

FILED
2018 APR -9 P 3:13
CIVIL
DISTRICT COURT

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

CASE NO. 18-3471

DIVISION I-14

ALLIANCE FOR AFFORDABLE ENERGY, DEEP SOUTH CENTER FOR
ENVIRONMENTAL JUSTICE, 350-NEW ORLEANS and SIERRA CLUB

VERSUS

THE COUNCIL OF THE CITY OF NEW ORLEANS

FILED: _____

Deputy Clerk

PETITION FOR JUDICIAL REVIEW

NOW INTO COURT, through undersigned counsel, comes the Alliance for Affordable Energy, 350-New Orleans, Sierra Club and Deep South Center for Environmental Justice, (jointly, "Petitioners"), who respectfully allege:

NATURE OF THE ACTION

1. Petitioners seek judicial review of the Council of the City of New Orleans ("Council") Resolution 18-65 dated March 8, 2018 in the matter styled Application of Entergy New Orleans, Inc. for Approval to Construct New Orleans Power Station and Request for Cost Recovery and Timely Relief, Docket No. UD-16-02.

2. The Council violated the Louisiana Constitution, Louisiana Statutes, City Ordinances and the Council's own policies when it approved Entergy New Orleans, Inc.'s ("ENO" or "Company") application to construct a 128 megawatt ("MW") gas-fired generating station in a hazardous flood zone at the Michoud site which is located in New Orleans East. Among other things, the manner in which the Council conducted the proceeding, and the Council's predetermination of certain vital issues, violated Petitioners' constitutional right to due process. Moreover, the Council's failure to consider alternatives and its failure to adopt conditions designed to protect ratepayers was arbitrary and capricious and violated its charge to protect the public interest. Finally, several conclusions of the Council are not supported by evidence on the record.

JURISDICTION AND VENUE

3. This Petition for Judicial Review is filed pursuant to Section 3-130 (7) of the Home Rule Charter of the City of New Orleans.

PARTIES

A. Petitioners

4. The Alliance for Affordable Energy ("Alliance") is a non-profit Louisiana organization that serves as a consumer advocate for the electric ratepayers of Louisiana, with special concern for residential and small commercial customers. The Alliance is dedicated to supporting fair, affordable, environmentally-responsible energy policy for the citizens of New Orleans and Louisiana. The Alliance filed a timely motion to intervene and actively participated in the Council proceeding.

5. Deep South Center for Environmental Justice (“DSCEJ”) is a non-profit organization incorporated in the State of Louisiana with a main office located in New Orleans East. DSCEJ is dedicated to improving the lives of children and families harmed by racially disproportionate pollution burdens and vulnerable to climate change in the Gulf Coast Region by providing research, education, and advocacy for policy change as well as health and safety training for environmental careers. DSCEJ works locally, regionally and globally as a resource for communities, scientific researchers, and policymakers on issues involving environmental justice. DSCEJ serves civic organizations and faith based groups in New Orleans East by finding solutions to environmental issues that adversely affect the health and quality of life of residents. DSCEJ is committed to conducting research and spearheading advocacy for the purpose of ensuring a healthy and safe environment, equity, and justice for New Orleans East residents. Deep South filed a timely motion to intervene and actively participated in the Council Proceeding.
6. 350-New Orleans is a non-profit, volunteer- led local organization whose purpose is to connect the Louisiana region to the international climate change movement led by 350.org. 350-New Orleans’ mission is to lend support to initiatives in New Orleans to raise consciousness and promote sound policy around climate change, which poses unprecedented threats to our lives. Rising seas, hotter temperatures, and stronger storms make our community especially vulnerable. 350-New Orleans prioritizes locally-grown initiatives and collaboration with existing New Orleans-based groups working for climate justice. 350-New Orleans filed a timely motion to intervene and actively participated in the Council Proceeding.

7. Sierra Club is a non-profit corporation organized under California law, with more than 822,000 members nationwide, including more than 3,300 members residing in Louisiana, dedicated to the protection of public health and the environment. One of Sierra Club's priority national conservation campaigns involves promoting cost-effective clean energy alternatives and energy efficiency measures as a means to reducing or eliminating reliance on expensive fossil-fuel energy generation resources that emit high levels of harmful greenhouse gases and other pollutants. Sierra Club has intervened in numerous utility regulatory proceedings across the country to consider the economic and public interest in proposals to construct large fossil fuel generation resources. The Sierra Club filed a timely motion to intervene and actively participated in the Council proceeding.
8. Each of the Petitioners is adversely affected parties with a real and actual interest in ENO's possible construction of a fossil-fuel generating station in Michoud. Each of the Petitioners and/or their members will be directly and adversely affected by the construction of the proposed facility. Each of the Petitioners satisfies all requirements to bring this Petition for Judicial Review.

B. Defendant

9. Defendant is the Council of the City of New Orleans. Pursuant to the Louisiana Constitution and the Home Rule Charter of the City of New Orleans, the Council is the governmental body with the power of supervision, regulation, and control over public utilities providing service within the City of New Orleans.

BACKGROUND

10. On June 20, 2016, ENO¹ filed an Application for Approval to Construct New Orleans Power Station and Request for Cost Recovery and Timely Relief (“Application”). The Application sought approval to construct the New Orleans Power Station (“NOPS”), a 226 MW fossil-fuel generating station on the Michoud site in New Orleans East. ENO requested that the Council approve ENO spending approximately \$215 million² (plus the cost of fuel, operating costs, and maintenance costs) on a new power plant in the City of New Orleans and approve ENO recovering those costs through utility bills paid by ENO customers along with an additional amount to pay ENO’s shareholders for their return on equity. In conjunction with the Application, ENO submitted the testimony of seven witnesses.
11. On November 3, 2016, pursuant to Resolution 16-506, the Council directed ENO to file supplemental testimony addressing 1) additional modeling runs requested by the Council Advisors; 2) subsidence issues at the Michoud site and surrounding area; and 3) air quality effects of the proposed plant. On November 18, 2016, ENO filed the supplemental testimony of two witnesses.
12. On January 6, 2017, Petitioners jointly filed testimony of four witnesses, addressing the economic, technical, environmental and social justice aspects of the proposed plant.
13. On February 14, 2017, ENO filed a motion seeking to suspend the procedural schedule to allow the Company to evaluate the implications of the recently updated ENO customer

¹ ENO is a public utility providing electric and natural gas service to all of New Orleans.

² In a July 6, 2017 filing, ENO informed the Council that the overall cost of this proposed project had increased to \$232 million.

load forecast. According to ENO counsel's representations, the new load forecast data show a significant reduction in ENO's forecast yearly load, amounting to as much as 30 percent decrease of the capacity ENO would need in 2020. On March 7, 2017, Council's Administrative Law Judge Jeffrey Gulin granted the request that the procedural schedule in this proceeding be suspended.

14. On July 6, 2017, ENO filed a Supplemental and Amending Application, which sought approval to construct either the originally proposed 226 MW generation station or, alternatively, a 128 MW fossil fuel generation facility. The 128 MW facility would cost \$210 million. Either facility would be located at the Michoud site.
15. On October 16, 2017, Petitioners jointly filed the supplemental testimony of eight witnesses. Through this testimony and Petitioners' previously filed testimony, Petitioners demonstrated that the Council should find that a) ENO's reliability problems largely stem from its dysfunctional distribution system, which cannot be fixed by a new power plant; b) ENO conceded that making transmission upgrades to five existing transmission lines would mitigate all reliability-based system constraints over the next ten years without building a new power plant; c) neither proposed plant will protect the citizens of New Orleans from outages due to major weather events such as hurricanes; d) ENO's peak capacity forecast makes unrealistic assumptions about increases in energy efficiency and renewable energy, as well as unwarranted assumptions that the capacity price in the MISO market will skyrocket and remain high for 20 years, so that it can argue that there is a capacity need to justify spending more than \$200 million on the plant, when the City may actually have a long-term capacity surplus; e) the ground in New Orleans is naturally prone to subsidence, and any human-driven activity that causes subsidence, such as

withdrawing groundwater as planned by ENO for the operation of the proposed gas plant, will intensify a problem already known to exist; f) either proposed plant would significantly increase air pollution, causing increased numbers of asthma, heart attacks, more frequent emergency room visits, lost school and work days, and premature deaths; g) ENO failed to conduct an environmental assessment of either proposed plants' impact on the health, safety, environment, and quality of life of the predominantly African American and Vietnamese Americans communities who live within three miles of the proposed plant site; h) the public record shows that the Council predetermined a variety of vital issues prior to the institution of its adjudication proceeding on the Entergy gas plant application and this predetermination violates Petitioners due process rights; i) Advisors to the Council impermissibly performed commingled roles as the negotiator of a prior agreement with Entergy for the development of a gas plant, a party to the Council's adjudication proceeding on the Entergy gas plant application, and the drafter of the Council's decision and order in this proceeding, which violated Petitioners due process rights; and j) ENO failed to analyze alternative resource options such as energy efficiency, and solar PV.

16. On November 16, 2017, the Advisors filed a motion to strike Dr. Wright's testimony regarding the prior agreement and the conflict of interest issues, mischaracterizing Dr. Wright's testimony as legal opinion. The Public Interest Intervenors filed a motion in opposition, which showed that Dr. Wright's testimony was based on her expertise in developing protocols for meaningful and effective public participation and advising administrative agencies, including the U.S. Environmental Protection Agency, on how to conduct decision-making processes with public input.

17. On November 20, 2017, the Advisors filed the testimony of five witnesses. In this testimony, the Advisors' witnesses concluded that the least cost option was a combination of transmission upgrades and installation of utility-scale solar energy. Moreover, the Advisors' witness found that ENO had failed to conduct the analysis necessary to determine the cost and feasibility from a timing perspective of performing the transmission upgrades. Despite these findings by the Advisors' witnesses, the Advisors nonetheless recommended approval of the 128 MW gas plant.
18. On November 24, 2017, Administrative Law Judge Gulin granted the Advisors Motion to Strike portions of Petitioners' witness Dr. Beverly Wright's testimony from the record of evidence.
19. On November 30, 2017, ENO filed Rebuttal testimony.
20. From December 15, 2017 through December 21, 2017, evidentiary hearings were conducted before Administrative Law Judge Gulin. All parties, including the Advisors, cross examined the other parties' witnesses.
21. On December 21, 2017 during the evidentiary hearing, Petitioners filed an Offer of Proof with the Council, pursuant to New Orleans City Code § 158-481, requesting that the Council overrule Mr. Gulin's decision to strike portions of Dr. Wright's testimony from the evidentiary record. The Council never ruled on this Offer of Proof.
22. By Memorandum for the Record, dated January 22, 2018, Administrative Law Judge Gulin closed the record and transmitted the record to the Council. This Memorandum contained no findings of fact or conclusions of law.

23. The fossil fuel-fired plant will be located in New Orleans East. During public hearings, residents of New Orleans East repeatedly expressed concerns as to the health risks posed by pollution from the gas plant.
24. Pollution from the gas plant will pose a threat to the health and wellbeing of the residents of New Orleans. The community health impacts of particulate matter and other pollutants are well known. Petitioners presented the uncontroverted testimony of Dr. George Thurston in which Dr. Thurston extensively discussed the adverse health impacts resulting from living near a fossil fuel fired generation station.
25. On information and belief, throughout this proceeding, the Advisors provided information to and had discussions with Council members. These discussions are illustrated by Council Resolution 16-506, in which the Council orders ENO to conduct modeling runs requested by the Advisors. These required modeling runs were not set forth in the Resolution. Moreover, Petitioners only learned of the nature of these runs through a discovery request.
26. After January 22, 2018 and the close of the proceeding, the Advisors crossed the boundary of their role as a party to the proceeding and acted as a *de facto* trier of fact. Once again, on information and belief, the Advisors provided written materials to the Council members, contrary to New Orleans City Code § 158-322 (e) which prohibits parties from providing written materials to the Council after the close of the record. Moreover, the Advisors provided the Council with a 188-page draft of the Resolution and Order approving ENO's application in the manner advocated by the Advisors. In this Resolution the Advisors and, by extension, the Council accepted without independent

analysis several unsupported ENO assertions, including ENO's contentions regarding transmission upgrade feasibility and cost.

27. On February 21, 2018, the Council's Utility, Cable, Telecommunications and Technology Committee convened a public meeting to consider the Advisor-drafted Resolution. At this meeting, the Committee allowed the parties to present closing arguments. While the Advisors had obviously reviewed and prepared the draft Resolution well in advance of oral argument, Petitioners and other parties received copies of the 188-page document just minutes before the start of the meeting. After closing arguments and public comment, the Committee voted 4-1 to approve ENO's construction of a 128 MW fossil fuel-fired plant.

28. On March 8, 2018, the full Council considered ENO's application and the draft Resolution prepared by the Advisors. By a 6-1 vote in favor of Resolution 18-65, the Council approved ENO's construction of the 128 MW gas plant on the Michoud site in New Orleans East.

ASSIGNMENT OF ERROR

29. Article 1, § 2 of the Louisiana Constitution, like the 14th Amendment to the United States Constitution, guarantees the right to due process, including the right to a fair trial. The Louisiana Supreme Court has held that the public utility regulators, like the City Council in this case, cannot deprive private citizens of their due process rights in adjudicatory matters. *Bowie v. La. Pub. Serv. Comm'n*, 627 So. 2d 164, 169-170 (La. 1993). In this adjudication proceeding, the Council permitted the Advisors to perform the conflicting roles of advocate and fact-finder, and as those roles were exercised in this case, it clearly resulted in bias. These commingled roles performed by the Advisors violate the other

parties' due process and procedural rights and undermines the fundamental fairness, and the appearance of fairness, required for the proceeding. The Council Advisors commingled role as party/advocate and factfinder violates the due process rights of Petitioners, which are protected by the Louisiana Constitution, as well as City Ordinance § 158-322 (e), which prohibits *ex parte* written communications.

30. The Advisors' decision, prior to the evidentiary hearing, to advocate for Entergy to construct the 128 MW gas plant, and against further consideration of the less expensive transmission alternative violated Petitioners' due process rights. This Advisors' predetermined position was the continuation of a prior agreement that they negotiated with Entergy outside of the Council's adjudication proceeding on the Entergy gas plant application. By drafting the Council's findings and conclusions, the Advisors put themselves in the position of the adjudicator. This predetermination of several issues vital to the decision regarding whether ENO's application should be approved violates due process and is contrary to law.
31. The Advisors filed a motion to strike the portion of the Supplemental Testimony of Dr. Beverly Wright, which uncovered their commingled role and determined that it presented a conflict of interest undermining the fairness of the Council's proceeding. Dr. Wright is an expert witness for the Petitioners. Despite the Petitioners opposition, the administrative law judge granted the Advisors' motion to strike this portion of Dr. Wright's testimony from the record of evidence. Pursuant to New Orleans City Code § 158-481, Petitioners filed an Offer of Proof that is an appeal to the City Council of the ruling by the administrative law judge. The City Council issued Resolution 18-65 without ruling on this exclusion of evidence, which is required by New Orleans City

Code § 158-481. The Council's failure to rule on Petitioners Offer of Proof is contrary to law.

32. For nearly two years, the Council demanded that ENO present the alternative of making transmission upgrades to resolve potential reliability concerns, instead of building the gas plant. Entergy consistently refused to provide this information, despite Entergy's own initial evidence that such options would cost a fraction of Entergy's preferred gas plants. This substantial omission has prevented the Council from making a fully informed decision and discharging its duty to regulate in the public interest. The Council's apparent determination that the 128 MW fossil fueled generation station is the least cost, lowest risk alternative to meet the transmission reliability needs of New Orleans is arbitrary and capricious and unreasonable because it is unsupported by and contrary to the evidence in the record.
33. Cost conditions are necessary in this case because Entergy has sought to place nearly all of the financial risks of the gas plant on the shoulders of New Orleanians, and those risks are considerable. The Council's resolution and order approving the gas plant contains no specific, immediate conditions to protect ratepayers from the gravest financial risks associated with the plant. The Council's failure to effectively consider and impose conditions to protect ratepayers from the grave financial risks associated with the gas plant is arbitrary and capricious and unreasonable because it is contrary to the evidence on the record.
34. City Code § 158-286(b) requires the New Orleans' Department of Finance to be a party to the Council's proceeding. The City of New Orleans is not only a major Entergy customer with a financial stake, but also has a significant role to play in developing the

City's energy and environmental policies. The Department of Finance did not participate in any manner in this proceeding. Certainly, the Department did not make any "recommendations" or "assert the city's interest as an energy consumer" as required by City Code Section 158-286(b). The Council's failure to include this necessary party in these proceedings is contrary to law.

35. The New Orleans City Code § 158-1045 establishes the right of ratepayers to "safe and reliable service in accordance with industry standards." In this proceeding, Entergy failed to produce any evidence that its plan to build a new gas plant at the Michoud site in New Orleans East, which is located in a high-risk flood hazard area on the Federal Emergency Management Administration flood map, is in keeping with the industry standard. In fact, the evidence on the record is to the contrary. Council Resolution 18-65 disregards this requirement. Additionally, the Resolution approves Entergy failure to comply with the Flood Damage Prevention Ordinance (New Orleans City Code 78-1 et seq.). The Council's failure to require ENO to produce evidence supporting ENO's decision to locate the gas plant in a hazardous flood zone is arbitrary and capricious and unreasonable because it is contrary to the evidence on the record and contrary to law.

36. The City Council assured the public that the Entergy gas plant would be fully vetted on social justice issues. These social justice issues include the racially disproportionate pollution burden that the proposed Entergy gas plant would have on predominantly African American and Vietnamese American residents living near the site and the cost burden of a new gas plant on low income households in New Orleans. The City Council's sole determination on this issue was that if the proposed Entergy gas plant met environmental regulations, then there is no potential for a disproportionate adverse

impact on minority neighborhoods in New Orleans East. This conclusion is contrary to federal policy which recognize that the environmental permitting regime under laws including the Clean Air Act has proven insufficient to ensure protections against the injustice of racially disproportionate exposure to pollution that threatens health and wellbeing. The issue to be examined by the City Council was the issue of whether the proposed Entergy gas plant would have a discriminatory effect, also referred to as the disproportionate impact, on predominantly African American and Vietnamese American neighborhoods. The City Council's failure to perform this analysis, in a neutral manner, renders its decision arbitrary and capricious and contrary to law.

DESIGNATION OF THE RECORD

37. Petitioners designate the entire record compiled by the Council in connection with ENO's application for authority to construct the gas plant.

PRAYER FOR RELIEF

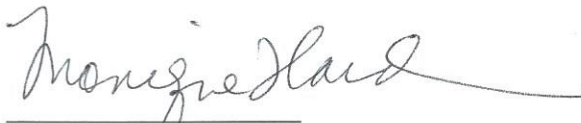
38. Upon consideration of the law and facts of this case, Petitioners respectfully request that this Honorable Court grant relief as follows:
- 1) Reverse the Council decision and vacate Council Resolution 18-65.
 - 2) Recuse the Council's Advisors from acting as fact-finders, adjudicators, or otherwise assisting the City Council in rendering a decision on any further proceedings concerning Entergy's application to construct a gas generation station.
 - 3) Require the City Council to reopen the evidentiary record to take additional evidence on the issues of:
 - a. transmission reliability solutions,
 - b. cost calculations and conditions to protect ratepayers from financial risk,

- c. flood risk,
 - d. social and environmental justice,
 - e. the admissibility of the portion of Dr. Beverly Wright's testimony excluded by the Advisors' motion to strike,
 - f. and any other issue necessary to render fair and just decision on the entire record.
- 4) Award all other relief as this Court finds equitable.

Petitioners' Motion to Hold Case in Abeyance is attached.

Dated: April 9, 2018.

Respectfully submitted:



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VERSUS

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MOTION TO HOLD CASE IN ABEYANCE

Petitioners Alliance for Affordable Energy, Deep South Center for Environmental Justice, 350-New Orleans, and Sierra Club respectfully request this Court to hold this case in abeyance pending the resolution of their Petition for Hearing that is currently before the Council of the City of New Orleans (“Council”), which may affect the outcome of this case.

In support of this motion, the Plaintiffs/Appellants state as follows:

1. On April 9, 2018, Petitioners timely filed a Petition for Judicial Review with this Court, which is an appeal from the Council decision to issue Resolution 18-65 in Docket No. UD-16-02, entitled *Resolution and Order Regarding the Application of Entergy New Orleans, Inc. for Approval to Construct New Orleans Power Station and Request for Cost Recovery and Timely Relief* (hereinafter, “Resolution”). The Resolution is dated March 8, 2018. On this date, the Council adopted the Resolution by a majority vote at a Council meeting.¹

¹ The Council sent parties to Docket No. UD-16-02 a **certified copy** of the Resolution on March 29, 2018. The Home Rule Charter of the City of New Orleans provides that “any party in

2. Concurrent with the filing of this appeal, Petitioners submitted a Petition for Rehearing to the Council, pursuant to New Orleans City Code § 158-485. *See* Ex. A (copy of the Petition for Rehearing). The Council has neither granted nor denied the Petition for Rehearing.

3. Petitioners respectfully request that the Court hold this case in abeyance until the Council has acted on the pending Petition for Rehearing and concluded the rehearing process, if any. The Petition for Rehearing involves the same Council Resolution, 18-65 that is the subject of this appeal. Consequently, the Council's decision on the Petition for Rehearing could affect the issues to be reviewed by this Court. Awaiting the outcome of the Council's rehearing process will allow this case to be litigated more efficiently, thereby conserving the Court's and parties' resources.

4. In requesting this abeyance, Petitioners reserve their right to file a motion at any time to lift the abeyance or to oppose such a motion.

WHEREFORE, Petitioners respectfully request that the Court issue an order:

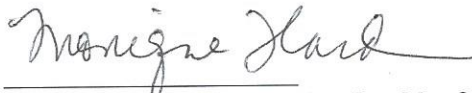
- (i) granting their request to hold in abeyance all proceedings in this case (including merits briefing) concerning Council Resolution 18-65 until the Council has taken action on the related Petition for Rehearing and concluded the rehearing process, if any. Denial of the Petition for Rehearing constitutes the taking of action on and conclusion of the reconsideration process for purposes of this Order; and

interest may appeal from orders of the Council to the Civil District Court for the Parish of Orleans by filing suit against the Council within thirty (30) days from the date of the order of the Council, and not thereafter.” HRC, § 3-130(7). Petitioners filed their appeal with this Court on April 9, 2018. This was done out of an abundance of caution, as the “date of the order of the Council,” as stated in section 3-130(7), may refer to the date recorded on the Resolution, March 8, 2018, and not the date the parties received a certified copy of the Resolution, March 29, 2018.

- (ii) maintaining the Petitioners' right to file a motion at any time to lift the abeyance or to oppose such a motion.

Dated: April 9, 2018.

Respectfully submitted:



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