

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

FILED

STATE OF LOUISIANA

2018 JUN 11 P 4: 34

NO. 18-3471

DIVISION "T"

SECTION 14  
DISTRICT COURT

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

VERSUS

THE COUNCIL OF THE CITY OF NEW ORLEANS

FILED: \_\_\_\_\_

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DEPUTY CLERK

ANSWER AND AFFIRMATIVE DEFENSES TO PETITION FOR JUDICIAL REVIEW

NOW INTO COURT, through undersigned counsel, comes The Council of the City of New Orleans ("Defendant" or "Council") for an Answer to Plaintiffs' Petition for Judicial Review as follows:

At stake in this case is whether New Orleans will continue to have an **unacceptable risk of cascading outages and blackouts** of potentially long duration or whether the Council's approval of a safe, efficient, all-weather, fast-start electric power plant will be sustained. With the deactivation of the massive and inefficient Michoud generating station, New Orleans now has no reliable source of fast-start, local electric generation, which makes the City unreasonably dependent on heavily constrained transmission lines from the west side of the City and forced to import power from other areas without local voltage and reliability support.

Unlike other jurisdictions that have multiple transmission pathways from numerous directions, New Orleans is surrounded by water on three sides, a vital point that Plaintiffs fail to disclose to this Court. Specifically, under certain prescribed test circumstances, the **evidence showed that approximately 49,000 customers would lose electric service suddenly and be out of service for a matter of days or even weeks**. Under these circumstances, Entergy New Orleans, LLC ("ENO" or "Company") would not be in compliance with the standards set by the North American Electric Reliability Corporation ("NERC"). NERC requires each Transmission Planner (in this instance, ENO) to perform annual Planning Assessments of its portion of the transmission system to determine whether, under a wide variety of contingencies, the system is able to continue to perform in accordance with the Standard. According to Advisors' witness Philip J. Movish, the

results of ENO's Assessment "indicate that after the retirement of the Michoud Units, and without adding any new generation, ENO's system is presently at risk of transmission reliability violations."<sup>1</sup> Under NERC Transmission Reliability Standards, a Corrective Action Plan is required to insure the future transmission reliability of ENO's system. In this docket, ENO has provided its plan, which includes the construction of NOPS, based upon its performance of analyses to fully mitigate such transmission reliability risks. Failure to present a viable Corrective Action Plan could lead to fines imposed on ENO of up to \$1 million per day.

The evidence also clearly demonstrated a need for a local power plant to meet peak demand during extremely hot (*e.g.*, extensive air conditioning usage) and cold (*e.g.*, polar vortex) times of the year. In addition, the current situation makes the City **more vulnerable to extended storm and hurricane outages** because there is no local power source to assist with voltage support when the already limited transmission lines, which are heavily clustered in the same pathway, are damaged by storms.

Plaintiffs disingenuously state that the Council's experts have testified that upgrading existing transmission lines is the lowest cost option. They fail, however, to disclose to the Court the explicit, repeated and essential testimony of multiple experts that the transmission option had not been proven to be viable. Transmission experts provided uncontroverted testimony that it could take **eight to ten years to complete these upgrades** and the ability to accomplish this type of construction is highly uncertain.

In addition, ENO would need to obtain approval to upgrade transmission lines through densely populated communities outside the Council's jurisdiction, making the argument for New Orleans to build a reliable power plant even more compelling. The willingness of other jurisdictions to enable transmission upgrades for New Orleans that disrupt their own communities is by no means assured.

Plaintiffs also fail to disclose the extensive expert testimony describing how transmission lines serving New Orleans are already heavily constrained and, therefore, taking lines out of service for upgrades would intensify an already unacceptable risk of system failure and cascading outages. For this reason, **time is of the essence** because the City's electric system has been vulnerable since

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<sup>1</sup> Direct Testimony of Philip J. Movish, p 14:9-11 (Nov. 20, 2017).

the Michoud power plant was deactivated in June 2016 and the Council's experts have continuously warned the City of this vulnerability.

There is also substantial and uncontroverted evidence in the record demonstrating that the **emissions levels** of the Reciprocating Internal Combustion Engine ("RICE") units chosen by the Council are **well within the levels permitted by state and federal regulations**. In addition, based on expert testimony provided by ENO, the RICE units will represent a significant **reduction** in allowable emissions compared to the allowable emissions from the deactivated Michoud units. Also, those emissions from the RICE units are **dissipated** before they reach the fence line to concentrations well below the limits for public breathing level air based on federal air quality standards.

Based on the emissions allowed under ENO's current Michoud permit, the proposed RICE unit emissions **represent an average 77.3% reduction in criteria pollutants** pursuant to the EPA's air quality standards compared to the two old Michoud units retired in 2016. Plaintiffs also fail to disclose to this Court that the generating units selected by the Council are a proven technology that many regulators have safely and effectively deployed throughout the United States and the world. Recently, respected state regulators and city councils, including Michigan, Hawaii, Tucson, Arizona and the City of Denton, Texas, have approved construction of the same technology chosen by the Council in this case in order to support transmission voltage, insure reliability and support the addition of renewables, which are intermittent resources.

### **OVERVIEW OF COUNCIL PROCEEDING**

In June 2016, ENO filed an application at the Council seeking approval to build a new and highly efficient electric generating unit at its Michoud location in New Orleans East.<sup>2</sup> This new generating unit would be one element in a plan to replace approximately 781 megawatts ("MW") of power at the Michoud site that had been deactivated in 2016 because the plant was more than 50 years old, was inefficient and required significant investments to continue operating safely. ENO's initial request, which remained a part of the application throughout, was for a 226 MW natural gas combustion turbine ("CT"). For several reasons, ENO supplemented its application to add a 128

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<sup>2</sup> Application of Entergy New Orleans, Inc. for Approval to Construct New Orleans Power Station and Request for Cost Recovery and Timely Relief, Docket No UD-16-02 (June 20, 2016) ("Application").

MW natural gas RICE unit as an alternative. The project is generally referred to as the New Orleans Power Station ("NOPS").

The Council established and conducted an **extremely extensive evidentiary and public process** to consider ENO's proposal. ENO held at least twenty-one public meetings regarding the project, including meetings in every Council district. There were multiple opportunities for parties and members of the public to address the Council regarding the proposal at public Utility, Cable, Telecommunications and Technology Committee ("UCTTC") meetings and at the Council's public hearing specifically addressing the NOPS issue. The Council heard a combined total of **more than thirteen hours of public comment and discussion** at the February 21, 2018 UCTTC meeting and the March 8, 2018 full Council meeting.

A total of ten parties participated in the docketed NOPS proceeding established by the Council; all parties were represented by legal counsel. Among the parties, twenty-four expert witnesses were presented amassing **more than 2,800 pages of testimony and other evidence**. The parties also conducted numerous depositions and exchanged more than thirty sets of written requests for information that produced voluminous responses from ENO and other parties. A five-day evidentiary hearing was conducted before the Council's Hearing Officer<sup>3</sup> where all parties presented their positions and cross-examined witnesses. Finally, all parties had an opportunity to fully outline their positions and supporting legal authority in post-hearing briefs. It should be noted that all active parties, in fact, submitted post-hearing **briefs totaling nearly five hundred pages** of argument and authority for the Council's consideration. This extremely well developed record forms a very substantial evidentiary foundation upon which the Council made its decision.

### **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.<sup>4</sup> 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.<sup>5</sup>

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<sup>3</sup> The Honorable Jeffrey S. Gulin is based in Maryland and has been presiding over New Orleans City Council utility dockets for the past two decades.

<sup>4</sup> La. Const. art. 6, §§ 4-6 (1974), Home Rule Charter of the City of New Orleans, art. III, § 3-101(1).

<sup>5</sup> Home Rule Charter of the City of New Orleans, art. III, § 3-130(1); *see also State ex rel. Guste v. Council of City of New Orleans*, 309 So.2d 290, 293 (La.1975).

The **standard of judicial review** of rate making determinations has been detailed by the Louisiana Supreme Court on numerous occasions, mainly concerning orders of the Louisiana Public Service Commission (“LPSC”).<sup>6</sup> The LPSC has regulatory and rate making powers over all public utilities in this state, except those operating in New Orleans and regulated by the Council.<sup>7</sup> **The regulatory principles and legal analysis are the same for both the LPSC and the Council.**

The Supreme Court has held that an order of the LPSC should not be overturned unless it is **arbitrary and capricious, a clear abuse of authority, or not reasonably based upon the factual evidence presented.**<sup>8</sup> The function of the reviewing court is not to re-evaluate and re-weigh the evidence, or to substitute its judgment for that of the regulator.<sup>9</sup> The Supreme Court further held that the LPSC’s interpretation and application of its own orders deserve great weight because the LPSC is in the best position to apply them.<sup>10</sup> Just as the LPSC has exclusive regulatory and rate making powers over public utilities in its jurisdiction, the Council has exclusive regulatory and rate making authority over public utilities in New Orleans.<sup>11</sup> The Louisiana Supreme Court has specifically stated that the proper standard of review over the Council’s decisions in this regard is the arbitrary and capricious standard.<sup>12</sup>

Therefore, regarding the regulatory and rate making authority of the Council, Louisiana law, in clear deference to that authority, **requires that the court limit its review to a determination of whether the decision of the Council is reasonable and not arbitrary or capricious based solely on the record presented.** There is no *de novo* review in these matters and therefore this Court should refrain from merely substituting its judgment for that of the Council.<sup>13</sup>

As both the LPSC and the Council are regulators of public utilities and experts in their knowledge of that field, Louisiana courts apply the same standard of review to the Council as they

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<sup>6</sup> *Gordon v. Council of City of New Orleans*, 9 So.3d 63 (La. 2009) citing *Entergy Louisiana, LLC v. Louisiana Pub. Serv. Comm’n*, 990 So.2d 716, 723 (La. 2008) (citing *Entergy Gulf States, Inc. v. Louisiana Pub. Serv. Comm’n*, 766 So.2d 521, 525 (La. 2000); *Entergy Louisiana, Inc. v. Louisiana Pub. Serv. Comm’n*, 717 So.2d 217, 218) (La. 1998).

<sup>7</sup> *Gordon v. Council of City of New Orleans*, 9 So.3d at 72.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *State ex rel. Guste v. Council of City of New Orleans*, 309 So. 2d at 294.

do to the LPSC.<sup>14</sup> The **burden** of showing that an order is arbitrary, capricious or abusive of the regulator's authority is **on the party attacking that order**.<sup>15</sup> Plaintiffs cannot meet their burden of proof in this case because the Council's decision was based on substantial and persuasive evidence in the record on each and every issue raised.

**AND NOW FURTHER ANSWERING PLAINTIFFS' PETITION**, the Council states as follows:

**1.**

The allegations contained in Paragraph 1 of Plaintiffs' Petition do not require an answer; however, to the extent that an answer is required, those allegations are denied.

**2.**

The allegations contained in Paragraph 2 of Plaintiffs' Petition are denied. No federal, state or local laws were violated when the Council approved ENO's request to construct NOPS. Further, all Council rules, regulations and policies were followed throughout the entire proceeding including the public hearings conducted by the UCTTC and the full City Council. At no time prior to Council approval of ENO's NOPS application on March 8, 2018, did the Council predetermine any issues raised in the proceeding. **The Council's decision was based on the extensive evidentiary record in the case, which record was developed over nearly two years of litigation.** Contrary to Plaintiffs' assertions, the Council, in Resolution R-18-65, adopted all necessary provisions to protect ratepayers from potential risks associated with the project and the record is devoid of any credible evidence supporting the conditions that Plaintiffs' now argue should have been imposed on ENO.

**3.**

The allegations in Paragraph 3 of Plaintiffs' Petition contain a legal conclusion and, therefore, do not require a response.

**4.**

The allegations contained in Paragraph 4 of Plaintiffs' Petition are denied for lack of sufficient information to justify a belief therein.

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<sup>14</sup> *Gordon v. Council of City of New Orleans*, 9 So.3d at 72.

<sup>15</sup> *Dixie Elec. Membership Corp. v. Louisiana Pub. Serv. Comm'n*, 441 So. 2d 1208 (1983).

**5.**

The allegations contained in Paragraph 5 of Plaintiffs' Petition are denied for lack of sufficient information to justify a belief therein.

**6.**

The allegations contained in Paragraph 6 of Plaintiffs' Petition are denied for lack of sufficient information to justify a belief therein.

**7.**

The allegations contained in Paragraph 7 of Plaintiffs' Petition are denied for lack of sufficient information to justify a belief therein.

**8.**

The allegations contained in Paragraph 8 of Plaintiffs' Petition are denied for lack of sufficient information to justify a belief therein.

**9.**

The allegations contained in Paragraph 9 of Plaintiffs' Petition are denied except to admit that the Council is the governing body with the power of supervision, regulation, and control over public utilities providing service within the City of New Orleans.

**10.**

The allegations contained in Paragraph 10 of Plaintiffs' Petition are denied except to admit that ENO filed its Application in June 2016. ENO's Application speaks for itself and is the best evidence of its contents. The record in this proceeding is the best evidence of the number of witnesses that testified.

**11.**

The allegations contained in Paragraph 11 of Plaintiffs' Petition are denied except to admit that ENO filed Supplemental Testimony in November 2016. ENO's Supplemental Testimony speaks for itself and is the best evidence of its contents.

**12.**

The allegations contained in Paragraph 12 of Plaintiffs' Petition are denied except to admit that Plaintiffs filed testimony in January 2017. Plaintiffs' testimony speaks for itself and is the best evidence of its contents.

13.

The allegations contained in Paragraph 13 of Plaintiffs' Petition are denied except to admit that ENO filed a motion requesting a suspension of the procedural schedule in February 2017, which was subsequently granted by the Hearing Officer in March 2017.

14.

The allegations contained in Paragraph 14 of Plaintiffs' Petition are denied except to admit that ENO filed a 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 ("Supplemental Application") on July 6, 2017. ENO's Supplemental Application speaks for itself and is the best evidence of its contents.

15.

The allegations contained in Paragraph 15 of Plaintiffs' Petition are denied except to admit that Plaintiffs' filed supplemental testimony in October 2017. Plaintiffs' supplemental testimony speaks for itself and is the best evidence of its contents. **Furthermore, the allegations in this paragraph are self-serving conclusions wholly unsupported by any specific data, studies or analyses or other credible evidence in the record.**

16.

The allegations contained in Paragraph 16 of Plaintiffs' Petition are denied except to admit that the Advisors filed a Motion to Strike Portions of Dr. Beverly Wright's testimony, because certain parts of Dr. Wright's testimony contained legal opinions and conclusions that are beyond the scope of her expertise and qualifications as clearly stated in the Hearing Officer's order dated November 24, 2017.

17.

The allegations contained in Paragraph 17 of Plaintiffs' Petition are denied except to admit that the Advisors filed direct testimony of five expert witnesses on November 20, 2017. **Plaintiffs grossly mischaracterize the Advisors' testimony.** According to Advisors' witness Joseph W. Rogers, "of the cases modeled, the economically preferred alternative appears to be construction of transmission upgrades and 100 MW of solar capacity. This alternative compares favorably under a significant range of capacity market price forecasts. However, as Advisors' witness Movish explains, reliance upon this transmission alternative poses potentially excessive risks to ENO's



customers"<sup>16</sup> and is not a realistic alternative. Mr. Rogers also strongly recommended the "128 MW project...due to its better fit with ENO's load and capability needs especially when considering the Council's 2% DSM Goal, superior heat rate, operational flexibility, and black start capability in the event that New Orleans becomes disconnected from the regional transmission grid."<sup>17</sup>

**18.**

The allegation contained in Paragraph 18 of Plaintiffs' Petition is admitted.

**19.**

The allegation contained in Paragraph 19 of Plaintiffs' Petition is admitted.

**20.**

The allegations contained in Paragraph 20 of Plaintiffs' Petition are denied except to admit that an evidentiary hearing before the Hearing Officer began on December 15, 2017, and concluded on December 21, 2017.

**21.**

The allegations contained in Paragraph 21 of Plaintiffs' Petition are denied except to admit that on April 19, 2018, the Council adopted Motion M-18-137 denying Plaintiffs' Petition for Rehearing, which was filed on April 9, 2018, and clarifying that the Council, in approving ENO's request to construct NOPS did not disturb the Hearing Officer's ruling regarding the exclusion of designated portions of Dr. Wright's testimony thereby effectively denying the Plaintiffs' appeal of that decision.

**22.**

The allegations contained in Paragraph 22 of Plaintiffs' Petition are denied except to admit that on January 22, 2018, the Hearing Officer issued an Order Certifying the Official Administrative Record and designated the proceeding, Council Docket UD-16-02, officially closed. The Hearing Officer's January 22, 2018 order speaks for itself and is the best evidence of its contents.

**23.**

The allegations contained in Paragraph 23 of Plaintiffs' Petition are denied except to admit that the Council has undertaken an extensive public process to evaluate this case in an open and transparent manner. **There have been over twenty-one public meetings regarding the proposal, including meetings in every Council district.** There have been multiple opportunities for parties

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<sup>16</sup> Direct Testimony of Joseph W. Rogers, 3:1-9 (Nov. 20, 2017).

<sup>17</sup> *Id.*, 3:10-15.

and members of the public to address the Council regarding the proposal at public UCTTC meetings and at the Council's public hearing specifically addressing the NOPS issue. **The Council heard a combined total of more than thirteen hours of public comment and discussion at the February 21, 2018 UCTTC meeting and the March 8, 2018 full Council meeting.** A total of ten parties participated in the docketed proceeding established by the Council, and twenty-four expert witnesses represented by all active parties, submitted more than 2,800 pages of testimony and evidence in this matter.

The parties also conducted numerous depositions and exchanged more than thirty sets of written requests for information. **A five day evidentiary hearing was conducted before the Council's Hearing Officer where the parties were able to present their positions and cross-examine witnesses.** Finally, all parties had an opportunity to fully outline their positions and present supporting legal authority in post-hearing briefs. It should be noted that all active parties, in fact, submitted post-hearing briefs totaling nearly five hundred pages of argument in this matter for the Council's consideration. This extremely well developed record forms a substantial foundation upon which the Council made its decision.

#### 24.

The allegations contained in Paragraph 24 of Plaintiffs' Petition are denied. Based upon sworn testimony in the record of the Council proceeding, the RICE units represent a significant reduction in air emissions and groundwater usage from that of Michoud Units 2 and 3 that were deactivated in 2016, but had operated at that site since 1963 and 1967, respectively.

The Council, in its resolution approving the RICE units, declined to disregard the expertise of the United States Environmental Protection Agency ("EPA") and the Louisiana Department of Environmental Quality ("LDEQ") with regard to air emissions, as Plaintiffs requested. The Council recognized that those agencies have considerable expertise and regulatory authority regarding air emissions. The Council also found that the record before it in this case did not support the Council creating a new regulatory standard regarding air emissions, or determining how such a standard would be developed, applied or enforced. **The Council, therefore, found it appropriate and reasonable to condition its approval of the plant upon ENO demonstrating compliance with all local, state, and federal laws applicable to the plant, including all environmental laws and regulations set forth by the EPA and the LDEQ.**

25.

The allegations contained in Paragraph 25 of Plaintiffs' Petition are denied except to admit that the Council did adopt Resolution R-16-506 in the NOPS docket. ENO's 2015 Integrated Resource Plan ("IRP") process identified the need for a 194 MW CT. ENO subsequently filed its original NOPS application requesting approval to construct a 226 MW CT. At the time Resolution R-16-506 was adopted, the Council was extremely concerned that ENO had not provided an adequate explanation in the IRP record for a CT larger than 194 MW. The increased size of the proposed CT had potentially significant implications, particularly for energy efficiency, renewables integration and demand side management ("DSM"). Further, the Council believed ENO had not "made its case" for the larger CT.<sup>18</sup> The Council also noted that very little information had been provided to the parties that would allow the Council or its Advisors to reach a conclusion regarding the appropriate size of the proposed CT.<sup>19</sup>

The Council also stated that its concerns regarding the increased size of the proposed CT and the implications, particularly for energy efficiency, renewables integration, and DSM, had likewise not been completely addressed by ENO.<sup>20</sup>

The Council's Advisors and other parties had begun conducting formal discovery and producing requested information in the NOPS docket regarding the proposed project. On September 19, 2016, the Council's Advisors requested that ENO perform additional IRP modeling using its AURORA resource planning software, which would include multiple, updated expansion plans and scenarios in order to assist the Council in determining whether the construction of NOPS is necessary and in the public interest.

ENO agreed to perform the additional modeling, which was critical to the Council in its obligation to (1) insure that ratepayers receive the most reliable electric and gas service at the lowest reasonable cost, and (2) achieve potentially cost effective renewable resources and energy efficiency/demand side measures during ENO's resource planning horizon.<sup>21</sup> The Council required the results of the additional AURORA modeling be provided before the NOPS procedural schedule

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<sup>18</sup> Resolution R-16-506 at 7 (Nov. 3, 2016) *citing* Resolution R-16-263 (July 14, 2016).

<sup>19</sup> Resolution R-16-506 at 7.

<sup>20</sup> *Id.* at 8.

<sup>21</sup> *Id.*

became effective. Otherwise, Resolution R-16-506 speaks for itself and is the best evidence of its contents.

26.

The allegations contained in Paragraph 26 of Plaintiffs' Petition are denied. **The Louisiana Supreme Court has squarely rejected the contention that a violation of due process occurs when the regulator's consultants and staff members take an adversarial stance in hearings and then advise the regulator regarding its decision.**<sup>22</sup>

The *Gulf States* Court firmly supported the LPSC's regulatory process, including the legislative nature of its proceedings and the propriety of the dual role of its consultants and staff, which is fundamentally the same as the Council's process. Further, with respect to Plaintiffs' claim that the Council's Advisors acted as a "*de facto*" trier of fact by providing the Council with a draft resolution and order in this case, *Gulf States* recognized that it is standard agency practice for staff members to prepare the opinions adopted by the agency and such practice does not violate any party's due process rights.<sup>23</sup>

The Louisiana Fourth Circuit has described the due process argument, which was made by the utility, as a contention "that it had been denied due process because the Council used its legal and technical staff during both the evidentiary and the decisional phases of the hearing process," and that this was a prohibited "commingling of functions."<sup>24</sup> The *Alliance* Court clearly rejected Plaintiffs' argument stating:

The law, both federal and state, is that a "separation of functions" is required in adjudicative proceedings, **but not in legislative proceedings**. The federal Administrative Procedure Act requires separation of functions in adjudicative proceedings, but explicitly exempts "proceedings involving the validity or application of rates, facilities, or practices of public utilities."<sup>25</sup>

**The Court went on to uphold essentially the same process used in NOPS to conclude that it was legislative and not adjudicative, and that the dual function of the Advisors was**

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<sup>22</sup> *Gulf States Utils. Co. v. Louisiana Pub. Serv. Comm'n*, 578 So. 2d 71 (La. 1991).

<sup>23</sup> *Id.*

<sup>24</sup> *Alliance for Affordable Energy, Inc. v. Council of City of New Orleans*, 578 So. 2d 949, 968 (La. Ct. App.), writ granted *sub nom. Alliance for Affordable Energy, Inc. v. Council of the City of New Orleans*, 585 So. 2d 554 (La. 1991), and writ granted, 585 So. 2d 555 (La. 1991), and vacated *sub nom. Alliance for Affordable Energy v. Council of City of New Orleans*, 588 So. 2d 89 (La. 1991).

<sup>25</sup> *Id.* (Emphasis added).

**appropriate and not a violation of state or federal law.**<sup>26</sup> Additionally, if Plaintiffs were correct (which they are not) that the Council's proceeding regarding NOPS was adjudicative not legislative, **Plaintiffs would need to be disqualified from participating in this case because they have had numerous *ex parte* communications with Councilmembers to advocate their positions.** These types of *ex parte* communications are acceptable in a legislative process, but are strictly prohibited in judicial proceedings.

## 27.

The allegations contained in Paragraph 27 of Plaintiffs' Petition are denied. As noted above, the Louisiana Supreme Court has squarely held that the contention that a violation of due process occurs when the regulator's consultants and staff members take an adversarial stance in hearings and then advise the regulator regarding its decision has been rejected by the federal courts.<sup>27</sup>

The *Gulf States* Court went on to firmly support the LPSC's regulatory process, including the legislative nature of its proceedings and the propriety of the dual role of its consultants and staff, which is fundamentally the same as the Council's process. Further, with respect to Plaintiffs' claim that the Council's Advisors acted as a "*de facto*" trier of fact by providing the Council with a draft resolution and order in this case, *Gulf States* recognized that it is standard agency practice for staff members to prepare the opinions adopted by the agency and such practice does not violate any party's due process rights.<sup>28</sup>

The Louisiana Fourth Circuit has described the due process argument, which was made by the utility, as a contention "that it had been denied due process because the Council used its legal and technical staff during both the evidentiary and the decisional phases of the hearing process," and that this was a prohibited "commingling of functions."<sup>29</sup> The *Alliance* Court clearly rejected Plaintiffs' argument stating:

The law, both federal and state, is that a "separation of functions" is required in adjudicative proceedings, **but not in legislative proceedings.** The federal Administrative Procedure Act requires separation of functions in adjudicative proceedings, but explicitly exempts "proceedings involving the validity or application of rates, facilities, or practices of public utilities."<sup>30</sup>

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<sup>26</sup> *Id.*

<sup>27</sup> *Gulf States Utils. Co. v. Louisiana Pub. Serv. Comm'n*, 578 So. 2d at 82.

<sup>28</sup> *Id.*

<sup>29</sup> *See supra* n.23.

<sup>30</sup> *Id.* (Emphasis added).

The Court went on to uphold essentially the same process used in NOPS to conclude that it was legislative and not adjudicative, and that the dual function of the Advisors was appropriate and not a violation of state or federal law.<sup>31</sup>

**28.**

The allegations contained in Paragraph 28 of Plaintiffs' Petition are denied except to admit that the Council, by Resolution R-18-65, approved ENO's request to construct the RICE units at the Michoud site.

**29.**

The allegations contained in Paragraph 29 of Plaintiffs' Petition are denied. **Louisiana courts have consistently held that regulatory proceedings such as the NOPS proceeding are legislative in nature and not adjudicatory.** As noted above, the Louisiana Supreme Court has squarely held that there is no violation of due process when the regulator's consultants and staff members take an adversarial stance in hearings and then advise the regulator regarding its decision.<sup>32</sup>

The *Gulf States* Court went on to firmly support the LPSC's regulatory process, including the legislative nature of its proceedings and the propriety of the dual role of its consultants and staff, which is fundamentally the same as the Council's process. Further, with respect to Plaintiffs' claim that the Council's Advisors acted as a "*de facto*" trier of fact by providing the Council with a draft resolution and order in this case, *Gulf States* recognized that it is standard agency practice for staff members to prepare the opinions adopted by the agency and such practice does not violate any party's due process rights.<sup>33</sup>

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The law, both federal and state, is that a "separation of functions" is required in adjudicative proceedings, **but not in legislative proceedings.** The federal Administrative Procedure Act requires separation of functions in adjudicative

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<sup>31</sup> *Id.*

<sup>32</sup> *Gulf States Utils. Co. v. Louisiana Pub. Serv. Comm'n*, 578 So.2d at 82.

<sup>33</sup> *Id.*

<sup>34</sup> *See supra* n.23.

proceedings, but explicitly exempts “proceedings involving the validity or application of rates, facilities, or practices of public utilities.”<sup>35</sup>

The Court went on to uphold essentially the same process used in NOPS to conclude that it was legislative and not adjudicative, and that the dual function of the Advisors was appropriate and not a violation of state or federal law.<sup>36</sup>

### 30.

The allegations contained in Paragraph 30 of Plaintiffs' Petition are denied. When negotiations to terminate the 30-year-old Entergy System Agreement began under the auspices of the Federal Energy Regulatory Commission (“FERC”), it was vital to the Advisors that ENO have **access to reliable capacity and energy at a reasonable cost.** The resource sharing and cost-allocation arrangements under the 30-year-old System Agreement had provided significant benefits to New Orleans, and the end of that arrangement was potentially detrimental to ENO’s customers, particularly with the clock already winding down on the remaining life of the Michoud plant.

The proceedings surrounding the termination of the System Agreement took place in several public venues. A filing by Entergy Services, Inc. (“Entergy”) at FERC triggered an intervention period, which allowed any interested parties to intervene in FERC’s public proceeding regarding the proposal to terminate the System Agreement. Once that intervention period had elapsed, FERC set the proceeding for settlement discussions facilitated by a FERC Administrative Law Judge (“ALJ”).<sup>37</sup> The Advisors negotiated with ENO and the other parties to the case, on behalf of the Council, and a settlement between all parties to the case was ultimately reached.

On August 14, 2015, Entergy filed the settlement in the public proceeding at FERC.<sup>38</sup> The Settlement Agreement was subject to review and approval by the Council as well as by the other regulatory commissions party to the Settlement Agreement. The Settlement Agreement resolved a host of issues. **Among these, the Settlement Agreement provided that ENO would explore the possibility of developing peaking generation in New Orleans. It did not mandate, pre-select or pre-approve any particular resource, or any particular site.**

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<sup>35</sup> *Id.* (Emphasis added).

<sup>36</sup> *Id.*

<sup>37</sup> *Entergy Services, Inc.*, Combined Notice of Filing #2, Docket Nos. ER14-75-000, *et al.* (Oct. 15, 2013). *Entergy Services, Inc.*, 149 FERC ¶61,262 (2014).

<sup>38</sup> Settlement Agreement of Entergy Services, Docket Nos. ER14-75, *et al.* (Aug. 14, 2015) (“Settlement Agreement”).

Further, the agreement did not assure that any resource would be approved for construction in the City. It reflected the Council's concern about the deactivation of Michoud, which ENO had long relied on to support reliability in the City, at the same time that Entergy was terminating the resource sharing contract that had benefitted New Orleans for decades. In light of this, the settlement established ENO's commitment to examine the potential of a local resource needed for reliability.

**To the extent that ENO identified an appropriate resource and location, any approval was subject to the full public interest determination that the Council undertakes in evaluating any request by ENO to add generation to its portfolio of resources serving New Orleans which is precisely what the Council's NOPS proceeding accomplished.**

With respect to Plaintiffs' claim that the Council's Advisors and ENO reached some agreement that violated Plaintiffs' due process rights, it should be noted that the public, including the **Plaintiffs herein, had numerous opportunities to weigh in on the Settlement Agreement.** Before approving the Settlement Agreement, the Council provided all parties affected by it, opportunities to understand the proposal, submit comments, and have their views considered.<sup>39</sup>

The Council established a procedural schedule that allowed the parties to the proceedings addressing the System Agreement termination (Docket Nos. UD-13-03 and UD-13-04), and members of the public, to submit comments and reply to comments regarding the proposed Settlement Agreement. **All of this input was considered by the Council in deciding whether to approve the settlement.** Consistent with the Council's practice generally, the process included the publication of notice of the proceedings.

**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, including the Plaintiffs herein.**

On November 5, 2015, the Council adopted Resolution No. R-15-524, which found the FERC Settlement Agreement, including ENO's commitment to use reasonable diligent efforts to pursue development of a peaking resource in the City, to be just and reasonable and in the public interest.<sup>40</sup> The Resolution was made available to the public in the Council's usual manner and was

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<sup>39</sup> Resolution No. R-15-437 at 4 (Sept. 3, 2015).

<sup>40</sup> Resolution No. R-15-524 at 12 (Nov. 5, 2015).



discussed at a Council UCTTC meeting, which was recorded on video, broadcast and made available over the Council's website.<sup>41</sup>

### 31.

The allegations contained in Paragraph 31 of Plaintiffs' Petition are denied except to admit that on April 19, 2018, the Council adopted Motion M-18-137 denying Plaintiffs' Petition for Rehearing, which was filed on April 9, 2018, and clarifying that the Council, in Resolution R-18-65 approving ENO's request to construct NOPS, did not disturb the Hearing Officer's ruling regarding the exclusion of designated portions of Dr. Wright's testimony, and thereby effectively denying the Plaintiffs' appeal of that decision.

As stated by the Hearing Officer in his November 24, 2017 order granting the Advisors' motion to strike portions of Dr. Wright's supplemental testimony, all of the testimony that the Advisors sought to strike was "clearly outside of the expertise of Dr. Wright."<sup>42</sup> Specifically, Dr. Wright's "interpretations of FERC proceedings, legal settlements, Council resolutions, and Council proceedings, are all clearly beyond her professed expertise."<sup>43</sup>

### 32.

The allegations contained in Paragraph 32 of Plaintiffs' Petition are denied. ENO and the Council's Advisors provided extensive sworn testimony in the 2,800-page evidentiary record addressing the transmission option that Plaintiffs preferred. **The Council evaluated all expert testimony related to the transmission option, including testimony from witnesses on behalf of ENO, the Council's Advisors and Plaintiffs.** The positions of each party regarding the transmission option were discussed at length in Resolution R-18-65 ("NOPS Resolution").

**ENO experts stated that transmission upgrades are not a viable alternative to constructing NOPS.**<sup>44</sup> ENO's experts testified that transmission can only move power around, it cannot produce electrical energy, capacity or much-needed dynamic reactive power in the Downstream of Gypsy ("DSG") load pocket.<sup>45</sup> ENO's analysis also determined that five transmission upgrades need to be constructed in the absence of NOPS, and that there are significant

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<sup>41</sup> Videos of Council meetings are available in the Council's on-line archives, [http://www.nolacitycouncil.com/video/video\\_legislative.asp](http://www.nolacitycouncil.com/video/video_legislative.asp).

<sup>42</sup> Memorandum and Order, Docket UD-16-02, at 3 (Nov. 24, 2017).

<sup>43</sup> *Id.* at 4.

<sup>44</sup> Resolution R-18-65 at 111 (Mar. 8, 2018).

<sup>45</sup> *Id.*

concerns regarding constructability of those upgrades, including soil condition, obstructions, and environmental challenges that would increase the cost of construction.<sup>46</sup> ENO submitted testimony that the planned outages required to make these upgrades would span many months over many peak hours and that getting the required permissions for enough planned outages to construct the upgrades could take years because the planned outages can only occur at the lowest load times. ENO's witnesses expressed skepticism that it can be done at all.<sup>47</sup>

**Council Advisors' witness Philip J. Movish, who has over 47 years of transmission and distribution system planning experience, testified that he had significant concerns about the constructability and timing issues surrounding the transmission upgrade projects that ENO had identified.** The Council also took note that Advisors' witness Joseph Rogers did conclude that of the cases modeled, the economically preferred alternative appeared to be construction of transmission upgrades and 100 MW of solar capacity instead of constructing NOPS.<sup>48</sup> However, Mr. Rogers emphasized that the Council should not base its decision in this docket solely on economics and that he believes that **reliance on this Transmission Alternative posed potentially excessive risk to ENO's customers.**<sup>49</sup>

Thus, contrary to Plaintiffs' argument that the Council is required to select the option that is considered the least cost, the Council reached its decision after considering a well-developed record that consisted of nearly 2,800 pages of written testimony and other documents. **Cost was one of many considerations properly evaluated by the Council.**

### 33.

The allegations contained in Paragraph 33 of Plaintiffs' Petition are denied. **No party, including the Plaintiffs, submitted any credible evidence in the record of this proceeding demonstrating that imposing conditions associated with the cost of the proposed project were either appropriate or necessary.**

Plaintiffs raised the issue of cost conditions at the eleventh hour, after the evidentiary record had been submitted to the Council and days prior to the UCTTC meeting where the NOPS proposal was discussed. Without credible evidence in the record supporting the imposition of cost conditions on ENO's construction of NOPS, the Council could not have reasonably imposed such conditions.

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 127.

<sup>49</sup> *Id.*

Also, it should be pointed out that the Council did approve a monitoring plan that requires ENO to provide periodic updates on the project, including any potential changes in costs and the construction schedule. This will allow the Council to closely monitor the overall costs of the project and to be in a better position to avoid any unnecessarily large cost overruns.

**34.**

The allegations contained in Paragraph 34 of Plaintiffs' Petition are denied. The referenced section of the New Orleans City Code ("Code") is entitled "classification" and discusses how parties to a regulatory proceeding are classified. Subsection (b) merely designates the proper party to represent the City as an *ex officio* party. **It does not create any special procedural or substantive rights.**

It is absurd to suggest that the Council failed to secure the participation of the Department of Finance in the NOPS proceeding. In fact, the Department of Finance was **treated as a party**. A representative of the Department of Finance is listed on the official service list in all ongoing Council utility dockets and receives copies of all pleadings, discovery and other notices required to be served upon parties in each respective proceeding.

**It should be noted that it was Plaintiffs who objected to the Department of Finance's nonparticipation. The Department of Finance itself raised no objections, nor did it join in Plaintiffs' objection.** Nonparticipation by the Department of Finance in a Council regulatory proceeding does not prohibit, or in any way restrict, the Council from carrying out its utility regulatory functions, as conferred by the City's Home Rule Charter. The Council cannot force the Department of Finance to participate.

All legislative powers are vested in the Council.<sup>50</sup> The power to grant utility franchises and to regulate such utilities is **exclusively granted to the Council.**<sup>51</sup> Plaintiffs' argument would provide the executive department with a "**pocket veto**" over any utility regulatory action simply by not submitting a "report" or "recommendations," all based upon a Code provision that classifies parties.

Clearly, the Code cannot abrogate the powers granted in the Charter. Moreover, the Code itself confirms the primacy of the separation of powers. By defining the scope of the utility rules in Section 158-232, which states:

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<sup>50</sup> Home Rule Charter of the City of New Orleans, art. III, § 3-101.

<sup>51</sup> *Id.*, §§ 3-128 - 3-130.

The provisions of this article [on utility regulation] shall not restrict, condition, or impair the powers of the council, as the legislative branch of municipal government under the home rule charter of the city.

**The Plaintiffs' argument is not only baseless and unenforceable, it is contrary to law.** It would call into question decades of Council regulatory proceedings and cede the Council's exclusive authority to the executive branch.

**35.**

The allegations contained in Paragraph 35 of Plaintiffs' Petition are denied. There is absolutely no credible evidence in the record of this proceeding that indicates that ENO has violated the terms of any City ordinance or regulation, including those regulations and requirements contained in the sections of the Code that address flood damage protection.

To the contrary, the Council found that there are many proven advantages to the Michoud site, including ENO's ownership of the site, the availability of the gas pipeline, transmission and distribution interconnections and administrative building facilities. The Council also noted ENO's long history of operating a plant at Michoud and resulting in-depth knowledge of the site. The record also supports the position that adding generation at **the Michoud site will beneficially support ENO's transmission reliability overall.**<sup>52</sup>

With respect to the project being located in a high-risk flood area, the Council found that the evidence clearly indicated that significant mitigation of the potential for flooding at the Michoud site has occurred, in particular the Hurricane and Storm Damage Risk Reduction System implemented by the South Louisiana Flood Protection Authority-East. In addition, the record shows that ENO's construction design was raised so that the Top of Concrete level is **above both the Federal Emergency Management Agency guidance and the level of flooding seen during Katrina.** Finally, the Council found the Coastal Protection Restoration Authority's 2017 Master Plan's prediction of no flooding at the site under the worst-case scenario to be very persuasive.<sup>53</sup>

In addition, as a condition of the Council's approval of ENO's NOPS proposal, ENO is required to demonstrate its compliance with all applicable laws and regulations by filing with the Council all permits granted, and orders or rulings issued by any local, state or federal agency with

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<sup>52</sup> Resolution R-18-65 at 170.

<sup>53</sup> *Id.* at 170-171.

jurisdiction over the project, including, but not limited to the EPA and LDEQ.<sup>54</sup> Thus, **Plaintiffs' claims that ENO violated local and/or federal flood regulations is baseless and unsupported by any evidence in the record of this case.**

**36.**

The allegations contained in Paragraph 36 of Plaintiffs' Petition are denied. The Council was convinced by the arguments made by its Advisors and ENO that Louisiana case law regarding environmental justice does not support a finding that environmental discrimination would be perpetuated by the siting of a natural gas plant at Michoud.

The case of *North Baton Rouge Environmental Association v. Louisiana Department of Environmental Quality* was particularly instructive.<sup>55</sup> In that case, the court found that in a situation where a plant was being built at the same site where a plant previously operated and had polluted more, and was located in an industrial area with no indication that the original zoning was intentionally racist, the granting of a permit did not constitute environmental racism solely due to the proximity of an African American neighborhood.<sup>56</sup>

As clearly stated in the Council's decision, the Advisors successfully argued that this case compares favorably to *North Baton Rouge*, in that Orleans Parish is already in compliance with all of the EPA's National Ambient Air Quality Standards, whereas the area at issue in *North Baton Rouge* was not.<sup>57</sup>

The Michoud site is a sparsely populated industrial site where a power plant has been operating for decades, and, based on expert testimony, **the proposed RICE units will represent a significant reduction in allowable emissions** compared to the allowable emissions from the deactivated Michoud units.<sup>58</sup> Moreover, the appellants in the *North Baton Rouge* case argued that the initial siting of the facility was racially discriminatory, whereas in this case, even Dr. Wright admits in her testimony that when the original Michoud plant was undertaken, New Orleans East was largely undeveloped wetlands and sparsely populated.

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<sup>54</sup> *Id.* at 171.

<sup>55</sup> *Id.* at 161.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 162.

<sup>58</sup> *Id.*

In providing additional protection for New Orleans residents, the Council conditioned its approval on ENO meeting all EPA and LDEQ regulations and requirements.<sup>59</sup> Based on the evidence in the record, and ENO's compliance with all applicable environmental regulations, the Council correctly concluded that there is no potential for a disproportionate adverse impact on minority neighborhoods in New Orleans East.

**37.**

The allegations contained in Paragraph 37 of Plaintiffs' Petition are denied except to admit that the record upon which the Council rendered its decision is the evidentiary record.

**38.**

The allegations contained in Plaintiffs' Prayer for Relief do not require a response, but in an abundance of caution if a response is required, those allegations are denied.

**AND NOW**, further answering Plaintiffs' Petition, Defendant, The City Council of New Orleans, avers as follows:

**FIRST AFFIRMATIVE DEFENSE**

Plaintiffs have failed to state a cause of action against Defendants upon which relief can be granted.

**SECOND AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred by the doctrine of *res judicata* and/or collateral estoppel.

**THIRD AFFIRMATIVE DEFENSE**

The Council exercised its exclusive regulatory authority by rendering a thorough decision that was based on an extensive evidentiary record that included testimony and other evidence submitted by all parties to the proceeding.

**WHEREFORE**, the Council prays that this Answer to the Petition for Judicial Review be deemed good and sufficient and that, after due proceedings are had, there be judgment rendered the Council's favor: (1) denying Plaintiffs' request to reverse the Council's decision and vacate Council Resolution R-18-65; (2) denying Plaintiffs' request to recuse the Council's Advisors; and (3) denying Plaintiffs' request to reopen the evidentiary record to take additional evidence, all with prejudice and at Plaintiffs' expense.

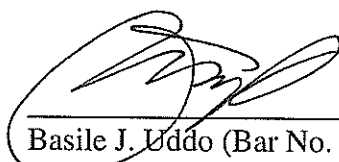
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<sup>59</sup> *Id.* at 188.

The Council further prays that because time is of the essence in this matter an expedited briefing schedule and a date for oral argument be established by this Honorable Court so that the parties may submit their legal arguments to the Court and for all general, special and equitable relief as the nature of the case may permit.

Respectfully submitted,

**DENTONS US LLP**



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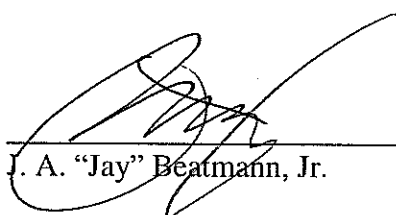
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been served upon counsel for all parties to this proceeding by facsimile, and/or email, and/or by depositing in the United States mail, properly addressed and first class-postage prepaid, on this 11th day of June, 2018.



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J. A. "Jay" Beatmann, Jr.