大成 DENTONS

Jay Beatmann
Counsel

jay.beatmann@dentons.com
D +1 504 524 5446

Dentons US LLP
650 Poydras Street
Suite 2850
New Orleans, LA 70130-6132
United States

大成 **Salans FMC SNR Denton McKenna Long**
dentons.com

May 13, 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 *Opposition to Entergy New Orleans, LLC's Motion to Strike Portions of Surrebuttal Testimony of Advisors' Witnesses James M. Proctor and Victor M. Prep* in the above referenced docket, which the Advisors to the Council for 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

RECEIVED
MAY 13 2019
BY:

MAY 13 4 24

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	))))))	**DOCKET NO. UD-18-07**

OPPOSITION TO ENTERGY NEW ORLEANS, LLC'S MOTION TO STRIKE PORTIONS OF ADVISORS' SURREBUTTAL TESTIMONY

On May 8, 2019, Entergy New Orleans, LLC ("ENO" or "Company") filed a Motion to Strike Portions of Surrebuttal Testimony of Advisors' Witnesses James M. Proctor and Victor M. Prep ("Motion"). The Advisors to the Council of the City of New Orleans submit this opposition to ENO's Motion.

All portions of the Advisors' surrebuttal testimony that ENO's seeks to strike are in direct response to arguments made by ENO in rebuttal.

I. MR. PROCTOR'S SURREBUTTAL TESTIMONY REGARDING GOLDMAN'S APPLICATION OF CAPM IS DIRECTLY RESPONSIVE TO ENO'S CRITICISM OF MR. PROCTOR'S APPLICATION OF CAPM

Mr. Hevert criticized the overall reasonableness of the Advisors' cost of equity recommendations.[1] The Advisors' surrebuttal testimony that ENO seeks to strike addresses Mr. Hevert's contention that Mr. Proctor's application of the CAPM is flawed and his findings, conclusions and recommendations regarding ENO's cost of equity are unreasonable. Among the arguments Mr. Proctor makes to address Mr. Hevert's criticisms includes demonstrating that Mr.

[1] Revised Rebuttal Testimony of Robert B. Hevert, Page 15, Line 20 through Page 19, Line 12 and Page 30, Line 4 through Page 32, Line 7.

Proctor's application of the CAPM is largely consistent with that of a large investment bank employed previously by Entergy.

In 2011 Entergy Corporation, the parent company of ENO, entered an agreement with ITC Holdings, Corp. ("ITC") to divest Entergy's transmission utility assets to ITC. As part of its due diligence for the transaction, Entergy employed Goldman, Sachs & Company ("Goldman") to evaluate the transaction. In the course of Goldman's review of the transaction, it estimated Entergy's cost of equity. Goldman's estimate for Entergy's cost of equity was based on the application of the CAPM and its equity beta.

Mr. Proctor explains in his surrebuttal testimony that the cost of equity for an investment in ENO's equity is essentially the same as the cost of equity for an investment in Entergy's transmission utility business. More specifically, Goldman's application of the CAPM for determining the cost of equity for Entergy's transmission utility business illustrates the appropriateness and reasonableness of Mr. Proctor's application of the CAPM for estimating the cost of equity for ENO in this electric utility ratemaking proceeding.

In addition, Mr. Hevert clearly challenges Mr. Proctor's reliance on the CAPM method by stating "[i]n my view, Mr. Proctor's 7.57 percent CAPM result, **which he argues is based on a more defensible method**, is so far removed from the returns investors know to be available elsewhere that investors would not see it as meeting the *Hope* and *Bluefield* standards."[2] (Emphasis in Bold Added).

This testimony is exactly the type of responsive testimony that is intended by surrebuttal and therefore, Mr. Proctor's testimony should not be stricken.

[2] Hevert Revised Rebuttal, Page 50, Line 13 through Line 16.

Another aspect of Mr. Proctor's CAPM analysis criticized by Mr. Hevert in his rebuttal testimony is Mr. Proctor's use of a historical market risk premium.[3] In direct response to this criticism, Mr. Proctor's surrebuttal testimony that ENO seeks to strike explains the reasonableness of this approach by showing that Goldman also used a historical market risk premium in its application of the CAPM for Entergy. Goldman also used the same source for its historical risk premium as Mr. Proctor used in his analysis.

Finally, Mr. Hevert criticized Mr. Proctor's derivation of the beta coefficient used in Proctor's application of the CAPM. Mr. Proctor's surrebuttal testimony, directly challenging Mr. Hevert's criticisms, appropriately and effectively points out that Goldman, on behalf of Entergy, used approximately the same beta coefficient in its application of the CAPM. ENO should not reasonably expect that its mischaracterizations and illogical arguments on rebuttal will not be directly addressed by the Advisors on surrebuttal.

II. THE ADVISORS' SURREBUTTAL TESTIMONY CLEARLY RESPONDS TO ENO'S REBUTTAL REGARDING IRS PRIVATE LETTER RULINGS

With regard to the Internal Revenue Service ("IRS") Private Letter Rulings ("PLR") discussed by ENO in its Motion to Strike, it is important to note that simply because no witness discussed the PLRs in direct testimony, it does not follow that subsequent discussion regarding PLRs is prohibited in the case. In contrast to what ENO has asserted, the PLRs were first discussed on pages 11 and 12 of the rebuttal testimony of ENO witness, Rory L. Roberts. In fact, on pages 7 and 8 of ENO's Motion to Strike, the Company admits "ENO witness Rory L. Roberts attaches

[3] Hevert Revised Rebuttal, Page 30, Line 4 through Page 32, Line 7 and Page 37, Line 4 through Page 40, Line 14.

as Exhibit RLR-2 to his Rebuttal Testimony the Company's discovery response producing the Private Letter Rulings, restates the Company's position set forth in Mr. Thomas testimony, and notes that the Advisors ignored the Private Letter Rulings. Mr. Roberts does not discuss any details of the Private Letter Rulings."

However, this statement ignores Mr. Roberts' testimony, is factually incorrect, and misrepresents the rebuttal testimony of the Company's own witness. On pages 11 and 12 of his rebuttal testimony, Mr. Roberts did discuss details of the PLRs and specifically states;

> Attached as Exhibit RLR-2 are two IRS private letter rulings, PLR Nos. 201438003 and PLR 201548017, that explain in detail the income tax normalization rules that require the inclusion in rate base of NOL ADIT attributable to accelerated tax depreciation. Those private letter rulings explain that the NOL ADIT asset must be included in rate base to reduce the credit ADIT by the amount for which no cost-free capital was received. To do otherwise is a normalization violation because credit ADIT attributable to accelerated tax depreciation deductions would offset rate base for which no cost-free capital was received.

Mr. Proctor's surrebuttal testimony that ENO seeks to strike on this topic directly addresses arguments made by Mr. Roberts in his discussion of the IRS Private Letter Rulings. Mr. Proctor explains that the circumstances relied on by the IRS in issuing these PLRs do not support ENO's positions related to NOLCF ADIT assets. Mr. Proctor further explains IRS rulings are not treated as precedent with respect to an IRS Private Letter Ruling that could be sought by ENO.

ENO's attempt to now diminish the existence and scope of its own witness' sworn rebuttal testimony regarding the PLRs in order to justify its Motion to Strike Mr. Proctor's testimony should be rejected and the Motion should be denied.

III. ENO'S FAILURE TO PRODUCE TIMELY DISCOVERY RESPONSES SHOULD NOT BE A BASIS TO EXCLUDE ADVISORS' TESTIMONY

Mr. Proctor discusses the information provided in ENO's responses to CNO 12-2 and CNO 12-3 on page 65, line 3 through page 70, line 17 of his Surrebuttal Testimony, which is a portion of Mr. Proctor's Surrebuttal Testimony that ENO seeks to strike.

The Advisors received ENO's responses to CNO 12-2 and CNO 12-3 on March 1, 2019 (65 days after submittal to ENO) and February 27, 2019 (63 days after submittal to ENO), respectively. Specifically, ENO's late responses to CNO 12-2 and CNO 12-3 caused the Advisors to issue 14 additional discovery questions (most having subparts) regarding ENO's Pension Asset before filing Mr. Proctor's Surrebuttal Testimony on April 26, 2019.

Mr. Proctor incorporated the information from ENO's responses to CNO 12-2 and CNO 12-3, and ENO's responses to the 14 follow-up discovery questions into his examination of and recommendations for the ratemaking treatment of ENO's Pension Asset found in his Surrebuttal Testimony. All of Mr. Proctor's review and analysis of ENO's Pension Asset conducted after filing Direct Testimony could have been undertaken and completed prior to his Direct Testimony if ENO would have responded in a timely manner to CNO 12-2 and CNO 12-3. Under those conditions, Mr. Proctor would have presented the same recommendations for the ratemaking treatment of ENO's Pension Asset in his Direct Testimony instead of Surrebuttal Testimony.

On page 9 of its Motion to Strike Mr. Proctor's Surrebuttal Testimony, ENO states "ENO produced the requested final end-of-year information when it became available (in connection with audited financial statements)…." ENO seems to infer that it could not have provided answers to CNO 12-2 and CNO 12-3 prior to audited financial statements. This argument has no merit. ENO frequently provides financial information to the Council and Council's Advisors before being

audited.

The Advisors and Intervenors depend on receiving timely and complete data from ENO (which in many instances is only in ENO's possession) in order to formulate their opinions and submit testimony. ENO should not be allowed to submit delayed responses to discovery an then criticize the requesting parties for discussing how ENO's late responses impact the parties' positions and recommendations made in the case. Striking Mr. Proctor's surrebuttal testimony on this issue would only prejudice the Advisors who would otherwise have no chance to introduce this testimony into the record. If the Motion to Strike is denied, ENO would in no way be prejudiced because the Company had the benefit of its own financial data. Other parties, including the Advisors, did not have it because of ENO's claim that it was unavailable.

IV. MR. PREP'S CRITICISMS OF ENO'S COMPLIANCE WITH COUNCIL RESOLUTION R-17-504 WERE RAISED IN HIS DIRECT AND SURREBUTTAL TESTIMONY

At the outset, it should be noted that ENO's Motion claims that the Company and the Advisors "worked through" disagreements over ENO's compliance, or lack thereof, with Resolution R-17-504 during the course of discovery.[4] In fact, during the course of discovery, ENO and the Advisors discussed amending some filed VP Exhibits submitted by Mr. Prep, but did not discuss Mr. Prep's direct testimony regarding the non-compliance of ENO's Application with Resolution R-17-504. There was no agreement or resolution of this issue between ENO and the Advisors.

ENO's Motion also claims that the Company provided the information to perform any

[4] ENO's Motion to Strike at page 10.

analyses "deemed necessary." Whether all necessary information was contained somewhere within various parts of the Application is not relevant to the fact that the cost of service study included in the Application did not comply with Resolution R-17-504. ENO also states that Mr. Prep's surrebuttal was the "first time" he argues that the Company did not comply with Resolution R-17-504 regarding the manner in which the Company has presented its cost of service studies. However, on pages 11 and 12 of his direct testimony Mr. Prep included specific language from Resolution R-17-504 (which was repeated in his surrebuttal) and discussed specifically how ENO did not comply with the Resolution.

ENO's Motion further claims that Mr. Prep's testimony is improper because no party has filed a notification of deficiencies pursuant to Section 158-91(a) of the Code of the City of New Orleans. However, Section 158-91(a) of the Code also states that any failure to provide notification of deficiencies within 14 days of the Application date "...shall not prohibit the Council or its designees from giving a notice of deficiency whenever such deficiency becomes apparent, and does not waive the obligation of the utility to comply with any laws, ordinances , orders, rules of the Council or these standard filing requirements."

Contrary to ENO's assertions that the Code "contemplates" that issues regarding a rate application's compliance be addressed outside of testimony, this Code Section does not preclude the issue from being addressed by the Advisors in testimony. In fact, the term "council designee" is specifically used in that Section. There is nothing in the Code that prohibits the Advisors from commenting on ENO's non-compliance with a Council resolution and therefore Mr. Prep's testimony should not be stricken.

ENO's claim that Mr. Prep's surrebuttal regarding Resolution R-17-504 is beyond the scope of ENO's Rebuttal testimony is also erroneous. Pages 3 through 13 of ENO Witness

Matthew S. Klucher's Rebuttal testimony responds to specific questions and concerns raised by Mr. Prep related to the development of ENO's cost of services studies. Mr. Prep's specific questions and concerns were based on the inconsistencies of ENO's cost of service study development relative to the requirements in Resolution R-17-504. Therefore, Mr. Prep's surrebuttal responding to these pages is well within the scope of Mr. Klucher's rebuttal.

V. CONCLUSION

As demonstrated above, the Advisors have not submitted any new evidence or analysis in their surrebuttal testimony and all of the testimony that ENO's seeks to strike is wholly appropriate for surrebuttal and responds directly to claims made by ENO in rebuttal. Therefore, ENO's Motion to Strike should be denied.

RESPECTFULLY SUBMITTED:

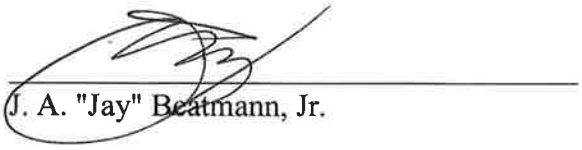
J. A. "Jay" Beatmann, Jr. (#26189)
Dentons US LLP
650 Poydras Street, Suite 2850
New Orleans, LA 70130
Telephone: (504) 524-5446
Facsimile: (504) 568-0331
Email: jay.beatmann@dentons.com

Clinton A. Vince
Emma F. Hand
Presley R. Reed, Jr.
1900 K Street, N.W.
Washington, D.C. 20006
202-408-6400 (Telephone)
202-408-6399 (Facsimile)
clinton.vince@dentons.com
emma.hand@dentons.com
presley.reedjr@dentons.com

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 13th day of May 2019.



J. A. "Jay" Beatmann, Jr.