February 19, 2019

To: Members of the Council of the City of New Orleans

Mr. Jason R. Williams, Councilmember-at-Large
Ms. Helena Moreno, Councilmember-at-Large
Mr. Joseph I. Giarrusso, District "A" Councilmember
Mr. Jay Banks, District "B" Councilmember
Ms. Kristen Gisleson Palmer, District "C" Councilmember
Mr. Jared C. Brossett, District "D" Councilmember
Ms. Cyndi Nguyen, District "E" Councilmember

Councilmembers:

During the recent UCTT Committee meeting on February 14, 2018, it became clear that there is significant confusion regarding the City Council's authority to deny Entergy the cost recovery of funds expended for the construction of the gas plant should the Council ultimately chose to cancel that plant. Entergy cannot simply wave a fist full of invoices at the City Council and be found to be entitled to ratepayer reimbursement for the expenditures.[1] Apparently, Entergy claims it has spent $96 million on the gas plant and that ratepayers must pay these costs regardless of whether the gas plant is constructed.

Statements by members of the Council that assume Entergy is entitled to the cost recovery are contrary to law and regulatory policy. A basic part of utility regulation is a

[1] With all due respect to Council member Moreno, the two options she described at the start of the UCTT Committee meeting, continued approval or cancellation of the gas plant, are not the only options available to the Council. **Draft Resolution 19-20** describes a third alternative, reopening the proceeding to consider evidence of alternatives which should have been presented during the evidentiary proceedings. Under this option, it is possible that the Council's ultimate conclusion may be to approve construction of the gas plant or some combination of the gas plant and other alternatives. Importantly, until this proceeding is completed, it will be impossible to determine how and whether Entergy's expenditures relate to the approved project.

decision-making process known as a prudence review in which a regulated utility, in this case Entergy, must prove that its expenditures were reasonable when incurred. The Council should initiate a prudence review to determine what costs, if any, should be recovered. The Council's should also be aware that Louisiana courts have established that in a prudence review the utility must "demonstrate that it went through a reasonable decision making process to arrive at a course of action and, given the facts as they were or should have been known at the time, responded in a reasonable manner." [2]

It is important for the Council to bear in mind that that prudence review is not a one-time process, but is a continuing obligation to make decisions based on on-going and updated information. In other words, the Council can administer more than one prudence review of expenses that Entergy proposes for cost recovery in order to address new facts or information that may require a change to a decision made in a prior prudence review. For this reason, Entergy's obligation to act in a prudent manner is a continuing one, and the Council is required as the regulator to enforce that obligation. The Council has an abiding responsibility to ensure rate-payers are not burdened with inappropriate costs.

Here are just a few examples where regulatory bodies or the utility itself addressed expenses that were incurred imprudently and therefore ineligible for cost recovery:

- *New Orleans:* In the early 1990s, the New Orleans City Council found that approximately $476 million of costs related to construction of a nuclear power plant had been imprudently incurred, because the utility failed in its oversight and management of its participation in the project construction. The Council specifically found that the utility had done virtually nothing to minimize its risks. However, the **Council decided not to permit $135 million** of the total costs to be passed onto ratepayers. On appeal, **the court found that none of**

[2] *Gulf States Util. Co. v. Louisiana Pub. Serv. Comm'n.,* 578 So.2d 71, 85 (La 1991).

the imprudently incurred costs could be passed through to ratepayers, but had to be borne by utility shareholders.[3]

- *Mississippi:* Following approval from the Mississippi Public Service Commission ("MPSC"), Mississippi Power & Light ("MPL") spent 10 years constructing a coal gasification power plant. When construction was nearly complete, the MPSC ordered the project halted notwithstanding MPL's expenditure of $7.5 billion on construction. After MPSC proceedings and negotiations, **ratepayers were shielded from having to pay $6.4 billion of the total construction costs**. The remaining costs were charged to the ratepayers to pay for the portion of the plant that was not cancelled and was actually serving customers. Thus, MPL recovered only a fraction of the costs of its approved but, later, cancelled power plant.[4]

- *Louisiana*: Entergy Louisiana halted the Little Gypsy rebuild project after other stakeholders made it clear to the utility that the power generated by this plant would be more expensive than power from other resources. In this instance, **Entergy Louisiana acted prudently to avoid the more expensive rebuild costs**, without waiting for a directive from the Louisiana Public Service Commission.

- *South Carolina:* The South Carolina Public Service Commission found that, starting in March 2015, SCG&E, the utility, intentionally misled the Commission about a failing nuclear plant construction project. In an effort to avoid being labeled imprudent, the **utility agreed not to charge ratepayers for any construction costs incurred from March 2015 until the project was cancelled in July 2017**. However, the SCPSC ultimately issued an order finding that the utility had been imprudent.

- *Arizona:* The Arizona Public Service Company, a utility, sought to recover expenses in cancelling the construction of Palo Verde Units 4 and 5 in California, a joint project proposed to be built by the Arizona Public Service in conjunction with other utilities. The Arizona Corporation Commission **disallowed cost recovery for construction expenses** because the decision to cancel the project was the result of imprudence by the utilities in failing to recognize the regulatory barriers and prepare contingencies in the negotiation of contracts.

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[3] *Alliance for Affordable Energy v. Council of the City Of New Orleans,* 578 So.2d 949 (1991). This decision was vacated by the Court at the request of the parties as part of the settlement agreement.
[4] *In Re: Encouraging Stipulation of Matters in Connection with the Kemper County IGCC Project*, Docket No. 2017-AD-112, Order dated February 6, 2018.

It is important emphasize that the duress Entergy attempts to exert on the Council to stand by the approval of the previous Council for a new gas plant is designed to force this Council to ignore established utility law and policy. Entergy incurred the expenses by its own actions and must accept the consequences of those actions.

Entergy's Unethical Behavior

On March 6, 2018, prior to the full Council's consideration of Entergy's application to construct the gas plant, several stakeholders sent a demand letter to the Council objecting to the manner in which the UCTT Committee meeting on the gas plant application was conducted. While at that time neither these stakeholders, the general public, or even the Council itself knew the exact nature of what had occurred at that meeting, Entergy knew because Entergy was responsible for the conduct that prevented residents of New Orleans from exercising their right to participate in the process. The investigator's report demonstrates that Entergy knew (or should have known) the actions being taken by the Hawthorn Group and Crowds on Demand and actively encouraged those actions to continue. If the Council's approval of the gas plant is rescinded, this decision will be the direct result of the unethical and possibly illegal conduct[5] of Entergy. Entergy cannot claim "good faith" when the very approval it is relying on occurred as a result of its unethical behavior. In the event that the plant is not constructed, the Council should find that Entergy is responsible for the costs associated with the cancelled plant since the cancellation of the plant would be the direct result of Entergy's own unethical disruption of the approval process.

[5] New Orleans Ordinance Sec. 158-52 ("It shall be unlawful and a misdemeanor for any person to intentionally or through gross negligence … to cause to be made any false or misleading representations of fact … in any proceeding or other matter commenced by an application or filing under this article.").

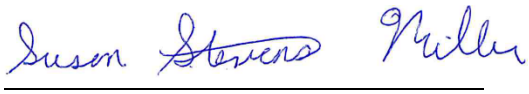
Entergy's Failure to Negotiate Contingency Plans in Design and Construction Contract(s)

The Council should find that Entergy's poorly structed EPC contracts also constitute imprudence. According to Council's Advisors testimony at the February 14, 2019 meeting, 80 percent of the costs Entergy claims it is entitled to recover stem from the EPC contract on the RICE units. Entergy, not its ratepayers, selects the firms which work on a construction project and negotiates the applicable contracts. Therefore, Entergy, not the ratepayers must bear the consequences of the utility's failure to negotiate appropriate terms.[6] In this instance, the consequences of Entergy's apparent failure to negotiate provisions protecting ratepayers from contingencies such as the cancellation of the project in the event that Entergy cannot obtain or retain all the permits necessary to construct the gas plant constitutes mismanagement and imprudence.[7]

The Council must not permit Entergy's unethical behavior to successfully block this Council from exercising its full authority to regulate Entergy. The Council should protect the ratepayers of New Orleans to the fullest extent possible by initiating an open and transparent prudence review of Entergy's claimed expenses. The Council should consider and adopt the resolutions recently made public, R-19-18, R-19-20, and R-19-17, to rescind the previous vote approving Entergy's application, reopen the record and require Entergy to submit all the analyses the Company was previously directed to provide, and fine Entergy at least $5 million for its unethical actions.

[6] Entergy's EPC on the RICE units is not in the gas plant application record. Thus, the parties were unable to review the sufficiency of the contract.
[7] For example, the Alliance fully expects that parties will appeal the LDEQ's decision to issue the air permit.

Respectfully submitted,



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