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December 20, 2024

VIA ELECTRONIC MAIL

Clerk of Council
Clerkofcouncil@la.gov
City Hall - Room 1E09
1300 Perdido Street
New Orleans, LA 70112

Re: Resolution (R-24-624) and Order Establishing A Docket and Procedural Schedule to Enhance Distributed Energy Resource Programs (CNO Docket No. UD-24-02)

Dear Clerk of Council:

Attached please find the Comments of Entergy New Orleans, LLC ("ENO") for filing in the above-referenced docket pursuant to Resolution No. 24-624. ENO submits this filing electronically and will submit the requisite original and number of hard copies once the Council resumes normal operations or as you direct.

Thank you for your assistance in this matter, and please let me know if you have any questions or concerns.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Edward R. Wicker, Jr.', with a stylized, flowing script.

Edward R. Wicker, Jr.

ERW/jlc

Enclosures

cc: Official Service List UD-24-02 (*via electronic mail*)

**BEFORE THE
COUNCIL OF THE CITY OF NEW ORLEANS**

RESOLUTION AND ORDER R-24-624)	
ESTABLISHING A DOCKET AND)	
PROCEDURAL SCHEDULE TO)	DOCKET NO. UD-24-02
ENHANCE DISTRIBUTED ENERGY)	
RESOURCE PROGRAMS)	

COMMENTS OF ENTERGY NEW ORLEANS, LLC

Entergy New Orleans, LLC (“ENO” or “the Company”) submits these Comments in compliance with the requirements of Resolution No. R-24-624 (“Resolution”) issued by the Council of the City of New Orleans (“Council”). As discussed below, ENO has concerns regarding the legality of third parties’ using the Settlement Credits (as defined herein) for their non-utility programs. ENO appreciates the opportunity to provide these Comments for initial consideration and discussion, and looks forward to reviewing comments from other stakeholders, participating in discussions, and submitting additional comments for the Council’s and parties’ consideration.

INTRODUCTION

ENO understands that non-utility third parties intend to present “proposals for changes to existing policies or programs, new programs, costs, and proposed funding mechanisms” for distributed energy resources (“DER”), among other facilities, in New Orleans.¹ Third parties like Together New Orleans (“TNO”) and the Alliance for Affordable Energy (“AAE”) have expressed plans for their own programs. ENO expects that TNO and AAE will reiterate, in their respective comments, their requests for funding of their programs through the Settlement Credits made at the October 9, 2024 Climate Change and Sustainability Committee meeting. Moreover, the initial

¹ Resolution, p. 4.

comment period in the Resolution allows ENO and others an opportunity to provide “comments on whether [the Settlement Credits] can and should be used to support these [third party] programs.”²

As discussed herein, to the extent the Council may be inclined to allow third parties to use the Settlement Credits for their own non-utility programs, that would be inconsistent with the terms of the settlement involving System Energy Resources, Inc. (“SERI”), and Resolution No. R-24-194 approving the settlement, and also may exceed the Council’s regulatory authority and likely implicates the Council’s taxing authority and constitutes the taking of private property.

If the Council is interested in implementing a kind of program that a non-utility third party may propose in its initial comments, ENO respectfully requests that the Council expand the Resolution to consider utility-run programs and afford ENO the opportunity to present its own proposal to the Council and stakeholders. Because of its unique position as the electric public utility serving New Orleans customers, any proposal from ENO – which could include expansion of the existing Energy Smart battery program – would avoid the legal obstacles discussed herein and provide benefits and protections to all customers in accordance with regulatory law and policy. ENO would welcome the opportunity to discuss such a proposal with the Council and stakeholders at the technical conference.

BACKGROUND

The Council opened this docket for stakeholders to consider, among other things, the potential for “increasing the availability of DERs, battery storage, and related facilities including any changes to ENO-related policies, funding mechanisms, and establishing a vendor-neutral program to facilitate these goals.”³ In the Resolution, the Council noted that TNO and AAE,

² Resolution, p. 4.

³ Resolution, p. 3.

among others, “have stressed the importance of increasing the number and scale of DERs and microgrid programs.”⁴

In opening the docket, the Council also noted its recent approval of a settlement involving SERI (“SERI Settlement”). The SERI Settlement, which resolved twenty FERC dockets to which the Council was a party, provided that SERI “shall provide a refund to ENO in the amount of \$116 million....”⁵ The SERI Settlement details the manner in which the settlement funds are “to be returned to ratepayers.”⁶ In its Resolution in this docket, the Council reiterated that the SERI Settlement will “refund \$116 million to ENO ratepayers.”⁷ In particular, the Council noted that “\$32 million credits [of the total SERI Settlement] was retained by ENO pending further direction from the Council and subject to an annual cap of \$10 million unless there is mutual agreement between ENO and the Council....”⁸ The Council stated that “regulatory law and policy generally require that credits such as these [\$32 million] should be passed on to ratepayers.”⁹

ENO understands, however, that non-utility third parties TNO and AAE, and others, seek to utilize the \$32 million from the SERI Settlement (“Settlement Credits”) as a source of funding for their own non-utility programs and projects. On October 9, 2024, TNO and AAE presented a “Proposal Summary” to the Council’s Climate Change and Sustainability Committee on their plans for potential DERs, including building out microgrids, virtual power plants, community lighthouses, and other facilities across New Orleans. During their presentation, TNO and AAE proposed to use the Settlement Credits to fund their programs.¹⁰

⁴ Resolution, p. 2.

⁵ Resolution, p. 2; Resolution No. R-24-194, SERI Agreement in Principle (“SERI AIP”) #4.

⁶ Resolution No. R-24-194, p. 2, SERI AIP #4, 6.

⁷ Resolution, p. 2.

⁸ Resolution, p. 2.

⁹ Resolution, p. 2.

¹⁰ TNO and AAE’s Distributed Community Resilience for the City of New Orleans: Proposal Summary (Oct. 9, 2024).

COMMENTS

Legal obstacles exist to the Council's using the Settlement Credits to fund non-utility programs of third parties. In the Resolution, the Council stated that "regulatory law and policy generally require that credits such as these [\$32 million] should be passed on to ratepayers."¹¹ ENO agrees. Accordingly, ENO is concerned about the legality of the Council's ordering ENO to turn over the Settlement Credits to third parties to develop their own programs composed of non-utility projects.

The third parties are not public utilities and do not otherwise represent the interests of all ENO customers. Along those lines, ENO is concerned about protecting its customers should any third party programs not be properly developed or managed. The third parties are not ENO that can return credits to customers by offsetting costs that would be otherwise recoverable from customers. If the Council were to issue such an order, an aggrieved customer (or other interested party) could initiate a legal challenge in court, and place ENO at risk of having to pay the Settlement Credits twice – one time to third parties for their projects (per Council order) and another time to customers as a bill credit (as intended by the SERI Settlement). Double payments at this level would harm all stakeholders as they would undermine ENO's financial condition.

The legality of the Council's ordering ENO to turn over the Settlement Credits to third parties is a concern because (a) such order is inconsistent with the SERI AIP and the SERI AIP approval in Resolution No. R-24-194, and (b) such order may exceed the Council's regulatory authority and likely implicates the Council's taxing authority and constitutes the taking of private property. If, however, the Council were to order ENO to turn over the Settlement Credits to third

¹¹ Resolution, p. 2.

parties, the Council's order should expressly relieve ENO of any further liability to customers for the amount of any Settlement Credits provided to third parties.

First of all, ordering ENO to turn over the Settlement Credits to third parties would be inconsistent with the SERI AIP and Resolution No. R-24-194 approving the SERI AIP. Indeed, both intended that ENO would return the Settlement Credits to customers. The SERI AIP addressed the retail ratemaking treatment of the \$116 million refund from SERI pursuant to the SERI Settlement. ENO had received approximately \$18 million of the \$116 million prior to the execution of the SERI AIP, and the SERI AIP set out the retail ratemaking treatment for the remaining \$98 million. The SERI AIP's third introductory paragraph explained that the primary purpose of the SERI AIP was to provide "expeditious benefits to ENO's customers in the form of credits and prospective rate reductions."

The SERI AIP's Paragraphs 6(b) and 6(c) direct the return of \$66 million to customers in two tranches over long-term periods: \$22 million over ten years and \$44 million over twenty-five years. Paragraph 6(a) addresses the Settlement Credits at issue, and provides as follows:

- a. ENO will retain a \$32 million credit for customers:
 - i. The \$32 million in SERI credits will be retained by ENO pending further collaboration and direction from the Council. In the event that the Council desires to use more than \$10 million of these credits in any given twelve month period, then CURO, the Council's Advisors and the Company shall collaborate on a mutually agreeable solution considering ENO's financial metrics.

Notably, the very first words of Paragraph 6(a) – "ENO will retain a \$32 million credit for customers" – signals that *customers* are to receive the Settlement Credits. Paragraph 6(a) then explains that the Council unilaterally can direct ENO to return up to \$10 million to customers in any twelve-month period. If the Council wants ENO to return more than that amount, then the

Council Utility Regulatory Office (“CURO”), the Advisors, and ENO must collaborate and find a “mutually agreeable solution” that preserves ENO’s financial condition.

At the time the Council Advisors and ENO formulated this provision, another retail regulator had ordered ENO’s sister company to provide each retail customer a one-time bill credit of \$80.¹² ENO knew that a one-time credit of \$80 would stress its financial condition, and the Council Advisors and ENO included the \$10 million figure as a guide for the amount of the Settlement Credits that ENO could return to customers in a short period of time, if the Council chose to do so. Additionally, Resolution No. R-24-194, which approved the SERI AIP, acknowledges in the penultimate “**WHEREAS**” clause that the objective of the SERI AIP is to return the SERI refund to ENO’s customers.¹³ Thus, the SERI AIP established the mechanisms to return the entirety of the SERI refund to customers – with one portion being returned over lengthy 10 to 25 year terms, and another portion (the Settlement Credits totaling \$32 million) that could be returned more quickly, with a maximum of \$10 million being returned in any twelve-month period.

Paragraph 6(a)’s use of the infinitive “to use” does not permit the Council to order ENO to turn over the Settlement Credits to third parties. Although “to use” can have a variety of meanings, interpreting the language to mean that customers would not receive the Settlement Credits is unsupported. As discussed above, Paragraph 6(a) expressly states that the Settlement Credits are “for customers.” Moreover, companion Paragraphs 6(b) and 6(c) return the majority of the SERI

¹² The Mississippi Public Service Commission directed Entergy Mississippi, LLC to provide a one-time bill credit of \$80 to all retail customers in the September 2022 billing cycle. In lieu of the credit, customers could request an \$80 check. Order Directing Disbursement of SERI Settlement Proceeds, MPSC Docket No. 2018-AD-141, July 12, 2022.

¹³ Resolution R-24-194, p. 2 (“**WHEREAS**, as part of the AIP, SERI agrees to a total refund of \$116 million to ENO to be returned to ratepayers . . .”).

refund to customers. Nothing in the SERI AIP suggests that third parties would receive the Settlement Credits instead of customers.

Although the Council has discretion to change policy, the Council has limited discretion when taking unilateral action inconsistent with an agreement previously approved by the Council. For example, in *Entergy Gulf States, Inc. v. Louisiana Public Service Commission*, the regulator argued that the terms of a Commission-approved agreement justified the disallowance of operation and maintenance expenses from the utility's rates.¹⁴ The Louisiana Supreme Court rejected the regulator's interpretation of the agreement, finding that it "cannot unjustifiably disregard the parties' intentions or the plain language of the agreement to uphold the Commission's interpretation of the order, even though the Commission's interpretation of its own orders generally deserves great weight."¹⁵ Applying this reasoning here, if the Council were to order ENO to turn over the Settlement Credits to third parties, the Council would be creating a risk that an aggrieved customer (or other interested party) may challenge its unilateral action inconsistent with the SERI AIP and to the detriment of ENO.

Additionally, the Council's ordering ENO to turn over the Settlement Credits to third parties may be a tax or constitute an illegal taking. This, too, would create the risk that an aggrieved customer (or other interested party) may challenge the Council's unilateral action. Although the Council does have the power to levy taxes,¹⁶ the Council can only exercise that power through ordinance and compliance with the associated procedures, including presentation to the Mayor.¹⁷ Moreover, the Louisiana Constitution provides that "[p]roperty shall not be taken . . . except for public purposes and with just compensation paid to the owner," and "property shall not

¹⁴ *Entergy Gulf States, Inc. v. Louisiana Pub. Serv. Comm'n*, 730 So. 2d 890, 897-901 (La. 1999).

¹⁵ *Id.* at 898.

¹⁶ Home Rule Charter of the City of New Orleans ("HRC"), §3-101.

¹⁷ HRC, §3-111.

be taken or damaged by the state or its political subdivisions: (a) for predominant use by any private person or entity; or (b) for transfer of ownership to any private person or entity.”¹⁸ The Council’s ordering ENO to turn over the Settlement Credits to third parties would implicate both of these clauses. Diverting all or a portion of the Settlement Credits to third parties instead of returning the credits to customers would be a tax on ENO’s customers or, worse, a taking of ENO’s customers’ private property without just compensation or for use or ownership by private parties.

ENO’s concern is not speculation. Another state has acknowledged that taxation and illegal takings of customer refunds may occur if a utility regulator does not return refunds to customers. In *Assembly of State v. Public Utilities Commission*, the court annulled the utility regulator’s ordering a substantial portion of a Federal Communications Commission-ordered refund from AT&T to Pacific Bell be “allocated toward school telecommunications infrastructure development and consumer education” because a state statute, Section 435.5, prohibited such action.¹⁹ The court explained that the legislature enacted Section 435.5 in the 1970s to prevent the utility regulator from using refunds for non-residential customers to fund conservation efforts because such action would result in illegal confiscation or illegal taxation.²⁰

This court decision indicates that diverting customer refunds to third parties is problematic and potentially illegal, and that returning the Settlement Credits to customers is the more reasonable and sound path as intended by the SERI AIP and Resolution No. R-24-194 approving it. Moreover, in at least one instance, the Louisiana Supreme Court found a fee imposed by a

¹⁸ La. Const. art. I, §4(B)(1) (Right to Property). Also, the “Louisiana Supreme Court has recognized that the State Constitution provides protections beyond the Federal Constitution and greatly limits the State government and the forfeiture, taking, or regulation of private property.” *In re: An Investigation into Whether Electric Industry Restructuring and Competition in the Provision of Retail Electric Service Are in the Public Interest*, Order No. U-21453, 1998 WL 34368455 (LPSC Oct. 16, 1998) (citing *State v. 1971 Green GMC Van*, 354 So. 2d 479, 486 (La. 1977)).

¹⁹ 906 P.2d 1209, 1210 (Cal. 1995).

²⁰ *Id.* at 1217 (“... in all likelihood this approach would constitute confiscation of property or illegal taxation.”).

legislative act to be an unconstitutional tax,²¹ and the Council should expect that a diversion of the Settlement Credits would receive careful scrutiny by a court. Accordingly, by ordering ENO to turn over the Settlement Credits to third parties, the Council would create a risk that an aggrieved customer (or other interested party) may challenge its unilateral action inconsistent with the SERI AIP and to the detriment of ENO.

If the Council were to pursue ordering ENO to turn over all or a portion of the Settlement Credits to third parties, which it should not, the Council should provide protection to ENO that it will not have to use its capital to replace the Settlement Credits, if a reviewing court determines that such Council order was unlawful. Assume the Council orders ENO to provide \$16 million of the Settlement Credits to third parties to pay for projects that would be owned by the third parties. Further, assume an aggrieved customer seeks judicial review of the Council's order, and, a year later, a court finds that the Council's order is unlawful and orders that ENO return to customers the \$16 million paid to the third parties as originally intended in the SERI AIP. In all likelihood, ENO would not be able to recoup the \$16 million from the third parties. As a result, ENO would have to use \$16 million of its capital to place customers in the same position they would have been without the Council order.

Such an outcome would have an adverse effect on ENO's financial condition and would be detrimental to all stakeholders. The Council should avoid this result. The Settlement Credits should not be used for third party programs. The third parties are not public utilities and do not otherwise represent the interests of all ENO customers. If the Council were to pursue ordering ENO to turn over all or a portion of the Settlement Credits to third parties, which it should not, the Council should provide protection to ENO.

²¹ *Audubon Ins. Co. v. Bernard*, 434 So. 2d 1072, 1076 (La. 1983).

CONCLUSION

To the extent the Council may be inclined to allow third party entities to use the Settlement Credits for their own non-utility programs, that would be inconsistent with the terms of the SERI Settlement and Resolution No. R-24-194, and also may exceed the Council's regulatory authority and likely implicates the Council's taxing authority and constitutes the taking of private property. If, however, the Council were inclined to issue such order, the Council should protect ENO by releasing the Company from any further claims regarding the Settlement Credits (in the event a court later finds that the Council's order is unlawful).

Further, if the Council is interested in implementing a kind of program that a non-utility third party may propose, ENO respectfully requests that the Council expand the Resolution to consider utility-run programs and afford ENO the opportunity to present its own proposal – which could include expansion of the existing Energy Smart battery program, avoid the legal obstacles discussed herein, and provide benefits and protections to all customers. ENO would welcome the opportunity to discuss such a proposal at the technical conference, and looks forward to reviewing comments from other stakeholders and submitting additional comments for consideration.

Respectfully submitted,

By:



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CERTIFICATE OF SERVICE

UD-24-02

I hereby certify that I have served the required number of copies of the foregoing pleading upon all other known parties of this proceeding individually and/or through their attorney of record or other duly designated individual.

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New Orleans, Louisiana, this 20th day of December, 2024



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