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April 15, 2019

VIA HAND DELIVERY

Lora W. Johnson
Clerk of Council
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Re: *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 Relief: UD-18-07*

Dear Lora:

Enclosed please find original and two (2) copies of *Crescent City Power Users' Group's Reply to Entergy New Orleans, LLC's Opposition to, and Memorandum in Support of Council Advisors' Motion to Strike*.

Should you have any questions whatsoever, please do not hesitate to contact me.

Very truly yours,



Shannon Bell, Legal Assistant to
Luke F. Piontek & Christian J. Rhodes

Enclosure

cc: All Counsel of Record via email

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

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

**CRESCENT CITY POWER USERS' GROUP'S
REPLY TO ENTERGY NEW ORLEANS, LLC'S OPPOSITION
TO, AND MEMORANDUM IN SUPPORT OF,
COUNCIL ADVISORS' MOTION TO STRIKE**

NOW COMES, Crescent City Power Users' Group ("CCPUG"), through undersigned counsel, which respectfully submits this Reply to Entergy New Orleans, LLC's Opposition to, and Memorandum in Support of, Council Advisors' Motion to Strike Portions of Entergy New Orleans, LLC's Rebuttal Testimony ("Motion to Strike"), and in support thereof states:

BACKGROUND

On April 3, 2019, the Council Advisors filed the Motion to Strike concerning certain portions of the Rebuttal Testimony filed on behalf of Entergy New Orleans, LLC ("ENO") on March 22, 2019. On April 8, 2019, the Honorable Jeffrey Gulin issued an order providing, among other things, that any party wishing to file a reply to ENO's opposition to the Council Advisors' Motion to Strike, and in support of such Motion to Strike, could file such response on or before April 15, 2019. CCPUG hereby submits its reply in support of the Council Advisors' Motion to Strike.

As noted in the Council Advisors’ Motion to Strike and supporting memorandum, certain portions of ENO’s Rebuttal Testimony – namely, the Rebuttal Testimony of Robert B. Hevert at page 44, line 11 through page 50, line 2; page 68, line 8 through page 71, line 7; and page 153, line 8 through page 154 (Table 11) – contain new analyses and evidence that could have been, but were not, included in ENO’s Direct Testimony in this matter. These sections of Mr. Hevert’s Rebuttal Testimony, therefore, constitute “new” direct testimony, which is improper for inclusion in rebuttal testimony.

STANDARD OF REVIEW

Section 158-478 of the Code of the City of New Orleans (“City Code”) provides that prepared testimony in City Council proceedings make be stricken in whole or in part. Further, Section 158-476 of the City Code states, in pertinent part, that “Any evidence which would be admissible under the general statutes of the state, or under the rules of evidence governing proceedings in matters not involving a trial by jury in the courts of the state, shall be admissible before the council...” Turning to the Louisiana “rules of evidence governing proceedings in matters not involving a trial by jury in the courts of the state,” La. C.E. art. 611(E) establishes that a plaintiff in a civil case “shall have the right to rebut evidence adduced by [its] opponents.”

As set forth by the Council’s Advisors, rebuttal evidence should be confined to matters raised by the opposing party. *See Roberts v. Owens-Corning Fiberglas Corp.*, 2003-0248, p. 16 (La.App. 1 Cir. 4/2/04), 878 So.2d 631, 645, *writ denied*, 2004-1834 (La. 12/17/04), 888 So.2d 863 (*citing State ex rel. Guste v. Nicholls College Foundation*, 592 So.2d 418, 422 (La.App. 1 Cir. 1991); La. C.E. art. 611(E). *See also, Jordan v.*

Rapides Regional Medical Center, 2014-124, p. 7 (La.App. 3 Cir. 10/1/14), 153 So.3d 1223, 1228, *writ denied*, 2014-2560 (La. 2/27/15) 159 So.3d 1071 (finding no error in trial judge’s refusal to allow rebuttal testimony regarding a purported “antibiotic protocol” since no evidence of such protocol was previously admitted into evidence). Finally, the issue of whether to admit rebuttal evidence is “largely within the discretion” of the tribunal. *See State ex rel. Guste*, 592 So.2d at 422 (*citing* La. C.E. art. 611(E); *Combs v. Hartford Ins. Co.*, 544 So.2d 583, 588 (La.App. 1 Cir.), *cert. denied*, 550 So.2d 630 (La. 1989)).

ARGUMENT

As the Council Advisors note in their supporting memorandum, no witness to this proceeding utilized the Empirical Capital Asset Pricing Model (“ECAPM”) in their direct testimony. Mr. Hevert’s reliance on the ECAPM methodology in his Rebuttal Testimony, therefore, constitutes entirely new evidence. Being that this entirely new methodology is contained for the first time in Mr. Hevert’s Rebuttal Testimony, it is untimely. In addition, there is no evidence of any ECAPM analysis introduced by the Council Advisors’ Direct Testimony or by intervenors to this proceeding, consequently, Mr. Hevert’s new testimony falls outside the scope of proper rebuttal. Mr. Hevert’s new testimony regarding the ECAPM analysis should be stricken pursuant to Sections 158-476 and 158-478 of the City Code and La. C.E. art. 611(E).

Again, on pp. 68 through 71 of Mr. Hevert’s Rebuttal Testimony, he attempts to introduce a new analysis of the purported effect of events such as the Tax Cuts and Jobs Act (“TCJA”) on the performance of electric utility stocks. Mr. Hevert goes on to discuss

the “event study” and “cumulative abnormal return” analysis he performed in this section of his Rebuttal Testimony. *See* p. 68, l. 8 – p. 71, l. 7. This testimony concerning the effects of certain events, like the passage of the TCJA, on utility stock performance – similar to his new testimony regarding the ECAPM methodology – could have been raised in Mr. Hevert’s Direct Testimony and is, therefore, untimely. This new testimony also does not address any portion of the Council Advisors’ Direct Testimony or the direct testimony of any intervenor and, as such, is improper as rebuttal. There is no evidence of any “event study” or “cumulative abnormal return” analysis introduced by the Council Advisors’ Direct Testimony or that of other intervenors to this proceeding. Mr. Hevert’s new testimony regarding the “event study” or “cumulative abnormal return” analysis should be stricken pursuant to Sections 158-476 and 158-478 of the City Code and La. C.E. art. 611(E).

Finally, on pp. 153-154 and in Table 11 of Mr. Hevert’s Rebuttal Testimony, he summarizes his admittedly “Updated Results” concerning the new ECAPM and TCJA methodologies. For the same reasons discussed above, this section of Mr. Hevert’s Rebuttal Testimony is untimely and improper new direct testimony and should likewise be stricken.

The inclusion of such new direct testimony is not merely a procedural error. The subject new testimony buried in Mr. Hevert’s Rebuttal Testimony creates undue prejudice against all other parties to this proceeding. The parties to this proceeding other than ENO have limited time to respond to ENO’s Rebuttal Testimony. Prior to the filing of the Council Advisors’ Unopposed Motion to Modify Procedural Schedule which is

unrelated to the current Motion to Strike, the Council Advisors and intervenors had only four weeks to conduct any discovery regarding, and prepare responsive testimony addressing, ENO's Rebuttal Testimony. Had ENO's Rebuttal Testimony contained only proper retort to the Council Advisors' and intervenors' Direct Testimonies, this would have been sufficient time within which to respond. The insertion of new direct testimony, however, renders the four weeks within which to respond woefully inadequate.

Considering the applicable authorities, the identified sections of Mr. Hevert's Rebuttal Testimony constitute untimely evidence that does not "rebut evidence adduced by [ENO's] opponents," and, consequently, these sections should be stricken as improper rebuttal evidence.

CONCLUSION

Crescent City Power Users' Group urges this tribunal, after consideration of the law and argument set forth above, to grant the Council Advisors' Motion to Strike Portions of Entergy New Orleans, LLC's Rebuttal Testimony, and for all other relief available to it under the facts and the law.

Respectfully submitted:

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CERTIFICATE

I hereby certify that on this day a copy of the foregoing Crescent City Power Users' Group's Reply to Entergy New Orleans, LLC's Opposition to, and Memorandum in Support of, Council Advisors' Motion to Strike has been sent to the official service list by email, and/or served by United States mail, postage prepaid, through their representatives, at the following addresses:

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