

April 15, 2019

BY HAND DELIVERY

Ms. Lora W. Johnson
Clerk of Council
Council of the City of New Orleans
City Hall, Room IE09
1300 Perdido Street
New Orleans, LA 70112

In Re: *Application of ENO for a Change in Electric and Gas Rates Pursuant to Council Resolutions R-15-194 and R-17-504 and for Related Relief*, CNO Docket UD-18-07

Dear Ms. Johnson:

Enclosed please find an original and three (3) copies of the *Reply Memorandum to Entergy New Orleans, LLC's Opposition to Advisors' Motion to Strike Portions of Entergy New Orleans, LLC's Rebuttal Testimony* in the above referenced docket, which Advisors to the City of New Orleans are requesting that you file into the record along with this letter in accordance with your normal procedure.

Sincerely,



Jay Beatmann
Counsel

JAB/dpm
Enclosures

cc: Official Service List for UD-18-07

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

**REVISED APPLICATION OF
ENTERGY NEW ORLEANS, LLC
FOR A CHANGE IN ELECTRIC AND
GAS RATES PURSUANT TO
COUNCIL RESOLUTIONS R-15-194
AND R-17-504 AND FOR RELATED
RELIEF**

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DOCKET NO. UD-18-07

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

On April 10, 2018, Entergy New Orleans, LLC ("ENO" or "Company") filed its Opposition to the Advisors' Motion to Strike Portions of Entergy New Orleans, LLC's Rebuttal Testimony ("Opposition"). ENO's improper rebuttal testimony fails to properly address direct testimony submitted by the Council's Advisors and blatantly attempts to expand the Company's direct case by adding new models and data. ENO overtly seeks to augment their case-in-chief in a manner that would severely prejudice the Advisors and other parties in this case and destroy the procedural integrity of the Council's regulatory proceeding. The Council's Advisors further submit this Reply to the Company's Opposition.

ENO acknowledges in its Opposition that rebuttal evidence must be confined to matters raised by the Advisors and others in their direct case¹ but the Company fails to provide a credible explanation as to why this principle should be ignored in this proceeding. The Company further asserts that rebuttal evidence may be offered if it is "probative and relevant" provided the substantive rights of all parties are protected.² Applying this logic as justification for ENO's

¹ ENO Opposition at 3.

² *Id.*

actions would compromise the procedural integrity of any case simply by introducing new evidence at any stage of the process. Based on ENO's interpretation of the rules of evidence, as long as the Company offers evidence that is considered probative and relevant, regardless of when it is submitted, such evidence would be admitted as long as other parties' rights are not violated. In that framework, ENO could presumably offer new evidence at each and every stage of the proceeding (e.g., direct case, rebuttal, rejoinder and hearing) with impunity. This is problematic for two reasons. First, it would improperly permit new evidence in rebuttal testimony, rejoinder testimony and potentially in other subsequent phases of the proceeding that the law clearly states "should be confined" to matters brought out by the opposition.³ New evidence improperly submitted as rebuttal severely prejudices other parties, including the Advisors, as it requires adequate time for parties to fully analyze it and effectively respond. Rate cases before the Council already employ a very limited time period for parties to submit and respond to various rounds of written testimony. ENO's inclusion of new models and analyses at this juncture, would have an incurable prejudicial effect on the parties' ability to respond to evidence that is properly included in the Company's rebuttal testimony.

Such a process would also potentially jeopardize the Council's ability to render a decision within the timeframe legally prescribed by the New Orleans City Code. ENO's "probative and relevant" argument would allow the Company to move the goalpost by submitting new analyses each time another expert witness effectively refuted ENO's positions in the case.

This assertion was squarely rejected in the Hearing Officer's Order dated March 14, 2014 in Council Docket UD-13-01, attached hereto as Exhibit A, which stated that "whether testimony

³ *State ex rel Guste v. Nicholls College Foundation*, 592 So.2d 419 (La. App. 1 Cir. 1991).

is probative and relevant is inapposite to whether it constitutes proper rebuttal.”⁴ The Order also makes clear that improper rebuttal testimony will not be admitted when the Company “was accorded ample opportunity to adduce such testimony at the proper time, and its failure to do so cannot be cured, absent good cause, by improperly disguising such testimony as ‘rebuttal,’ when it is not rebuttal.”⁵

I. ENO’S NEW EMPIRICAL CAPITAL ASSET PRICING MODEL SHOULD HAVE BEEN PRESENTED IN ITS REVISED DIRECT TESTIMONY AND SHOULD BE STRICKEN FROM THE RECORD AS IMPERMISSIBLE REBUTTAL

In its attempt to introduce a completely new and distinct ROE model in its rebuttal testimony in this case, ENO tries to somehow link Mr. Hevert’s Empirical Capital Asset Pricing Model (“ECAPM”) to testimony provided by Advisor witness James Proctor. However, a closer look reveals that Mr. Hevert introduces the ECAPM in an attempt to continue to justify his ROE recommendations in this case because his own CAPM analysis cannot support the level of ROE presented in his Revised Direct Testimony. It is important to note that Mr. Hevert now attempts to employ the ECAPM because the ECAPM model “adjusts for the CAPM’s tendency to underestimate returns for companies that (like utilities) have Beta coefficients less than the market mean of 1.00 and over-estimate returns for relatively high-Beta coefficient stocks.”⁶

Mr. Hevert used the CAPM in his Revised Direct⁷ and updated the analysis in his Rebuttal.⁸ He used Value Line Betas and Bloomberg Betas (which are lower than Value Line Betas) in his Revised Direct.⁹ The betas used in Mr. Hevert’s updated CAPM analysis in Rebuttal are even lower than the earlier betas used in his Revised Direct Testimony. Interestingly, he clearly stated

⁴ Order dated March 14, 2014 at 2.

⁵ Order at 2-3; citing *State ex rel Guste v. Nicholls College Foundation*, 592 So.2d 419 (La. App. 1 Cir. 1991).

⁶ Hevert Rebuttal at 44.

⁷ Revised Direct Testimony of Robert B. Hevert dated September 21, 2018 at 30-34.

⁸ Rebuttal Testimony of Robert B. Hevert dated March 22, 2019 at 153-154.

⁹ Hevert Revised Direct at 33, lines 17-19.

in his Revised Direct Testimony that the CAPM and Bond Yield Risk Premium models were entitled to greater weight than the Discounted Cash Flow (“DCF”) model. Mr. Hevert testified that “[o]n balance, I believe the DCF-based results should be viewed very carefully, and that somewhat more weight should be afforded the Risk Premium-based methods.”¹⁰ **Conspicuously, Mr. Hevert did not discuss the CAPM’s “tendency” to underestimate returns in his original testimony in this case.** Since Mr. Hevert’s updated CAPM analysis does not support ENO’s request for a 10.75% ROE, **he now offers a new financial model (ECAPM) in rebuttal in an attempt to continue to justify his unsupportable ROE recommendation.** According to Mr. Hevert, the ECAPM has the effect of mitigating the issue of the CAPM underestimating returns for low beta coefficient firms (like utilities).¹¹ If Mr. Hevert believed the Value Line Betas and Bloomberg Betas were deficient and unreliable for use in the CAPM analysis, he was certainly aware of that before filing his Revised Direct Testimony and should have offered the ECAPM at that time. The opportunity to present this new analyses is gone and the parties to this proceeding, including the Advisors, should be able to rely on all financial models, supporting analyses and data included as part of the Company’s direct case.

New financial models and data are not properly presented in rebuttal and therefore the portions of Mr. Hevert’s testimony identified in the Advisors’ motion should be stricken.

II. ENO’S IMPROPER REBUTTAL TESTIMONY DOES NOT RESPOND TO TESTIMONY PROVIDED BY ADVISOR WITNESS PROCTOR

ENO’s Opposition states “Mr. Hevert’s Rebuttal Testimony regarding his ECAPM directly responds to and counteracts the fallacy in Mr. Proctor’s testimony concerning the relationship between Beta coefficients and business risk.”¹² ENO also states, “Mr. Hevert notes that at page

¹⁰ *Id.* at 77, lines 15-17.

¹¹ Hevert Rebuttal at 49, lines 6-12.

¹² Opposition at 4-5.

33 of Mr. Proctor's Direct Testimony, he argues that declining Beta coefficients among his proxy group provide 'additional evidence business risk is decreasing.'"¹³ Further, the Company's Opposition states "Mr. Proctor specifically relies on decreasing Beta coefficients for his proxy group to argue that business risk has declined for electric utilities, stating that '[t]hroughout 2018 the equity beta coefficients for the proxy group used in my CAPM analyses have declined substantially.'"¹⁴

This is a mischaracterization of Mr. Proctor's testimony. Mr. Proctor's discussion of Betas took place in the context of business risk as it relates to Tax Cut and Jobs Act of 2017 ("TCJA 2017") not with respect to his CAPM recommendations. This is a critical distinction that ENO ignores in its attempt to submit new evidence on rebuttal. On page 32 of his Direct Testimony, Mr. Proctor asks the question "ARE YOU AWARE OF ANY EVIDENCE THAT SUGGESTS BUSINESS RISK HAS DECLINED FOR ELECTRIC UTILITIES DUE TO THE TCJA OF 2017?" In response, Mr. Proctor answers affirmatively and proceeds to discuss the relationship of business risk, betas and the TCJA 2017. Nothing in Mr. Proctor's Direct Testimony could conceivably be viewed as a basis for allowing ENO to now introduce new financial models and theories for the Company's unsupported positions in its direct case.

With respect to the portions of Mr. Hevert's Rebuttal Testimony beginning at page 68 regarding new empirical methods that can be used to assess the effect of an event such as the TCJA on utility stock performance, including the "event study" or "cumulative abnormal return" analysis, this testimony is also improper and should be stricken.

ENO's Opposition states that Mr. Hevert "specifically notes that at page 46 of Mr. Proctor's Direct Testimony, he concludes that "any over-all negative impact from the TCJA of

¹³ Id. at 5.

¹⁴ Id.

2017 on ENO's business risk is short-lived and immaterial...."¹⁵ ENO also states "Mr. Hevert testifies that an "event study" is commonly used by practitioners to test the effects of events on **stock prices** over time. He then presents the results of his "event study" based on the TCJA to "counteract" Mr. Proctor's unsupported claims made in his Direct Testimony."¹⁶

Here again, ENO misrepresents Mr. Proctor's testimony and then attempts to use the mischaracterization as a basis for improperly introducing new analysis on rebuttal. The citation from Mr. Proctor's Direct Testimony which Mr. Hevert uses as a basis for the inclusion of the "events study" testimony referred to any over-all negative impact from the TCJA of 2017 on ENO's business risk. **Mr. Proctor made no claims about stock prices or the effects of events on stock prices.** Mr. Proctor does discuss the impacts of the TCJA of 2017 on ENO's business risk, cash flow, net present value of cash flow, accumulated deferred income tax expense, financial leverage and many other factors in his Direct Testimony.¹⁷ Mr. Proctor does not, as ENO claims, mention ENO's or other utility stock prices in the context of this discussion. Thus, ENO's improper rebuttal testimony in this regard is falsely predicated on a mischaracterization of the Advisors' testimony and should be stricken.

III. CONCLUSION

The Company's "sandbagging" tactic of adding new data and analyses in its rebuttal testimony to bootstrap its inadequate direct testimony would violate the Council's procedure and cause extreme prejudice to the other parties to this docket, including the Advisors. This maneuver is untimely, administratively costly to New Orleans ratepayers, and undermines the Council's structured regulatory process. For these reasons, the Advisors' Motion to Strike should be granted.

¹⁵ Opposition at 7.

¹⁶ *Id.*

¹⁷ Direct Testimony of James M. Proctor at 31-46.

RESPECTFULLY SUBMITTED:



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Advisors to the Council of the City of New Orleans

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served upon the following parties of record by electronic mail on this 15th day of April 2019.



J. A. "Jay" Beatmann, Jr.

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

**APPLICATION OF ENTERGY)
LOUISIANA, LLC FOR AUTHORITY)
TO CHANGE RATES, APPROVAL OF)
FORMULA RATE PLAN AND FOR)
RELATED RELIEF FOR OPERATIONS)
IN ALGIERS)**

DOCKET NO. UD-13-01

ORDER

On February 26, 2014, the Council Advisors filed a motion to strike certain portions of the rebuttal testimony and related exhibits previously filed by ELL. On March 5, 2014, AARP filed an identical motion and adopted the memorandum in support filed by Council Advisors. Also on March 5, 2014, ELL filed its reply opposition to the motion.

A telephone hearing was held on March 7, 2014 and all parties participated. At the conclusion of the telephone hearing, the Hearing Officer directed the parties to begin negotiations to resolve the matter with particular efforts directed toward the possibility that the Hearing Officer might deny the motion *if* ELL agreed to sufficiently *extend* its waiver of its right to have the Council render its determination by "May, 2014" as provided in Resolution R-13-159. *See* Resolution at 7.

Within the time frames prescribed by the Hearing Officer, ELL and Council Advisors informed the Hearing Officer via electronic mail correspondence that, while ELL was willing to extend the deadline for Council determination until June 30, 2014, the parties were unable to

reach an agreement as to resolution of the motions and requested the Hearing Officer to render a ruling.

Arguments

Council Advisors and AARP (“Movants”) argue that certain portions of the Rebuttal testimony filed by ELL on February 18, 2014, specifically certain updated cost of service adjustments, substitution of a new “MISO Cost Recovery Mechanism” for the “Incremental Transmission Revenue Recovery rider,” and updates to the “ROE,” constitute improper rebuttal testimony and should be stricken from the record. Moreover, they argue that ELL “cannot change the Council-ordered test year ... without Council authorization.” Advisors’ Memorandum at 6.

In reply, ELL argues that (1) Movants mischaracterize Council Resolution R-13-159 in a manner which would unlawfully “limit plant pro forma adjustments to a six-month post-test period.” ELL Memorandum at 8; (2) the rebuttal testimony constitutes proper rebuttal of prior criticisms contained in written testimony of Movants; and (3) in any event, all of the testimony is highly probative and relevant.

Discussion


The Hearing Officer fully concurs with ELL’s third argument – all of the rebuttal testimony at issue is highly probative and relevant. Indeed, the Hearing Officer would much prefer that the Council have the benefit of reviewing said testimony and supporting data before rendering a determination. But whether testimony is probative and relevant is inapposite to whether it constitutes proper rebuttal. ELL was accorded ample opportunity to adduce such testimony at

the proper time, and its failure to do so cannot be cured, absent good cause, by improperly disguising such testimony as "rebuttal," when it is not rebuttal. *See e.g., State ex rel Guste v. Nicholls College Foundation*, 592 So.2d 419 (La. App. 1 Cir. 1991). Indeed, because the testimony and data *are* highly relevant, the Hearing Officer expressed at the hearing a desire to explore every possibility of allowing the testimony, so long as any prejudice to Movants could be mitigated by a sufficient extension of time for Movants to analyze the new testimony and data, conduct discovery, and prepare their surrebuttal testimony. Unfortunately, the Hearing Officer has concluded that the approximate four-week extension of the procedural schedule offered by ELL does not allow sufficient time. Accordingly, the Hearing Officer must reluctantly grant the motions.

Given that the Hearing Officer has found that the testimony and exhibits at issue must be stricken as improper rebuttal, there is no need to address the parties' interpretations of Council Resolution R-13-159.

IT IS HEREBY ORDERED that the motions of Council Advisors and AARP to strike portions of the rebuttal testimony and related exhibits filed by ELL are granted in full.

Signed this 14th day of March, 2014.



JEFFREY S. GULIN, HEARING OFFICER