Civil District Court for the Parish of Orleans
STATE OF LOUISIANA

No: 2018 - 03471

Division/Section: I-14

ALLIANCE FOR AFFORDABLE ENERGY ET AL

versus

THE COUNCIL OF THE CITY OF NEW ORLEANS ET AL

Date Case Filed: 4/9/2018

NOTICE OF SIGNING OF JUDGMENT

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In accordance with Article 1913 C.C.P., you are hereby notified that Judgment in the above entitled and numbered cause was signed on June 14, 2019

New Orleans, Louisiana
June 14, 2019

MINUTE CLERK

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

CASE NO.: 2018-3471 **DIVISION: "I-14"**

ALLIANCE FOR AFFORDABLE ENERGY, ET AL

V.

THE COUNCIL OF THE CITY OF NEW ORLEANS

_____ _____

DATE FILED **DEPUTY CLERK**

JUDGMENT

This matter came before the Court on March 26, 2019 on a *Petition for Judicial Review* as well as a *Motion to Correct the Record* filed by Petitioners, Alliance for Affordable Energy, Deep South Center for Environmental Justice, 350-New Orleans, and Sierra Club.

Present at the hearing on March 26, 2019:

- Monique Harden and Susan Stevens Miller on behalf of Petitioners, Alliance for Affordable Energy, Deep South Center for Environmental Justice, 350-New Orleans, and Sierra Club;
- Basile Uddo and Pressley Reed, Jr. on behalf of Defendant, Council of the City of New Orleans;
- W. Raley Alford on behalf of Intervenor, Entergy New Orleans, LLC.

The Court thereafter took both matters under advisement. After considering the briefs, arguments of counsel, and evidence presented, the Court finds that the record was complete. Furthermore, the Court finds that the action taken by the City Council in approving Resolution 18-65 did not violate due process and was not arbitrary and capricious in light of the evidence presented.

Therefore, **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the *Motion to Correct the Record,* filed by Petitioners, Alliance for Affordable Energy, Deep South Center for Environmental Justice, 350-New Orleans, and Sierra Club, be and is hereby **DENIED.**

IT IS FURTHER ORDERED that the *Petition for Judicial Review,* filed by Petitioners, Alliance for Affordable Energy, Deep South Center for Environmental Justice, 350-New Orleans, and Sierra Club, be and is hereby **DENIED**.

SIGNED this 14th day of June, 2019, in New Orleans, Louisiana.

JUDGE PIPER D. GRIFFIN
DIVISION "I"

CERTIFIED COPY
DEPUTY CLERK OF DISTRICT COURT
PARISH OF ORLEANS
STATE OF LA

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

CASE NO.: 2018-3471 **DIVISION: "I-14"**

ALLIANCE FOR AFFORDABLE ENERGY, ET AL

V.

THE COUNCIL OF THE CITY OF NEW ORLEANS

DATE FILED **DEPUTY CLERK**

REASONS FOR JUDGMENT

This matter came before the Court on March 26, 2019 on a Petition for Judicial Review filed by The Alliance for Affordable Energy, Deep South Center for Environmental Justice, 350-New Orleans, and Sierra Club (collectively referred to as "Petitioners"). Petitioners sought to overturn the City Council's Resolution 18-65 dated March 8, 2018, which approved Entergy New Orleans' application to construct a new power plant in New Orleans East. Following receipt of briefs and arguments of counsel, this Court took the matter under advisement.

I. Facts and Procedural History

A. Background

The facts of this case have their genesis almost 20 years before the present date. At the core of those facts is the operational structure of Entergy, Inc. and how the changing of that structure led to consequences that are still not fully resolved. Entergy's structure will be explored in more detail below, but it is clear from the established facts that the decisions of Entergy New Orleans and the City Council were precipitated by many years of planning, negotiation, trial and error, and compromise.

Much of the early history of this case can be found in the Council's resolution dated November 5, 2015. (Res. No. R-15-524). That Resolution establishes that, since 1951, Entergy's six wholly-owned subsidiaries operated more or less as a single, integrated unit, sharing costs, resources, and profits. However, as early as 2000, multiple entities noticed that the sharing was not equal. Entergy New Orleans (hereinafter "ENO") and Entergy Louisiana (hereinafter "ELA")

produced energy from natural gas, which had a higher production cost than energy from coal (as utilized by Entergy Arkansas). The result was that Entergy Arkansas (and to a lesser extent, Entergy Texas) had a higher financial burden than the other subsidiaries.

In 2001, the City Council and the Louisiana Public Service Commission (on behalf of ENO and ELA) filed a petition with the Federal Energy Regulatory Commission, seeking a modification of the system agreement to more evenly allocate resources. The petition resulted in an agreement whereby each company's production costs were required to be within 11 percent of the system average. In other words, companies with lower operating costs (Entergy Arkansas and Entergy Texas) were required to make payments to companies with higher operating costs. Arkansas utility regulators, along with Entergy Arkansas, felt that sharing a disproportionate financial burden was unfair and unduly burdensome on Arkansas ratepayers. Arkansas claimed that it was paying over $200 Million per year to the Louisiana companies.

Thus, on December 19, 2005, Entergy Arkansas sent a notice of its intent to withdraw from the system agreement and, in effect, operate independently. The withdrawal would take effect on December 18, 2013 (under the system agreement, companies were required to give 8 years notice to the other companies before withdrawing). The other companies followed soon after. The City Council recognized that Entergy New Orleans would be most affected by the termination of the system agreement.

In 2013, the parent company filed a notice with FERC for the purpose of amending the system agreement. Several utility regulators intervened in the proceeding in order to represent each jurisdiction's interests in the future of Entergy. The City Council of New Orleans was among these intervenors. After two years of discussions, the companies and regulators entered into a settlement which essentially dissolved the system agreement. The settlement was filed by the parent company on August 14, 2015 and approved by the City Council on November 5, 2015. As far as New Orleans was concerned, the settlement mandated that ENO would (1) have the option to buy power from plants built or acquired by ELA in the future, and (2) evaluate and consider building a power plant in the city of New Orleans. It is this second directive that concerns us in the instant case.

B. Procedural History

On June 20, 2016, Entergy New Orleans filed an Application for Approval to Construct New Orleans Power Station and Request for Cost Recovery and Timely Relief (hereinafter referred to as the "Initial Application" or simply "the Application"), seeking approval to build a 226 Megawatt (MW) combustion turbine (CT) in New Orleans East. ENO also sought permission to recover the cost of the power station, projected to be over $200 Million, from the ratepayers through an increase in utility bills. At the time, ENO's main justification for building the plant was to support a forecasted increase in energy demand over the next 20 years; however, Petitioners assert that ENO did not add system reliability as a concern until later. ENO also modified its request in two ways: (1) the company would seek to build a 128 MW station because of new forecasts that showed a less drastic increase in demand, and (2) the plant would feature "reciprocating internal combustion engines" (RICE units) that were smaller and more efficient than CT units.

On November 3, 2016, the Council directed ENO to file supplemental testimony to address several issues raised by the construction of the new plant, including air quality, subsidence, and modeling. Entergy provided the testimony of two witnesses on November 18, 2016. On January 6, 2017, Petitioners presented the testimony of four witnesses who addressed, economic, technical, environmental, and social justice issues related to the construction of the plant.

Over the months and years that followed, the Council held approximately 21 public meetings related to ENO's Application. The following list includes events relevant to this Court's review of the underlying proceedings:

1. December 12, 2016, meeting of the Council Utility Regulatory Office on ENO's Initial Application;
2. February 14, 2017, ENO's filing of a motion to suspend the procedural schedule to reevaluate its Application in light of new forecasts of energy demand;
3. July 6, 2017, ENO's filing of a Supplemental and Amending Application (the "Amended Application") proposing a 128 MW station as opposed to a 226 MW station;

4. October 16, 2017, Petitioner's filing of supplemental testimony of 8 witnesses, as well as the Council Utility Regulatory Office's public hearing on ENO's Amended Application;
5. November 16, 2017, Advisors' filing of a motion to strike portions of testimony filed by Dr. Beverly Wright, expert witness for Petitioners;
6. November 20, 2017, Advisors' filing of testimony of five witnesses;
7. November 24, 2017, Administrative Law Judge Gulin's granting of Advisors' motion to strike;
8. November 30, 2017, ENO's filing rebuttal testimony regarding Council's request for additional analysis of alternatives;
9. December 15-21, 2017, a five-day evidentiary hearing before Administrative Law Judge Gulin, where all parties cross-examined the other parties' witnesses;
10. January 22, 2018, Judge Gulin's filing of a Memorandum for the Record, closing the record and sending it to the Council;
11. February 21, 2018, the Council's Utility, Cable, Telecommunications and Technology ("UCTT") Committee's public hearing on a resolution drafted by the Council's advisors to approve the power plant, where the UCTT committee voted 4-1 in favor of the resolution;
12. March 8, 2018, public hearing by the full City Council in consideration of the resolution, where the Council voted 6-1 in favor of adopting Resolution 18-65, approving the 128-MW RICE unit plant;
13. April 9, 2018, Petitioners' filing of a Petition for Rehearing;
14. April 18, 2019, Petitioners' filing of a request for hearing on the Petition for Rehearing;
15. April 19, 2018, City Council public meeting, summarily denying Petitioners' Petition for Rehearing.

The result of the March 8 hearing was a 188-page resolution, in which the Council explained their rationale for approving the power station. In addition to the actions taken above, the Council claims to have reviewed over 3,000 pages of testimony, documentary evidence, and post-hearing briefs.

On April 9, 2018, Petitioners timely filed a Petition for Judicial Review in this Court pursuant to Section 3-130(7) of the Home Rule Charter of the City of New Orleans. It is that request for review which is currently before the Court.

II. Motion to Correct the Record

Petitioners filed a Motion to Correct the Record on March 6, 2019. The Court heard argument on that motion on March 26, 2019 (the same day as oral argument on the Petition for Judicial Review) and thereafter took both matters under advisement.

As a preliminary matter, the Court must consider the Motion to Correct the Record. In that regard, petitioners seek to have certain documents included in the record on appeal that were not initially included when the record was certified by Administrative Law Judge Gulin. Petitioners argued that it was necessary to include these documents in the record on appeal in order to have a "complete record" as required by *Lowenburg v. City of New Orleans*, 859 So.2d 904, 810 (La. App. 4 Cir. 2003). These documents include:

1. A transcript of the UCTT Committee hearing on February 21, 2018;
2. A transcript of the full City Council hearing on March 8, 2018;
3. A letter from Charles Rice, then-CEO of Entergy New Orleans, to City Council President Jason Williams (and served on all parties) dated March 5, 2018;
4. A letter from Petitioners in response to Mr. Rice's letter (served on all parties) dated March 7, 2018;
5. A letter from Petitioners to the Clerk of Council requesting a hearing on their Motion for Rehearing); and
6. A motion by the City Council on April 19, 2018 (M-18-137) denying the request for hearing.

The Council did not object to the assertion that Council Motion M-18-137 is part of the record; as an order of the Council, it is automatically part of the record on appeal. However, the Council opposed the introduction of the other documents based on both Petitioners' untimeliness in filing the motion and the City Code.

This Court finds that the documents were properly excluded from the record. First, the transcripts from February 21, 2018 and March 8, 2018 were excluded on the basis of City Code regulations that expressly deal with this issue. City Code Section 158-431(b) states that no statements made by "members of the public at large who are not parties of record . . . shall, in legal

terms, form (and such matter shall not form) the basis of any council decision in a contested proceeding." New Orleans City Code, Chap. 158, Art. III, Div. 6, § 158-431(b). Petitioners' motion explicitly states that Petitioners seek to introduce statements made by Councilmembers expressing concerns about the power plant. However, those Councilmembers were not parties to the underlying proceedings (even though the Council is a party to the instant appeal). Second, the letters sent by the CEO of Entergy New Orleans and subsequently by Petitioners constitute hearsay. The letters do not include sworn testimony and no party had the chance to cross-examine the authors of the letters. Although the purpose of the letters was indeed discussed during the hearing[1], the letters themselves were properly excluded from the record on appeal. Finally, the Council's decision to deny Petitioners a rehearing has no bearing on this Court's review of Resolution R-18-65.

[1] The letters to the Council concerned the possibility and feasibility of the imposition of a cost cap on the power plant in order to protect ratepayers from an increasingly expensive project.

III. Assignments of Error in Petition for Judicial Review

Petitioners list nine assignments of error in three broad categories: (1) the Council violated due process, (2) the Council violated the City Code and the Council's own regulations, and (3) the Council's decision to approve ENO's Application was arbitrary and capricious.

Specifically, Petitioners assert that the Council erred by taking the following actions:

1. The Council deprived Petitioners of their constitutional rights to due process when the Council allowed its Advisors to act in a dual capacity as advocates for ENO;
2. The Council also deprived Petitioners their due process rights when the Council failed to disclose details of a prior agreement with ENO, namely the 2015 settlement agreement;
3. The Council violated the City Code by failing to secure the participation of the City's Department of Finance;
4. The Council violated its own regulations when it denied Petitioners' request for a hearing on the Petition for Rehearing; and
5. The Council acted arbitrarily and capriciously by:
    a. Approving the application without meaningfully evaluating reasonable alternatives;
    b. Concluding that ENO established a need for the plant based on either reliability or capacity;
    c. Refusing to establish a maximum cost for the project to protect ratepayers;
    d. Denying ratepayers safe and reliable service as required by the City Code; and
    e. Failing to fully examine the social justice issues related to the plant's effect upon citizens living near the plant.

IV. Standard of Review

"As authorized by the Louisiana Constitution and pursuant to the Home Rule Charter of the City of New Orleans, all legislative powers of the City are vested in the Council. La. Const. Art. 6, §§ 4–6 (1974), Home Rule Charter 3–101(1). Among the legislative powers exclusively granted to the Council are the powers of "supervision, regulation, and control" over those utility companies that furnish services within the City of New Orleans. Home Rule Charter 3–130(1); *see*

also State ex rel. Guste v. Council of City of New Orleans, 309 So.2d 290, 293 (La. 1975)." *Gordon v. Council of City of New Orleans*, 9 So.3d 63, 71 (La. 2009).

City Council decisions regarding public utilities should not be overturned unless one of three things is found: (1) the decision was arbitrary and capricious; (2) the decision represented a clear abuse of authority; or (3) the decision was not reasonably based upon the factual evidence presented. *Gordon*, 9 So.3d at 72. Reviewing courts must limit their review "to a determination of whether the decision is reasonable and refrain from merely substituting our judgment for that of the Council." *Gordon*, 9 So.3d at 72 (quoting *State ex rel. Guste*, 309 So.2d at 294).

This Court will not decide whether the Council's decision was right or wrong; or whether they were correct in weighing certain pieces of evidence more heavily than others; or whether the Council's decision was the best decision available. This Court will only decide if the Council had sufficient evidence to come to a decision and whether that decision was actually reasonable based on the evidence presented.

In taking this into consideration, the Court will now examine the individual assignments of error raised by Petitioners.

V. Procedural Issues

A. Advisors' dual role as advocate for Entergy New Orleans and advisor to the Council

Both the United States Constitution and the Louisiana Constitution guarantee the fundamental right to due process, which includes the right to a fair and impartial trial. U.S. Const. amend. XIV, § 1; La. Const. art. I, § 2. The right to a fair trial is violated when there is a high probability of bias on the part of the decision maker. *See Withrow v. Larkin*, 421 U.S. 45, 47 (1975).

Administrative agencies such as the City Council can act in both legislative and quasi-judicial capacities. The distinction is subtle but important. This case involves "advisors" who have both advocated on behalf of Entergy New Orleans and advised the City Council in reaching a decision. In this sense, they have acted in a dual role as advocate and *de facto* fact-finder. Louisiana Courts have held that, when the agency is acting in a quasi-judicial capacity, this dual role violates a party's right to a fair and impartial trial. *See Allen v. Louisiana State Board of Dentistry*, 543 So.2d 908 (La. 1989); *Georgia Gulf Corp. v. Board of Ethics for Public Employees*, 694 So.2d 173 (La. 1997). However, Louisiana courts have also held that this commingling of functions is permissible and does not violate due process when the regulatory agency is acting in a legislative capacity. *See Gulf States Utils. Co. v. Louisiana Pub. Serv. Comm'n*, 578 So.2d 71 (La. 1991); *Alliance for Affordable Energy, Inc. v. Council of City of New Orleans*, 578 So.2d 949 (La. App. 4 Cir. 1991), *vacated as moot on other grounds*, 588 So.2d 89 (La. 1991).

At the heart of this particular issue is whether the City Council was acting in a legislative or quasi-judicial/adjudicatory capacity. Both parties have cited cases to support their contentions, but a review of the jurisprudence shows that no Louisiana courts have definitively ruled on this issue (when a regulatory body rules on an application by a public utility to build new facilities).

The cases cited by Petitioners deal with an agency's role as adjudicator. In *Allen*, the Louisiana Supreme Court reviewed the Dentistry Board's decision to suspend a dentist's license to practice for ten years. The Board hired an attorney to investigate and prosecute the charges against the dentist, and later asked the same individual to prepare findings of fact and conclusions for the committee. *Allen*, 543 So.2d at 913. The Court reversed the Board's decision, holding that

the dentist's right to a fair and impartial trial was violated when the Board's advisor "put himself in the position of adjudicator" by drafting the committee's findings. *Id.* At 914.

In *Georgia Gulf Corp.*, the state's Ethics Commission filed charges against a former employee of the Department of Revenue who later contracted with a company the Department was auditing. 694 So.2d at 174. The Commission appointed the executive secretary to investigate and prosecute the ethical violation, and later instructed the prosecutor and his staff to prepare an opinion on the matter. *Id.* at 174-75. The Court held that, as in *Allen*, the administrative agency was prohibited from using a third party as both prosecutor and fact finder, even when the board gave the accused an opportunity to oppose the opinion in a noticed hearing (in contrast to *Allen* where the opinion was drafted and issued *ex parte*). *Id.* at 180.

The Petitioners also cite cases which suggest that the Council's decisions on applications for construction projects are quasi-judicial. *See Williamson v. Williams*, 543 So.2d 1339, 1334 (La. App. 4 Cir. 1988) (stating that "the City Council, when considering the appeal of an individual property owner for a waiver of the restrictions of a temporary moratorium, is not acting in a legislative capacity but is acting in a quasi-judicial or administrative capacity. Because such action is not broad or general in scope and because the opportunity for favoritism or discriminatory treatment is easily directed towards an individual supplicant, the standard of review in such matters differs from that which is usually accorded to legislative decisions."). *See also State, Dept. of Social Servs. v. City of New Orleans*, 676 So.2d 149 (La. App. 4 Cir. 1996) (holding that a review of an application for a construction permit is adjudicatory and not legislative).

All of these cases involve specific determinations of an individual's rights pursuant to existing law in a trial-like setting. *Allen* and *Georgia Gulf Corp.* involved quasi-criminal proceedings, and *Williamson* and *Department of Social Services* involved permit applications for private exemptions from zoning ordinances. These cases do not exactly line up with the instant proceeding. The Council's decisions as a regulator of zoning law are not the same as its decisions as a regulator of public utilities. Both the Council and Entergy New Orleans cite cases to support their contention that the instant proceeding was legislative in nature, in which case the use of advisors in a dual capacity is expressly allowed by law.

In *Gulf States*, the Supreme Court explicitly recognized that the Council's decisions regarding public utilities enjoys a different standard of review regarding the dual roles of advisors and consultants. In that case, the Louisiana Public Service Commission (LPSC) partially denied Gulf States' application to increase rates relative to a large investment in a nuclear plant. The Commission allowed Gulf States to recover $1.6 Billion as opposed to the $3 Billion requested. Furthermore, the Commission limited the first-year recovery to $63 Million. Gulf States appealed, alleging inter alia that the Commission violated the appellant's due process rights by issuing an opinion authored by the Commission counsel and consultants who had acted as Gulf States' adversaries during the hearings. The Court held that ratemaking for public utilities, while particular in its application involving many trial-like aspects, is a legislative function. The key distinction is that adjudications are primarily based on the law applicable to actions already made, whereas legislative decisions look to the future.

The Court noted several federal cases where courts have found that due process is not violated when dual roles are utilized in public utility cases. *See Wilson & Co. v. United States*, 335 F.2d 788, 796 (7th Cir. 1964) (holding that "it was proper for members of the Commission's Common Carrier Bureau who were counsel of record in the hearing before the Commission to participate in the decisional process that led to the orders under review; and that this conduct did not violate section 3(a) of the Administrative Procedure Act, . . . the Commission's own rules, as well as constitutional due process."); *American Telephone & Telegraph Co. v. F.C.C.*, 449 F.2d 439 (D.C. Cir. 1979). Finally, the Court notes that the Administrative Procedures Act explicitly addresses the dual-role issue: "An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. *This subsection does not apply . . . to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers.*" 5 U.S.C. § 544(d). The Court ultimately held that the use of advisors or consultants as both advocate and advisor did not violate due process in ratemaking case. *See also Alliance for Affordable Energy, Inc.*, 578 So.2d at 968 (holding that ratemaking is a legislative proceeding where due process is not violated by advisors acting in a dual capacity).

Petitioners have asserted that *Gulf States* and its progeny only apply to rate-making, and is inapplicable to the instant proceeding (an application for a public utility to construct a new power plant). Any statement in those cases purporting to apply the rule in *Gulf States* to such an application, according to Petitioners, is dicta. On the other hand, Respondents argue that Williamson is inapplicable because a private construction permit is fundamentally different from a public utility construction permit. Accepting Petitioners' argument as true, the Court notes that this issue is a case of first impression.

The Court, having reviewed the applicable law, finds that *Gulf States* is still persuasive authority and that its holding applies to the instant case. Entergy's application to construct a power plant is much more akin to ratemaking than private construction (especially considering the fact that a major part of the application deals with a rate increase). The Council in this case was not merely adjudicating a quasi-criminal charge against an individual or exempting a single construction project from a zoning ordinance. The Council was tasked with making a decision about both the short-term and long-term stability of the city's infrastructure. This decision was and is one that will impact every citizen of the area and has infinitely more importance to the city's economic and structural health than the decisions in *Allen*, *Georgia Gulf Corp.*, or *Williamson*. A review of the record shows that, while the Council leaned heavily on the advisors' expertise and knowledge, it cannot be said that the Council did not make its own decision. Applying the rule to the instant case, the Court finds that the Council did not violate Petitioners' due process rights by allowing its advisors to act in a dual capacity.

B. The Council's "Failure to Provide Evidence" of its Prior Agreement with Entergy New Orleans

Petitioners assert that their due process rights were also violated when the City Council failed to disclose a deal purportedly made between it and Entergy New Orleans to pursue the construction of a plant as early as August 2015, approximately 10 months before Entergy actually submitted the application. Petitioners argue that this undisclosed agreement essentially predetermined the outcome of the City's decision such that the Council was biased from the very beginning. Petitioners further assert that the Council and Entergy sought to suppress their efforts

to address the prior agreement during the proceedings at issue. The facts stated above help illuminate the background of the settlement.

The FERC proceeding at issue was filed because of several companies' dissatisfaction with the state of affairs regarding cost equalization. The purpose of the FERC filing was essentially a concursus proceeding: FERC allowed all interested parties to participate and represent their interests. Notably, the City Council for New Orleans participated in the FERC proceedings as an interested party (because New Orleans arguably had the most to lose from the termination of the service agreement). In August of 2015, the companies filed a joint settlement agreement resolving their issues. The gist of that settlement was that each company would create and pay for its own energy. The City Council and Entergy New Orleans made two key findings: (1) Entergy New Orleans would have to buy and "import" energy from the other operating companies in the short term and (2) Entergy New Orleans would need to build its own power plant within the city for long term stability and cost savings.

The Court notes that the City's resolution adopting the Settlement Agreement was the subject of two public hearings at which no comment or opposition was made. Also, the agreement and resolution did not pre-approve Entergy's application for a power plant; it merely directed Entergy to explore the feasibility of a new power plant and to prepare a proposal for review by the Council.

Petitioners argue that their due process rights were violated because the Council did not disclose the details of the Settlement Agreement during the proceedings at issue. They also argue that they should not be burdened by having to participate in all Council meetings in order to have notice and input related to "matters whose import may not be foreseeably relevant to their interests or concerns in other Council proceedings." In other words, Petitioners believe that the Council had a duty to disclose and discuss a document that was already public. The Court finds that this argument is without merit. Petitioners had notice of the instant proceedings and were allowed to give input on the Council's decision to approve Entergy's power plant. It is disingenuous to suggest that the Council withheld evidence of a settlement approval that was the subject of multiple public hearings. The Court also notes that Petitioners do not cite to any legal authority to support

the contention that a body such as the City Council has duty to explicitly disclose prior, public documents that may be relevant to another proceeding.

Furthermore, Petitioners suggest that evidence related to the agreement was suppressed when the issue was raised by Petitioners. They argue that Dr. Beverly Wright was not allowed to testify about the agreement once Petitioners discovered its existence. Dr. Wright is an expert in advising administrative agencies on best practices for public participation in governmental decision making. Dr. Wright attempted to testify about the dual role of the Council's advisors (discussed above) and about the impact of the settlement agreement on due process. Dr. Wright was not allowed to testify in response to a motion by the Advisors. More specifically, it was determined that she was a non-attorney rendering a legal conclusion. Pretermitting a discussion on Dr. Wright's qualifications regarding public participation in governmental action, the question of whether certain governmental actions violate due process is a strictly legal question, and it was proper for the Council to strike Dr. Wright's conclusions.

The Court therefore finds that the City Council did not violate Petitioners' right to due process by not disclosing the settlement agreement during the proceedings at issue.

C. The Department of Finance's Failure to Participate in the Proceedings

Petitioners assert the City's Department of Finance's failure to participate voids the action taken by the Council. Petitioners cite the City Code, which states:

> The department of finance through the director of the department of finance, shall be, ex officio, a party to all matters governed under this article, in which capacity he shall represent and shall make recommendations as to the best interests of the city as a municipal corporation, e.g., to assert the city's interest as an energy consumer.
>
> New Orleans City Code § 158-286.

Petitioners argued that the Department of Finance's non-participation was analogous to the absence of an indispensable party at trial in an ordinary proceeding (in which case, a judgment

would be set aside as absolutely null). *See, e.g., Terrebonne Par. Sch. Bd. v. Bass Enter.*, 852 So.2d 541, 546 (La. App. 1 Cir. 2003).

The Council argued that its decision should not be voided based on the Department of Finance's failure to represent the city's interests. Such a position would, in effect, create a "pocket veto" whereby the Department could defeat any unfavorable actions of the Council by simply refusing to participate. The Council further argued that the Department of Finance was not prohibited from participating; the Council included the Department on the service list for all pleadings and the Department was, in all relevant respects, treated as a party to the proceedings. Notably, the Department has yet to raise any objection or sought to undo the Council's decision based on an alleged violation of City Code Section 158-286.

The applicable City Code provision does not explicitly state the consequences of the Department's failure to participate in the Council's energy regulatory proceedings. Despite the language requiring the Department to assert the City's interests, this Court does not find that the Council violated City Code Section 158-286. The Council should not be restricted from carrying out its duty to regulate public utilities simply because the Department of Finance did not participate. Contrary to Petitioners' argument, the Department of Finance is not an indispensable party; it is one of many parties with an interest in the outcome of the Council's decision. The Council gave the Department of Finance an opportunity to have the City's voice heard, and the Department chose not to exercise its rights under the City Code. The Council's resolution will not be voided under City Code Section 158-286.

D. The Council's Denial of Petitioners' Request for a Hearing on their Motion for Rehearing

After the Council's March 8, 2018 adoption of Resolution 18-65, Petitioners filed a Motion for Rehearing with the Council on April 9, 2018 "pursuant to New Orleans City Code § 158-485."[2] Petitioners filed a request for a hearing on their motion on April 18, 2018. However, the Council summarily denied the motion the next day, April 19, without a hearing. Petitioners argued that the

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[2] Pet. Brief at p. 11. New Orleans City Code § 158-485 provides that a rehearing on an order of the Council may be held either on the Council's motion or "on motion of any party **provided said motion is received within ten days of the mailing of the order, rule, or other action complained of.**" (emphasis added). The Court notes that Petitioners filed their Motion for Rehearing, approximately 30 days after the resolution was adopted.

denial of their motion without a hearing violates Regulations 1 and 2 of the *Rules and Regulations of the Council of the City of New Orleans*.

Regulation 1 states:

> "[a]ny person shall be entitled to a reasonable hearing on a) any proposed ordinance, motion or resolution . . . presented to the Council as long as the subject matter is one upon which the Council has legislative and regulatory authority. **Persons desiring such a hearing must request same in writing from the Clerk of Council in sufficient time to permit the notice required by Regulation Number 2.**" (emphasis added).

Regulation 2 states:

> "Before a hearing is held, all interested parties, including proponents, opponents, the Mayor or the Chief Administrative Officer, and members of the Council shall be notified by the Clerk of Council at least twenty-four (24) hours prior to the hearing."

The Council asserts that it put Petitioners' Motion for Rehearing on the Agenda for April 19, 2018. The Council further asserts that the only notice given of agenda items is a posting of the agenda on the Council's website the day before the meeting. The Council asserts that it provided sufficient notice that Petitioners' motion was on the agenda but that Petitioners' untimely filed a request for hearing.

It seems clear that Petitioners did not request a hearing on their motion with sufficient time for the Clerk of Council to provide notice to all interested parties. The request for hearing was not filed until 10 days after the motion for rehearing, and less than 24 hours before the Council's meeting on April 19, 2018. The Court will not comment on the pragmatism of the Council's method for publishing its agenda; however, the Court finds that Petitioners failed to request a hearing on their motion in timely fashion. The Council's denial of the motion was within its discretion, and Regulations 1 and 2 were not violated.

VI. Substantive Issues

After reviewing the procedural aspects of the Council's decisions, the crux of this case rests on the question of whether the proposed power plant is in the public interest. Petitioners assert, generally, that the Council acted arbitrarily and capriciously in approving ENO's application because the ENO had not sufficiently established that the plant was in the public interest.

Specifically, Petitioners pointed out 5 areas where they assert the Council acted arbitrarily and capriciously:

1. The Council failed to meaningfully evaluate reasonable alternatives;
2. The Council's conclusion that ENO established a capacity or reliability need for the power plant was not supported by the evidence;
3. The Council refused to establish cost conditions to protect ratepayers;
4. The Council denied ratepayers safe and reliable service pursuant to New Orleans City Code §§ 158-1045, 78-1 *et seq.*; and
5. The Council failed to fully examine the social justice issues.

The Court will address each of the aforementioned points of error in turn.

A. Council's Evaluation of Reasonable Alternatives

Petitioners assert that the Council's failure to meaningfully evaluate reasonable alternatives was arbitrary and capricious. Petitioners rely on *City of Plaquemine v. Louisiana Pub. Serv. Comm'n*, 282 So.2d 440, 443 (La. 1973) to support the argument that the City Council was required "to assure the furnishing of adequate service [to] all public utility patrons at the lowest reasonable rates consistent with the interest both of the public and of the utilities." They argue that this mandate requires the Council to meaningfully evaluate all reasonable alternatives and choose the one in the public's best interest.

Petitioners assert that the Council failed to evaluate reasonable alternatives; specifically, the Council failed to consider the feasibility of upgrades to ENO's transmission lines. Petitioners argued that transmission upgrades would solve ENO's reliability and capacity needs at a lower

cost than the proposed power plant. Thus, the Council's resolution approving the plant is based on incomplete information. The Council directed ENO in 2016 to evaluate four resource portfolio alternatives, including (1) transmission upgrades, (2) 100 MW solar power upgrade, (3) the Council's 2 percent energy efficiency goal, and (4) battery storage. Petitioners assert that ENO never evaluated these alternatives; the company simply made conclusory allegations that the alternatives were not feasible without running modelling to prove such.

ENO and the Council assert that they did consider alternatives to the proposed power plant; although ENO may not have run the specific models requested by the Council, they did evaluate the feasibility of alternative options. In fact, it was this evaluation that led to a fundamental change in the application, a departure from a 226 MW CT plant to a 128 MW RICE plant. The amendment was based on new information obtained about load forecasts and market conditions. ENO argued two main positions in relation to the transmission upgrades: (1) Petitioners' argument that the upgrades were a lower-cost alternative was based on speculation that energy prices would remain low, and (2) the evidence showed that transmission upgrades alone would not solve the existing capacity and reliability needs.

Before adopting Resolution 18-65, the Council considered evidence in the form of (1) screening analyses of alternatives from the original application, (2) supplemental testimony in response to the 2016 request for run models of the four portfolio alternatives, and (3) analyses included with the supplemental application. The Council also heard testimony from a number of witnesses for both Petitioners and ENO, including:

- Peter Lanzalotta;
- Robert Fagan
- Seth Cureington;
- Dr. Elizabeth Stanton;
- Joseph Vumbaco
- Joseph Rogers
- Philip Movish
- Charles Long

The Court again notes its role in this proceeding. More specifically, this Court is not tasked with second-guessing the City Council to determine if its decision to adopt Resolution 18-65 was right or wrong. This Court can only examine the record to determine whether the Council had sufficient evidence to make a reasonable decision. Although ENO did not run the specific models requested, and although the evidence was not presented perfectly on either side, evidence was presented and testimony was heard. Upon review of the record presented, it cannot be said that the Council did not consider the feasibility of alternative solutions. Furthermore, the Council was not tasked with only considering the lowest cost option; the Council had to choose the option it felt was in the best interest for the long-term health and stability of the City. The Court finds that the Council did not act arbitrarily and capriciously in regards to the consideration of reasonable alternatives.

B. Council's Finding that ENO established a Capacity or Reliability Need

For the reasons expressed above, the Court also finds that the Council was not arbitrary and capricious in finding that ENO established a need for the proposed power plant based on capacity and reliability.

In terms of capacity, Petitioners' argument is that ENO seeks substantially more capacity than it needs to fulfill demand requirements. Petitioners cite several witnesses who testified to this assertion, including Dr. Stanton, Mr. Vumbaco, and Maurice Brubaker. Generally, Petitioners asserted that ENO underestimated the effect of alternative energy sources and overestimated the future demand for energy.

ENO argued that, notwithstanding the fact that the power plant would create an immediate and short-term surplus of capacity, the evidence presented showed that the City would face a deficit in the long term. Furthermore, this deficit would be exacerbated by the fact that even more generators outside the city are being retired (increasing the need for local generation). ENO argued, and the Council concluded, that the effect of a surplus of capacity was preferable to the consequences of not having enough. Additionally, the transmission-only solution would not solve the capacity issued. ENO also criticized Petitioners plans on the same basis that Petitioners had argued; ENO asserted that Petitioners overestimated the effect that solar power sources would address the needs of the city.

Regarding reliability, Petitioners argued that all issues could be resolved by a combination of energy efficiency measures, solar generation, and limited transmission upgrades—all at a price cheaper than the cost of the proposed power plant. Meanwhile, ENO argued that New Orleans unique geographical location provided significant challenges to implementing the proposed alternatives—challenges ENO asserted were not considered by the witnesses for Petitioners. Essentially, ENO pointed out that almost all power being utilized is currently being "imported" from a single direction, over a small amount of land. In other words, all of ENO's eggs are currently in the same basket. A witness for ENO, Charles Long, testified that "the loss of even a portion of these transmission facilities delivering energy from the West into the City would likely prevent the Company from serving its entire load." Clearly this suggests a problem with reliability.

Regarding the contentions considered and evaluated by the Council, the Court looks to the explicit language of Resolution 18-65:

> [N]o party has rebutted ENO's contention that there are significant, and possibly insurmountable challenges associated with any transmission construction, whether it involves upgrades to existing lines or construction of new facilities. ***No party has refuted ENO's claim that it would take longer to plan and implement transmission upgrades than to construct NOPS on a site that ENO already owns.*** No party has refuted that there is a real likelihood that ENO would not be able to get the outages it would need to make any upgrades, and even if it did, the upgrades could take many years to complete. No party has refuted ENO's assertion that there is a serious risk of a P6 event occurring while any upgrades are being done because of the constraints on the system. Opponents of NOPS who support a transmission-only solution acknowledged the challenges ENO would face if it were to attempt to construct new facilities, particularly challenges in obtaining rights of way.

(Emphasis added). The resolution is replete with examples of the competing views considered by the Council. The Council spent a substantial amount of time considering the implications of its

decision and the possible alternatives available. Reviewing the record and evidence, it cannot be said that the Council's decision was unreasonable in light of all the information presented. Therefore, the Court finds that the Council did not act arbitrarily and capriciously in finding that ENO established a need for the power plant.

C. Council's Refusal to Establish Cost Conditions

Petitioners argue the Council acted arbitrarily and capriciously in refusing to set a cost limitation on the proposed power plant. Because the Council has approved ENO's request to pass the costs of the construction to ratepayers, Petitioners argue the lack of cost conditions exposes those ratepayers to unfettered increases in their energy bills. Petitioners point out that low-income ratepayers in New Orleans already bear a disproportionate burden in energy bills compared to the rest of the nation, and this would only be exacerbated by the construction of the proposed plant. Petitioners argue that part of the burden borne by ratepayers is highly dependent on speculative estimates of the future energy market.

Respondents assert that the issue of cost conditions was not raised until the "eleventh hour," and no party submitted credible evidence that such conditions were appropriate, feasible, necessary, or legal. Respondents also point out that, while the Council did not establish an explicit cap on costs incurred for the project, the Council did approve a monitoring plan. This plan would include periodic updates about the construction and any changes in budget; the Council would then have the ability to evaluate all costs incurred for prudence and allow recuperation of only those costs prudently incurred.

The resolution clearly states the Council's thoughts on the economic effect of the proposed plant. First, regarding the original application for a 226-MW CT plant, the resolution states,

> the CT would fully mitigate ENO's transmission reliability need over the planning period; however[,] the Council believes that the proposed size of the facility is excessive given ENO's load forecast, and that it would subject New Orleans customers to the risk of exposure to unpredictable MISO capacity market revenues. As the Advisors have demonstrated, if ENO's highly optimistic predictions

> about prices in the MISO capacity market prove incorrect, ENO will not be able to offset a sufficient amount of costs to make the CT economic for ratepayers.

This shows that the Council had already considered both the excess capacity issue and the economic impact issue. It is for this reason that the Council decided to approve the smaller 128-MW RICE plant. The Council clearly understood that the RICE option would involve similar risks as the CT option, but found that those risks would be more reasonable given the evidence presented. Regarding economic impact of the revised proposal, the resolution further states that the Council explicitly found "no evidence in the record that the conditions requested by the Joint Intervenors will result in a just and reasonable rate that is fair to ratepayers and allows the utility to recover its prudently incurred costs and a reasonable rate of return on its investment."

The Court finds that the Council did not act arbitrarily and capriciously in refusing to establish strict cost conditions on the construction of the proposed plant, particularly in light of the Council's implementation of a monitoring plan to evaluate the reasonability of all costs incurred.

D. The Council's Consideration of Flood Risks

Petitioners argue that the Council acted arbitrarily and capriciously in failing to comply with City Code Sections 158-1045 and 78-1, which require the Council to ensure safe and reliable service. Petitioners contend that the location of the proposed power plant (land already owned by ENO) is classified by FEMA as a high-risk flood hazard area. Petitioners assert that FEMA discourages construction of power plants in high risk areas, and argues that this policy evidences capriciousness on the part of the Council in approving construction at the location. Petitioners explicitly state that the resolution "entirely fails to address evidence in the record that both regional and federal governmental agencies responsible for flood protection in New Orleans recognize the flood risks that are inherent to the location and part of the operation of Entergy's proposed gas plant."

However, the resolution considers flood risk in many areas. It explicitly states that ENO presented multiple witnesses who testified that the proposed plant design, in conjunction with

ating flood risk reduction measures, would fully mitigate any flood risk. Specifically, the ordinance states that

> [T]he [NOPSI] project team took additional steps in the design and planning for NOPS to minimize the risk of NOPS being impacted by flooding, because the Company uses a Top of Concrete elevation in the design plans that exceeds FEMA guidance for the Michoud site in that it is 2.5 feet higher than the FEMA advisory [sic] recommendation.

The activities presented confirms that the Council seriously considered all important issues related to the construction of the proposed plant. While it may not have decided in Petitioners' favor, it cannot be said that the Council did not consider the respective arguments and evidence in conjunction with all applicable laws. Furthermore, though the Council considered the risk of flooding precluded by the events of Hurricane Katrina, the Council also considered the predictions of the Coastal Protection Restoration Authority. This prediction notes a number of facts that differentiate the present situation from the one 14 years ago, including (1) the closure of the Mississippi River Gulf Outlet, (2) the improvements to the levee system in St. Bernard Parish, (3) the installation of the Lake Borne Surge Barrier, and (4) the completion of the Seabrook Bridge Floodgate on Lake Pontchartrain near the proposed site of the power station.

The Court notes that the construction of the plant, though approved in part by Resolution R-05, is still conditioned on ENO's compliance with all applicable laws and regulations. It was reasonable for the Council to conclude that flood risks will be mitigated, and therefore the Court finds that the Council did not act arbitrarily and capriciously in regards to ensuring safe and reliable service pursuant to the aforementioned City Code Sections.

f. The Council's Examination of Social Justice Issues

Finally, Petitioners argue that the Council failed to fully and meaningfully examine the social justice issues created by the power plant. Petitioners assert that the location of the plant disproportionately affects the predominately poor and/or African-American and Vietnamese population of Michoud. Petitioners argue that, even if ENO complies with all EPA regulations, there is still a disproportionate risk of toxic pollution borne by Black and Vietnamese citizens

living near the plant. In other words, the EPA standards should be disregarded in terms of the social justice impact. Petitioners argue that "[t]he Council has not acknowledged much less analyzed or fully vetted the adverse impacts" posed by the plant.

However, ENO submitted evidence and testimony from a scientific expert that established that the emissions from this plant would not disproportionately affect the health of the population at issue. In fact, the emissions from the proposed plant would be substantially less than the emissions from the former Michoud units that were retired in 2016 (ENO claims there will be a 77.3% reduction from the previous units). There was also a dispute as to how far the nearest residences were located but no parties dispute that there are no residences at the "fence line" of the plant. The nearest residences are at least three-fourths of a mile to 1 mile away from the plant.

Yet again, Resolution 18-65 is replete with the Council's consideration of the social justice impacts of the proposed power plant. It states so explicitly in several places:

- WHEREAS, the Joint Intervenors argue that each of ENO's proposed gas-fired generation options would create racially disproportionate environmental burdens on predominately African American and Vietnamese neighborhoods in New Orleans East . . . ;
- WHEREAS, the Joint Intervenors argue that in its application, ENO does not examine, or even consider, the racially-disproportionate environmental burdens of operating a power plant in close geographic proximity to predominately African-American and Vietnamese-American neighborhoods;
- WHEREAS, the Joint Intervenors argue that the poor are especially at risk from air pollution, and older adults and children are also at greater risk . . . ;

Far from Petitioners' assertion that "[t]he Council has not acknowledged much less analyzed or fully vetted the adverse impacts" posed by the plant, it is ***abundantly clear*** from the language of the resolution that the Council did, in fact, acknowledge and consider the social justice ramifications of its decision. The 188-page resolution contains at least 13 full pages of what the Council considered from both Petitioners, ENO, and the Council's Advisors regarding air emissions and social justice issues.

Therefore, the Court finds that the Council did not act arbitrarily and capriciously in regards to examining the social justice issues posed by the proposed plant and its location.

VI. Conclusion

For the aforementioned reasons, the Court finds that the Council of the City of New Orleans did not deprive Petitioners of their constitutional rights to due process. Furthermore, under *Gordon*, the Council's decision (1) was not arbitrary and capricious; (2) was not a clear abuse of authority; and (3) was reasonably based upon the factual evidence presented. The Council's decision to adopt Resolution 18-65, conditionally approving ENO's application for a 128-MW RICE power plant, is **AFFIRMED ON THESE GROUNDS.**

SIGNED this 14th day of June, 2019, in New Orleans, Louisiana.

JUDGE PIPER D. GRIFFIN

DIVISION "I"

A TRUE COPY

DEPUTY CLERK, CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LA