Agreement Termination Date"), for all Operating Companies remaining a party to the System Agreement as of that date.

(2) The Entergy Operating Company Parties shall make such regulatory filings or direct MISO to make such filings that are necessary to effectuate the purposes of this Agreement, including but not limited to: amended notices of termination of the System Agreement for EGSL, ELL, and ETI; revisions to Section 1.01 of the System Agreement indicating that the System Agreement will terminate effective August 31, 2016 at 11:59:59 PM Central Daylight Time; notices to FERC of termination of the Jurisdictional Separation Plan ("JSP") power purchase agreements ("PPAs") and Calcasieu Generating Facility PPA ("Calcasieu PPA") consistent with Section II.B; amendments to the surviving PPAs listed in Attachment 2, consistent with Section II.B(4) herein;[5] removal of ENO as a party to the Amended Joint Pricing Zone Revenue Allocation Agreement ("JPZ Agreement") for the Entergy Louisiana transmission pricing zone ("TPZ") consistent with Section II.C(4); establishing a separate TPZ for ENO under

[5] The Settling Parties dispute the application of the ROE that will apply to replacement MSS-4 contracts, and this form revised contract included in Attachment 3 is not intended to take a position on that issue. It is included for informational purposes only.

the MISO Tariff; and providing for the transmission payment arrangement among ENO, ELL and EGSL as set forth in Section II.C(2).

(3) The Settling Parties shall either support or not oppose the regulatory filings identified in Section II.A(2) which are necessary to effectuate the purposes of this Settlement Agreement, provided such filings are consistent with the terms of this Settlement Agreement. The Settling Parties further authorize ESI and/or the Operating Companies to represent that the Settling Parties collectively and individually support the Settlement as in the public interest. The LPSC, CCNO, and PUCT cannot vote on approval of the Settlement Agreement until certain procedures before them, including further approvals, have been completed, which are expected to be completed by the end of October 2015. LPSC's, CCNO's, and PUCT's support for the Settlement Agreement is conditioned on and subject to these approvals of the Settlement Agreement. No later than October 31, 2015, LPSC, CCNO, and PUCT counsel will each report to the Settlement Judge and the Commission about whether approval of the Settlement Agreement from their respective client was obtained and, if not, the status and anticipated timing to complete the approval procedures.

(4) The Settling Parties shall execute further agreements that are reasonably needed to effectuate the purposes of this Settlement Agreement.

(5) The Settling Parties shall work in good faith to resolve any disputes or issues that may arise in connection with the implementation of the terms of this Settlement Agreement.

B. Agreements of Specified Parties Relating to Specified Power Purchase Agreements

ETI, EGSL, PUCT, and LPSC agree as follows:

(1) Upon the date of termination of the System Agreement, the cross-purchase power agreements ("PPAs") between ETI and EGSL associated with the gas-fired generation at the

Sabine, Lewis Creek, Nelson, Willow Glen, and Louisiana Station power plants that constitute the JSP PPAs and the Calcasieu PPA shall be terminated, without replacement contractual obligations. The JSP PPAs and Calcasieu PPA are identified in more detail, including FERC docket number, in Attachment 1. EGSL and ETI, or ESI on their behalf, shall make appropriate filings at FERC to provide notices of termination of the JSP PPAs and the Calcasieu PPA consistent with this Settlement Agreement. Should this Settlement Agreement not be approved and consummated, nothing herein shall be interpreted to modify the right of any Settling Party to take any legal position it determines to be appropriate regarding termination or continuation of the JSP PPAs or Calcasieu PPA.

(2) The Settling Parties mutually and irrevocably waive and release any rights, claims, remedies, or causes of action they may have against one another regarding the termination of the JSP PPAs or the Calcasieu PPA.

(3) This Settlement Agreement shall have no effect on the Reserved Source Points ("RSPs"), Auction Revenue Rights ("ARRs") (including Counterflow ARRs), or Financial Transmission Rights ("FTRs") that may be held by the Settling Parties, including but not limited to those associated with the JSP PPAs or the Calcasieu PPA. The Settling Parties waive and release any claim arising from or relating to the RSPs, ARRs (including Counterflow ARRs), or FTRs associated with the JSP PPAs or the Calcasieu PPA that may be held by any other Settling Party, including the past or future revenues associated therewith.

(4) This Settlement Agreement shall have no material effect on any PPA other than those listed in Attachment 1. Attachment 2 lists PPAs that shall be amended to remove any references to the System Agreement and replaced with provisions substantially similar to those shown in Attachment 3 (such provisions being an example of the provisions that will be added to

each of the PPAs listed in Attachment 2).[6] The revised PPAs shall be filed with FERC no later than 30 days following of termination of the System Agreement.

C. Agreements of Specified Parties Relating to Transmission Arrangements

EGSL, ELL, ENO, LPSC, and CCNO agree as follows:

(1) A separate TPZ within MISO will be established for ENO, to be effective upon the date of termination of the System Agreement. The ENO TPZ shall include ENO's existing load and transmission facilities and any new load or transmission facilities in the City of New Orleans that ENO may acquire or develop in the future.[7]

(2) On the first day of the month following (i) the date of System Agreement termination in accordance with this Settlement Agreement or (ii) the date of FERC approval of a separate TPZ for ENO in accordance with this Settlement Agreement, whichever occurs later, and on the first day of each month for 179 months thereafter, ENO will make a payment to ELL/EGSL in the amount of $183,333.33 (a total of 180 monthly payments in this amount). A separate agreement among ENO, ELL, and EGSL will be filed at FERC to effectuate these payments.

(3) Upon the effective date of a separate TPZ for ENO in accordance with this Settlement Agreement, there shall no longer be any allocation of transmission costs or revenues among ELL/EGSL on the one hand, and ENO on the other, except as otherwise provided pursuant to the MISO Tariff. The Settling Parties hereby acknowledge that, pursuant to the current MISO Tariff there is no allocation of transmission costs or revenues under Schedules 7,

[6] The Settling Parties dispute the application of the ROE that will apply to replacement MSS-4 contracts, and this form revised contract is not intended to take a position on that issue. It is included for informational purposes only.

[7] ENO and ELL are presently pursuing a transaction in which ELL's assets and operations in the Algiers section of the City of New Orleans would be transferred to ENO. The transaction is pending and may close during the period of performance of this Settlement Agreement.

8, or 9 among ELL/EGSL on the one hand, and ENO on the other. Transmission revenues associated with Schedules 7, 8, and 9 shall be allocated between ELL and EGSL in proportion to their transmission owner revenue requirements in the Entergy Louisiana transmission pricing zone or such other allocation methodology as they may agree upon in a FERC-filed joint pricing zone revenue allocation agreement that has been approved by the LPSC.

(4) Effective upon establishment of an ENO TPZ in accordance with this Settlement Agreement, ENO will no longer be a party to the JPZ Agreement for the current Entergy Louisiana TPZ. ELL, EGSL and ENO will file an amendment to the JPZ Agreement to remove ENO as a party. ENO and ELL/EGSL hereby waive and release any claims or causes of action they or any of them may have against each other arising out of or relating to the allocation of costs to or within, or the receipt of future transmission revenues from: (i) the current Entergy Louisiana TPZ (which includes ELL, EGSL, and ENO); (ii) the modified Entergy Louisiana TPZ that will be result from this Settlement Agreement (which will include ELL and EGSL but not ENO); or (iii) the separate ENO TPZ that will result from this Settlement Agreement. ENO and ELL/EGSL further hereby waive and release any and all claims or causes of action arising out of or relating to the JPZ Agreement to which each is a party prior to the establishment of the separate ENO TPZ in accordance with the terms of this Settlement Agreement.

D. Agreements of Specified Parties with Respect to Certain Future Generation Resources for Louisiana Operating Companies

EGSL, ELL, ENO, ESI, LPSC, and CCNO agree as follows:

(1) ENO will have the option to participate in up to a 30% share of the next LPSC-certified Amite South combined cycle gas turbine ("CCGT") unit constructed or acquired (including by long-term PPA) by ELL and/or EGSL ("2020 Amite South Resource"). In connection with the Summer 2014 Request for Proposals for Supply Side Resources ("Summer

2014 RFP"), the Operating Committee selected the self-build proposal that was market-tested in the RFP, and ENO's up to 30% allocation shall apply to this self-build project. Participation by ENO shall be in the form of a cost-based PPA. ENO's participation in the Amite South CCGT resource is subject to mutually satisfactory resolution of all material considerations, including, without limitation: (a) financial feasibility for ENO; (b) affordability for ENO customers; (c) timely rate recovery; and (d) consistency with sound utility practice and planning principles; and (e) the provisions of paragraph II.D(6).

(2) At the appropriate time, consistent with the terms of this Settlement Agreement, ENO will submit to the CCNO an application, with appropriate supporting evidence, seeking CCNO approval of the PPA for the up to 30% share of this CCGT resource. CCNO reserves the authority to grant or deny such approval, and nothing in this Settlement Agreement shall be construed as CCNO pre-approval of the PPA.

(3) This Settlement Agreement shall not in any way be construed to restrict the standards that the LPSC applies to the certification of electric generating capacity resources proposed by Louisiana electric public utilities subject to its retail jurisdiction (that is, certification pursuant to the LPSC's 1983 General Order, as amended, and the Market Based Mechanisms Order).

(4) This Settlement Agreement shall not obligate ELL to construct the resource being market tested in the Summer 2014 RFP nor shall this Settlement Agreement bind ELL to select any proposal submitted in response to that RFP.

(5) ENO will also have an option to acquire 10% of the capacity and energy of any and all future CCGT acquisitions made by ELL and/or EGSL within Amite South (as that region is presently defined). This option extends to all future CCGT acquisitions by ELL/EGSL within

Amite South (except the Amite South CCGT addressed in Section II.D(1) above), including new build resources, purchases from third parties, and long-term PPAs (10 years or greater in term). Such participation by ENO must be in the form of a mutually agreed upon cost-based PPA in which ENO is the purchaser and ELL and/or EGSL is the seller. This provision shall not in any way be construed to restrict the standards that the LPSC applies to the certification of electric generating capacity resources proposed by Louisiana electric public utilities subject to its retail jurisdiction (that is, certification pursuant to the LPSC's 1983 General Order, as amended, and the Market Based Mechanisms Order).

(6) Additionally, EGSL, ELL, ENO, ESI, LPSC, and CCNO agree to the following conditions applicable to this II.D:

(a) ELL/EGSL will notify ENO of a pending CCGT in timely fashion, sufficient to give ENO sufficient time to make a participation decision.

(b) ENO shall notify ELL/EGSL of its decision to participate in an Amite South CCGT as per section II.D(1) above, and any exercise by ENO of the option to participate in a CCGT provided in section II.D(5) above, as soon as possible and the notification must be provided in advance of the filing for LPSC certification of the new CCGT resource.

(c) ENO will seek CCNO approval of any decision to participate in an Amite South CCGT as per section II.D(1) above, or to exercise the option to participate in a CCGT provided in section II.D(5) above. CCNO commits to complete its review of ENO's decision to participate or exercise the option, as applicable, within 90 days of the date of ENO's filing for CCNO approval. In order to support the 90-day review period, ENO

commits that it will brief, and provide supporting analytics to, the CCNO Advisors in advance of making the filing regarding the decision to participate or exercise the option.

(d) LPSC commits that it will permit ELL's and/or EGSL's filing for certification of the Amite South CCGT addressed in Section II.D(1) or the applicable resource(s) that are subject to the option as provided for in Section II.D(5) to move forward in parallel with CCNO's review proceeding.

(e) The options conferred by Sections II.D(1) and II.D(5) will extinguish fifteen (15) years after the date of the Settlement Agreement.

(f) The options conferred by Sections II.D(1) and II.D(5) will extinguish if the following three conditions occur: (a) ENO acquires Power Block 1 of the Union Power Station ("UPS"); (b) ENO actually receives credit in MISO for the energy and capacity from the unit; and (c) UPS Power Block 1 has been granted full Network Resource Interconnection Service ("NRIS").

(g) The options conferred by Sections II.D(1) and II.D(5) shall be limited to a total of 500 MWs, inclusive of ENO's participation in the 2020 Amite South Resource.

(h) The options conferred by Sections II.D(1) and II.D(5) shall terminate if ENO is sold to a non-affiliated company, becomes bankrupt, defaults on its obligations to make payments pursuant to any purchase power agreements resulting from the exercise of the option, or is municipalized.

(i) With respect to the sharing of risk between ENO, on the one hand, and ELL and EGSL, on the other, pursuant to Section II.D herein, any PPA shall be subject to the same risk sharing provisions contained in the Reimbursement Agreement between ENO and ELL that was executed in connection with the certification of the Ninemile 6 project.

(j) Should either the LPSC or the CCNO provide rate support (e.g., cash earnings on Construction Work in Progress) for a unit subject to a PPA entered into pursuant to the exercise of an option conferred under this Settlement Agreement during the period of construction of the applicable generating unit, EGSL and/or ELL shall ensure that a proportionate share of such rate support is fully credited to the jurisdiction that provided such rate support in establishing the net book investment to be included in rates in that jurisdiction when the unit becomes operational.

E. Agreements of Specified Parties with Respect to Certain Potential Future Generation in the City of New Orleans

ENO and CCNO agree as follows:

(1) ENO will use reasonable diligent efforts to pursue the development of at least 120 MW of new-build peaking generation capacity within the City of New Orleans. As part of this commitment, ENO will fully evaluate Michoud or Paterson, along with any other appropriate sites in the City of New Orleans, as the potential site for a combustion turbine ("CT") or other peaking unit to be owned by ENO, or by a third party with an agreed-to PPA to ENO. This evaluation will take into consideration, among other material considerations, the results of the Michoud site analysis that was completed in connection with the Summer 2014 RFP.

(2) ENO commits to use diligent efforts to have at least one future generation facility located in the City of New Orleans.

(3) The commitments set forth in this Section II.E are subject to mutually satisfactory resolution of all material considerations, including, without limitation: (a) financial feasibility for ENO; (b) affordability for ENO customers; (c) economic feasibility in comparison to other potential projects, locations, or alternatives; (d) timely rate recovery; (e) regulatory jurisdiction over such facility(ies) to the extent not owned by ENO; and (f) consistency with sound utility practice and planning principles.

F. Required Regulatory Approvals

This Settlement Agreement is conditioned upon the timely receipt of all required regulatory approvals, including but not limited to:

(1) FERC approval of this Settlement Agreement;

(2) FERC approval of the establishment of a separate TPZ for ENO under the MISO Tariff;

(3) FERC approval of the transmission payment arrangement among ENO, ELL, and EGSL in accordance with this Settlement Agreement;

(4) FERC approval of the amendment to the JPZ Agreement for the current Entergy Louisiana transmission pricing zone;

(5) Approval of the Settlement Agreement by the LPSC, CCNO, and PUCT; and

(6) FERC acceptance or approval, or the effectiveness of the filings described in Sections II.A(2) and II.B(4) above.

G. Other Agreements of All Settling Parties

All Settling Parties agree as follows: