



November 30, 2018

By Hand Delivery

Ms. Lora W. Johnson,
CMC Clerk of Council
Room 1E09, City Hall
1300 Perdido Street
New Orleans, LA 70112

**Re. R-18-474: Show Cause Proceeding on Imposition of Sanctions against
Energy New Orleans, LLC, based upon Report of Independent
Investigators filed with the Council on October 29, 2018.**

Dear Ms. Johnson,

Please find enclosed an original and three (3) copies of the Alliance for Affordable Energy's Comments in the above- referenced resolution. Please file the attached communication and this letter in the record of the proceeding and return one time stamped copy to our courier, in accordance with normal procedures. If you have any questions, please do not hesitate to contact me.

Thank you for your time and attention.

Sincerely,

Logan A. Burke
Executive Director
Alliance for Affordable Energy

Comments regarding Council Resolution R-18-474: Show Cause Proceeding on Imposition of Sanctions against Entergy New Orleans, LLC, based upon Report of Independent Investigators filed with the Council on October 29, 2018.

These comments are in response to the New Orleans City Council's request for stakeholder input on the proposed sanctions set forth in Council Resolution R-18-474. The Alliance and other undersigned parties respectfully offer these recommendations to the Council in light of what has already been uncovered through the Council's investigation, and what remains to be discovered regarding Entergy New Orleans' ("ENO") behavior in the interest of obtaining approval of the New Orleans Power Station. The Alliance appreciates the opportunity to weigh in on such an important decision, as the Council considers the most appropriate response to New Orleans residents' rights and voices being trampled by the City's most powerful corporation.

A. The City Council Should Not Determine the Financial Penalty to be Imposed on ENO Until the Investigation is Completed.

On May 24 2018, the City Council initiated an independent third-party investigation of ENO to determine whether Entergy or some other entity paid or participated in paying actors to attend or speak at one or more public meetings in connection with ENO's New Orleans Power Station ("NOPS") application; and whether Entergy knew or should have known that such conduct occurred.¹ The independent investigators were expressly directed to 1) receive and review all documents and materials ordered produced; 2) to determine if all necessary documents were actually produced; and 3) to prepare and serve additional demands if necessary.

The report of the investigators, filed on October 29, 2018, found:

¹ Investigators Report at 3.

- Numerous individuals were paid to attend and/or speak in support of ENO;
- These attendees and speakers were commissioned to pose as citizens genuinely in support of NOPS;
- Payment and the obligation to pay flowed from ENO through ENO'S vendors to the individuals hired to attend or speak at meetings.
- ENO took no corrective action and continued to deny any knowledge of the improper activity even after it was clear that the conduct had occurred;
- ENO knew or should have known that such conduct occurred or reasonably might occur.²

One thing the Investigators Report makes crystal clear is that ENO was totally uncooperative throughout the investigation. The City Council incorrectly describes ENO's intransigence as merely "some delays by ENO with respect to certain documents and information requested" by the investigators.³ The Investigators expressly state that ENO failed to provide all documents related to the matter being investigated, all contracts related to the matter and all communications related to the matter.⁴ ENO also refused to produce relevant text messages. Instead, ENO raised inappropriate claims of privilege and simply refused to produce the information.⁵ The fact that ENO would attempt to assert a privilege against its regulator demonstrates how much disdain they have for the process and their regulator's important role in protecting the residents of New Orleans.

² See Resolution R 18-475 at 4.

³ Resolution R 18-475 at 3.

⁴ ENO even went so far as to refuse to permit the Investigators to interview certain ENO employees (Investigators Report at 29) and further refused to even inform the Investigators regarding the new roles of some employees. Investigators Report at 30.

⁵ Investigators Report at 7-8.

By failing to demand that ENO provide the information requested, the City Council is rewarding ENO's intransigence and thereby ensuring that this intransigence will continue in the future.

Moreover, the Investigators were tasked with determining what occurred at both the October 16, 2017 Meeting and the February 21, 2018 Meeting. While the Investigators provided a significant amount of information with regard to the October Meeting, there is little evidence and little discussion of the February Meeting. The only information regarding the February meeting is that 1) on January 11, 2018, ENO Chief Executive Officer Charles Rice requested that Hawthorne obtain 30 people to attend the February Meeting; 2) ENO refused to produce any further text messages from Mr. Rice that were sent after January 11, 2018; ENO moved up the time of its shuttle bus to ensure that its "supporters" arrived before the residents of East New Orleans; and 3) that only some of the individuals supplied by the Hawthorne Group wore the infamous orange t-shirts to this meeting.⁶

Tellingly, ENO refused to produce any texts after January 11, 2018. From January 11th until the February Meeting is the time period within which ENO would be planning with the Hawthorne Group regarding the actions which would be taken at the February Meeting.

Moreover, while the Investigators interviewed several ENO employees, the Investigators apparently only interviewed one member of the public who was prevented from attending the February Meeting, Mr. Pat Bryant.⁷ There are dozens of residents of New Orleans who were barred from attending the October and February Meetings due to the actions of ENO and its contractors. Certainly, the victims of ENO's actions should be a significant part of the City

⁶ Investigators Report at 18-19. (When asked why **some** folks wore the orange t-shirts again, Hammelman responded "we wanted to make sure **some** of the people showed up because that is what would happen organically.") *Id.* at 19.

⁷ The Investigators did not interview a single individual who was unable to enter the meeting room during the October Meeting.

Council's investigation. Many of these victims provided recorded statements to the investigators about their experience on February 21st, but these statements were not discussed in the final Investigators Report or exhibits.

Clearly, ENO's attitude toward the City Council and its role as ENO's regulator has not improved despite repeated admonishments by the Council. Once again, the City Council must decide if it will continue to tolerate this total lack of cooperation from an entity it regulates. Rather than simply accept ENO's failure to cooperate, the City Council should reopen the investigation, direct ENO to provide all information to the investigators that ENO previously refused to turn over and impose a fine of \$10,000 a day for every day ENO fails to provide the information requested.

- B. Resolution R 18-475 fails to even mention, let alone address, the harms to the residents of New Orleans intentionally created by ENO's actions.

As stated in Resolution R 18-475, the City Council is responsible for assuring that its proceedings relative to its utility regulatory function adhere to the highest standards of integrity, transparency, accuracy, efficiency, fairness and reliability.⁸ The City Council found that ENO's actions were extremely troubling, showed a complete disregard for the City Council's high standards, and undermined confidence in the regulatory system.⁹ The City Council also noted several other failures of ENO, including 1) the prolonged delays in implementing ENO's commitment to deploy 100 MW of renewable resources; 2) allowing a demonstrable decline in distribution system reliability; and 3) filing a rate case application that was contrary to a clear

⁸ Resolution R 18-475 at 2.

⁹ Resolution R 18-475 at 4.

mandate of the City Council.¹⁰ The City Council also notes that ENO's conduct "caused Council members, staff and Council Advisors to incur substantial hours of additional work to deal with the matter for the past seven months and will continue to cause additional work for the foreseeable future."¹¹

Finally, the City Council states that it "has become exasperated with ENO's 'tone deaf' actions."¹² The actions of ENO were more than merely tone deaf. ENO actively engaged in what can only be described as a conspiracy to deny the residents of New Orleans their right to participate in public meetings.

ENO instituted a long running campaign to win approval for NOPS. Over the course of several years, ENO faced growing opposition from residents of New Orleans. Eventually, ENO became concerned that their efforts to demonstrate support for NOPS were failing.¹³

As a result of this failure, ENO declared war on the residents of New Orleans and those organizations that represent the residents.¹⁴ According to Investigators, their investigation establishes that *numerous* individuals were paid to attend and/or speak in support of NOPS.¹⁵ These attendees and speakers were commissioned to pose as citizens genuinely supportive of NOPS.¹⁶ ENO itself prepared scripts for the speakers.¹⁷ Evidence shows that the Hawthorne Group secured at least 75 people and 10 speakers for the October public meeting after ENO stated that it was willing to pay for more than 50 and ENO apparently paid \$29,000 for the individuals' participation.¹⁸ ENO ultimately asked the Hawthorne Group to arrange for paid individuals to

¹⁰ Resolution R 18 -475 at 5-6.

¹¹ Resolution R 18-475 at 5.

¹² Resolution R 18-475 at 6.

¹³ Investigators Report at 3-4.

¹⁴ Investigators Report at 4. ("I am going to work with Chanel [Lagarde] to get an outside consultant ... to begin some type of **campaign/strategy against the alliance.**" Charles Rice email of August 31, 2017.)

¹⁵ Investigators Report at 3. (emphasis added).

¹⁶ Investigators Report at 3. Tellingly, when ENO tried to recruit real supporters, even from the ranks of its own employees, those people did not want to come.

¹⁷ Investigators Report at 36.

¹⁸ Investigators Report at 4-5.

pose as supporters at the February 21, 2018 meeting. Evidence also supports that ENO vetted the hired individuals talking points and “testimony”.¹⁹ Mr. Gary Huntley, ENO’s Vice President of Regulatory Affairs, admitted that ENO intentionally populated the meetings with pro-Entergy individuals in order to convince the City Council to approve NOPS.²⁰

While the Investigators did a remarkable job in ferreting out information from the Hawthorne Group and ENO (particularly in light of ENO’s intransigence), the Investigators failed to focus on the true victims of this fraud. As noted above, the Investigators only interviewed one individual who was barred from attending the February Meeting and did not interview a single individual effected by ENO’s use of actors at the October Meeting. The City Council asserts that, in determining the reasonableness of any penalty, one of the factors to be considered is “the nature and extent of the consequences of the conduct”.²¹ How can this factor be analyzed when the people directly affected by ENO’s actions are entirely left out of the discussion.

The proposed \$5 million penalty is not merely a slap on ENO’s wrist, it is a slap in the face to the residents of New Orleans who attended the public meetings and only wanted two minutes to look their Council members in the eye and tell them why they opposed the construction of NOPS. The City Council’s minor penalty will do nothing to remedy the harm to the direct victims of ENO’s fraud, nor will this slap on the wrist renew these individuals’ faith in the City Council’s process.

Any dollars that are collected from ENO as a sanction should benefit customers directly and immediately either as a flow back through bill credits that is itemized on bills so customers see the benefit or to support energy efficiency programs that will create multiple benefits for residents.

¹⁹ Investigators Report at 7.

²⁰ Investigators Report at 26.

²¹ Resolution R 18-475 at 7.

In addition to a more significant penalty, in which dollars should flow directly to customers, the Council should consider creating a fund to support the valuable work done by the community and organizations who faithfully represent New Orleans residents. The continued active participation of these organizations and individuals will aid the City Council in its obligation to ensure ENO operates in the public interest. Such funds are used in other jurisdictions to ensure the engagement and oversight of organizations who are working in the Public Interest and can show they have provided value through their engagement.

C. The proposed \$5 million penalty will not deter ENO's future conduct.

The City Council asserts that in determining the reasonableness of a penalty, one of the factors to be considered is "the level of the penalty that will deter future conduct so that bad conduct does not become simply a cost of doing business."²² The City Council also states that it has lost trust in management and that this loss of trust "makes deterrence a more pressing concern."²³

However, despite the City Council's asserted concern with deterring future conduct, the City Council proceeds to impose a penalty of only \$5 million, which is virtually guaranteed to simply become a cost of doing business for ENO. As a result of its actions, ENO received approval to build a \$210 million gas plant. ENO is expected to receive a return on this gas plant of approximately 10.5% after the plant is operational. Certainly, \$5 million is a small cost to pay to assure such a significant return. No reasonable person could envision that this penalty will in

²² Resolution R 18-475 at 7.

²³ Resolution R 18-475 at 7.

any manner impact ENO's attitude toward either the City Council or the residents of New Orleans.

Remarkably, the City Council based its imposition of this paltry penalty not only on ENO's horrendous conduct with regard to intentionally preventing New Orleans residents from participating in public meetings, but on ENO's years of intransigence and failure to follow the directives of its regulators.²⁴ Under the currently proposed sanctions, ENO is to be penalized only approximately \$1 million for each of its listed transgressions.

Finally, it is unclear how the City Council arrived at the \$5 million amount for the penalty. Apparently, this figure is based on the City Council's "finding" that ENO had a net income of \$44.5 million in 2017.²⁵ However, nothing in the Resolution explains how this figure was derived. Moreover, a company's "net" income can be easily manipulated, depending upon what amounts the company chooses to deduct from its gross income to arrive at the net income. Rather than use a suspect net income figure, the City Council should base the penalty on the revenues of ENO. Based on the revenues recently provided by ENO in its rate case application, a penalty of \$25 million would be approximately 5 % of ENO's revenues.

The Alliance has repeatedly warned that ENO's lack of cooperation will continue until there are real consequences for the Company's actions. Sadly, the City Council's proposed penalty actually constitutes little more than a rounding error to the Company. If the City Council truly wants to deter this type of conduct in the future, any proposed penalty must be of such a significant amount that ENO will have to be incentivized to avoid such conduct (and therefore the imposition of a second penalty) in the future.

D. The Investigators Report Provides Sufficient Evidence to Warrant the Rescinding the City Council's Approval of NOPS.

²⁴ Resolution R 18-475 at 5-6.

²⁵ Resolution R 18 – 475 at 7.

While the Investigators Report is incomplete, the Investigators found enough evidence to warrant the City Council concluding that the Resolution approving the construction of NOPS must be rescinded. To reiterate, the Investigators found that numerous individuals were paid to attend and/or speak in support of the ENO proposed gas plant; these individuals were commissioned to *pose* as citizens genuinely supportive of the gas plant; and ENO took no corrective action after news reports surfaced regarding the October Meeting. To the contrary, ENO, through Mr. Rice, doubled down and requested that Hawthorne use the same tactics for the February Meeting.

Furthermore, ENO unquestionably took these actions in an attempt to influence the City Council's vote on NOPS. ENO contracted with the Hawthorne Group "to ensure the *appearance* that they had overwhelming support for NOPS from a cross section of New Orleanians."²⁶ Similarly, "ENO's number 1 reason for recruiting speakers was to demonstrate to decision makers that ENO had support for the project."²⁷ Mr. Huntley admitted that ENO intentionally populated the meetings with pro-Entergy individuals in order to convince the City Council to approve NOPS.²⁸

The Investigators found that "there was never a justifiable reason to enter into such a contract with Hawthorne or anyone else."²⁹ More importantly, the Investigators determined that the "ENO subverted the process with fraudulent support."³⁰

In light of this overwhelming evidence that the City Council's process was corrupted, the proposed sanctions do little to signal that this conduct is not welcome in New Orleans. ENO

²⁶ Investigators Report at 56. (emphasis added).

²⁷ Investigators Report at 36.

²⁸ Investigators Report at 26.

²⁹ Investigators Report at 54.

³⁰ Investigators Report at 56. (emphasis added).

believed that it was critical to show support for NOPS to the City Council.³¹ Moreover, ENO concluded that generating “public” support was an integral component to ENO’s success in winning approval.³² Thus, ENO’s conduct was specifically designed to inappropriately influence the City Council’s decision regarding NOPS.

The City Council determined that ENO’s conduct impeded the Council’s purpose in holding an at-large public hearing, which was for the Council to hear opinions *of the public* regarding the matter.³³ Thus, the City Council has found that the process was unlawful. The investigation demonstrated that the public’s right to a fair and open public meeting process was intentionally, seriously, and repeatedly violated by ENO.

Unless a different remedy is approved, for the minimal cost of \$5 million, ENO receives approval of a plant which will earn the company millions more. It is difficult to fathom how making millions of dollars can be viewed as a deterrent. The City Council must stand up for the residents of New Orleans and rescind the approval of NOPS. Anything less will reward ENO for its fraudulent behavior and demonstrate to the residents of New Orleans that their participation in public meetings is irrelevant, and their wishes are immaterial.

CONCLUSION

The horrendous conduct of ENO has received national attention and is a black eye on the reputation of this City. As cogently stated by ENO employee Mr. Dunn, “people in the community suffer when people lie.”³⁴

³¹ Investigators Report at 44.

³² Investigators Report at 27.

³³ Resolution R 18- 475 at 5. (emphasis added).

³⁴ Investigators Report at 44.

The City Council has an opportunity to use its considerable authority to repair the damaged credibility of the regulatory process in our city and must take forceful action to ensure that the right of all residents to a fair, open and transparent process is never again violated in this manner. This action should include 1) rescinding approval of NOPS; 2) completing the investigation into ENO's conduct; and 3) after completion of that investigation, imposition of a penalty that is truly commensurate with ENO's conduct, and that would significantly and immediately benefit the people of New Orleans.

Respectfully,

Logan Burke
Executive Director of
Alliance for Affordable Energy
(504) 208-9761

Cherelle Blazer
Senior Campaign Representative, Louisiana and Arkansas
Sierra Club Beyond Coal Campaign
(214) 604-0425 (cell)

Pat Bryant
Member of
Justice and Beyond
pat46bryant@yahoo.com

Andy Kowalczyk
New Orleans 350, Sustainable Labor Group
1115 Congress St., New Orleans, LA 70117
a.kowalczyk350no@gmail.com

Marion Freistadt
1539 Adams St.
New Orleans, LA 70118
MARIONFREISTADT@YAHOO.COM