ALLIANCE FOR AFFORDABLE ENERGY
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Via Facsimile and UPS

Ms. Terri Lemoine Bordelon
Records and Recording Division
Louisiana Public Service Commission
Galvez Building, 12th Floor
602 N. 5th St.
Baton Rouge, LA 70802

In Re: Entergy Louisiana, LLC, ex parte. In re: Application for approval of the Entergy Future Ready Resilience Plan (Phase I). Louisiana Public Service Commission, ex parte. **(LPSC DOCKET No. U-36625)**

Dear Ms. Bordelon:

Please find attached the Alliance for Affordable Energy's Opposition to Entergy Louisiana LLC's Request for Approval of Proposed Framework pursuant to Rule 51 and 57 in the abovementioned docket. The original and two (2) copies will be mailed in five (5) business days.

Respectfully submitted,

Jessica Hendricks
Alliance for Affordable Energy

BEFORE THE

LOUISIANA PUBLIC SERVICE COMMISSION

***IN RE*: APPLICATION OF ENTERGY LOUISIANA, LLC FOR APPROVAL OF THE ENTERGY FUTURE READY RESILIENCE PLAN (PHASE I)**	))))	**DOCKET NO. U-36625**

THE ALLIANCE FOR AFFORDABLE ENERGY'S OPPOSITION TO ENTERGY LOUISIANA LLC'S REQUEST FOR APPROVAL OF PROPOSED FRAMEWORK PURSUANT TO RULES 51 AND 57

The Alliance for Affordable Energy ("Alliance") strongly opposes Entergy Louisiana LLC's ("ELL" or "Company") attempt to circumvent the contested proceeding process established by the Louisiana Public Service Commission ("Commission"). The Commission should deny ELL's request that the Commission approve the Company's Future Ready Resilience Plan (Phase I) ("Framework") at its April 19, 2024 Business and Executive Session. Specifically, the motion should denied because 1) contrary to ELL's assertion, there remain factual disputes in the proceeding; 2) use of Rule 51 and Rule 57 to short circuit this contested proceeding is contrary to the rules and violates the Alliance's due process rights; and 3) there is no evidentiary record to support the Framework, all the testimony provided in this proceeding solely addresses ELL's original application. For these reasons. The Commission should deny ELL's motion and order that the parties continue the proceeding before the Administrative Law Judge ("ALJ").

ARGUMENT

A. ***ELL's contention that there are no facts at issue is incorrect.***

First, this case is a contested case in which, despite the Company's assertions to the contrary, disputes exist with regard to significant facts.[1] Disputes exist not only with regard to the overall funding ELL should receive for its resilience plan, but how that funding should be spent, which projects will achieve the level of resilience necessary and whether ELL has justified its funding requests for the individual aspects of the plan.

For example, the Alliance provided the testimony of its expert witness Mr. Dinos Gonatas. The contentions raised by Mr. Gonatas include:

- Whether funds would be better spent expanding ELL's its existing transmission and distribution system to provide security through additional redundancy;

- Whether the modeling relied upon by the Company overstates their claimed benefit/cost ratios and NPVs due to problems with the model;

- Whether the Application and supporting testimony is deficient because of a lack of diligent analysis showing the improvement in key performance indicators that would result from the proposed investments;

- Whether resiliency of the system could be better improved by investing in enhanced transmission interconnections and undergrounding rather than investing in the system in the manner ELL proposes;

- Whether better resiliency results could be achieved by prioritizing crossbar-type pole replacement over cycle tree trimming;

- Whether the use of low-cost satellite imagery for surveying vegetation would improve vegetation management;

[1] ELL's contention is actually a non sequitur. The Company states "In light of the important policy considerations presented by the Application, there are few, if any, outstanding issues of law or fact to be adjudicated by an Administrative Law Judge." Motion at 1. Simply because there are policy considerations does not mean there are few issues of fact.

- Whether ELL's plan provides for the optimal deployment of dead-end structures;

- Whether ELL appropriately analyzed the economic value of customer interruptions; and

- Whether ELL's modeling provides valid information.

This list is merely a sampling of the factual issues that remain to be resolved in this proceeding. ELL's contention that no significant factual issues exist is disingenuous at best.

Moreover, in response to ELL's only settlement conference (at least the only conference that included all the parties), the Alliance developed a list of concerns and proposed changes to what has now apparently become the "Framework". Due to the confidential nature of settlement discussions, the Alliance cannot provide this list to the Commission. However, the Commission can certainly question how ELL can include that no factual issues exist when the Company prematurely ended discussions.

Questions of adjudicative facts must be resolved on the basis of evidentiary submissions. Disputed questions of adjudicative fact are normally not to be decided without providing the parties affected the opportunity to confront witnesses and hear and contest evidence against them.[2] In this instance, the Commission should find that a myriad of factual issues still remain to be resolved and should therefore deny ELL's motion.

B. ***Approval of the Framework at the April 19, 2024 Business and Executive Session is contrary to the Commission's rules and would violate the Alliance's procedural due process rights.***

[2] *Patagonia Corp. v. Board of Governors of the Federal Reserve System*, 517 F.2d 803 (9th Cir. 1975)

ELL relies on Rule 51 and Rule 57 to support the Company's motion. The Commission should find that these rules do not support the Company's motion.

Rule 51 provides:

> In its sound discretion, the Commission may suspend the operation of these Rules or modify them instanter, may authorize temporary rates or, to the extent authorized by law, may grant temporary operating authority, or temporary modification or extension of existing authority, after such proceedings and upon such conditions as it finds to be just and practicable.

However, the preamble to PART XI. ADMINISTRATIVE HEARINGS DIVISION, which include Rule 57, states:

> To the extent any Rule within this section conflicts with provisions elsewhere in the Rules of Practice and Procedure or in previously issued Orders of the Commission addressing procedural matters, the Rule within this Part shall govern.

Rule 54 provides:

> The Administrative Hearings Division shall conduct hearings and make necessary recommendations and rulings in *all* matters invoking the adjudicatory jurisdiction of the Commission for which a hearing is required. (emphasis added).

The exception to this requirement is in Rule 57 which states that the "Commission may also, upon its own motion, assert its original and primary jurisdiction and consider any question or issue *pending* before an Administrative Law Judge." In this instance, ELL's Framework is not pending before the Administrative Law Judge. It was not submitted to the ALJ. The Framework was provided directly to the Commissioners for a ruling, inappropriately by-passing the ALJ. Since the Rule 57 requirements prevail over Rule 51,[3] the Commission cannot consider the Framework in the absence of that Framework being placed before the ALJ.[4]

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[3] *Washington-St. Tammany Elec. Co-op, Inc. v. Louisiana Public Service Comm'n*, 1995-1932 (la. 4/8/96). 671 So.2d 908, 912. Moreover, because the LPSC is bound by its own rules, its failure to apply them properly would constitute an arbitrary and capricious action. *Id.* at 914 n.3.

[4] The Commission has previously relied on Rule 57 to consider temporary rates and uncontested settlements. The Commission has not used this rule to negate the rights of parties and should not do so now.

Moreover, the title of Rule 57 is "REVIEW OF INTERLOCUTORY RULINGS". Basic rules of statutory construction, which also apply to the interpretation of regulations, require that the title of a provision be considered when interpreting that provision. For this reason, Rule 57 should be interpreted only to apply to interlocutory rulings. Thus, the provision which grants the Commission authority to consider any issue or question must be interpreted as applying *only* to interlocutory decisions and should not be interpreted as enabling the Commission to render a final judgment which resolves the entire proceeding.

The Commission should bear in mind that ELL's only justification for the request to suspend the rules is that 1) there are no issues of fact and 2) that this proceeding is taking too long. With regard to the issues of fact, the argument above demonstrates that this contention is patently incorrect. Moreover, while the Company now claims the proceeding is taking too long, ELL never objected to the procedural schedules set forth in this matter. To the contrary, ELL joined in requests to suspend the procedural schedule and set a schedule that provided more time for the parties and delayed the evidentiary hearings. The Company cannot now be permitted to sandbag the other parties and use the very schedule it agreed to as a justification for abandoning the adjudicative hearing.

Rule 35 also bears on the Commission's consideration of ELL's motion. Rule 35 provides:

> In all proceedings, ... the prepared testimony of a witness upon direct examination, either in narrative or question and answer form, may be incorporated in the record as if read, or received as an exhibit, upon the witness's being sworn and identifying the same. Such witness shall be subject to cross examination and the prepared testimony shall be subject to a motion to strike in whole or in parts.

This rule raises two issues pertinent to the Company's motion. First, the testimony of a witness does not become a part of the record until the witness is sworn in at a hearing and identifies the testimony as theirs. Thus, at this juncture there is *no evidence* in this proceeding. A

Commission decision must be based on substantial evidence on the record. In this instance there is *no* evidence addressing the Framework and whether it is in the public interest. All the testimony ELL alludes to addresses solely the original application filed by the Company, and even that evidence is not in the record in the absence of complying with Rule 35. The Framework is therefore without any evidentiary support.

Rule 35 also provides that each witnesses' testimony will be subject to cross examination. Even in the absence of this rule, the parties have a procedural due process right to cross examine witnesses in a contested adjudicative proceeding.

Due process is a basic value in American law, and public participation in government decision-making is a basic value in American democracy. Procedural due process grants parties the right to fully litigate their issues in a meaningful manner. An administrative agency that performs an adjudicative function must comply with reasonable procedural requirements, such as adequate notice and a full hearing, in order afford the parties with due process.[5] Such a process involves conducting discovery, filing sworn testimony and evidence and holding an evidentiary hearing at which sworn testimony is given subject to cross examination. Under due process, parties are entitled to an opportunity to test, explain and/or refute that evidence.[6] Written submissions or presentations ought never to be permitted to be used to evade cross-examination where such cross-examination is the only effective means of testing out the reliability or probative value of a written submission or presentation.[7]

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[5] *Tafaro's Inv. Co. v. Division of Housing Imp.*, 259 So. 2d. 57, 63 (La. 1972).
[6] *Utility Regulatory Commission v. Kentucky Water Service, Inc.*, Ky.App., 642 S.W.2d 591 (1982). (In denying the Attorney General the right to cross examine Staff, the Commission violated due process).
[7] *See, eg* 38 Mass. Prac., Administrative Law & Practice § 7:13.

Failure to allow cross examination of witnesses prevents a party from setting forth their full case. For example, ordinarily discovery responses and correspondence between the parties are included in the record of a Commission proceeding only when they are admitted into evidence in an evidentiary hearing through a witness who is subject to cross-examination or by agreement of the parties. In an evidentiary hearing, the Alliance would have had an opportunity to introduce into evidence additional documents, together with the cross examination explaining these documents and their significance. If the Commission grants ELL's motion, the Alliance will be prevented from fully supporting its arguments.

Just one example of how the failure to permit cross examination unfairly impacts the Alliance is with regard to ELL's answer concerning whether winter storms were covered in ELL's resiliency analysis. The Company's report had coverage of hurricanes but said nothing about winter storms. Their consultant 1898 said during their technical conference in response to a question, that they included winter storms in their base of weather events, but the consultant failed to fully and clearly explain how. The consultant's response contradicts Entergy's response to Alliance discovery question 1-5 where the Company stated that winter storms were irrelevant. On cross-examination, the Alliance could explore why these two answers seem to contradict each other. Ending the process now prevents the Alliance, and thus the Commission, from determining the answer to this question. This is only one example which illustrates the need for cross examination.

The Commission should deny ELL's motion because granting the motion would violate the due process rights of the parties. Moreover, the procedural posture of the Commission's consideration of this motion also is unfair and prejudicial to the other parties. ELL chose to submit this motion and Framework despite having no support from the other eleven parties. Furthermore, the compressed time frame chosen by the greatly limited the other parties ability to

participate in the Commission's consideration of this motion. ELL provided the motion to the parties at the close of business Monday and the Commission did not place the motion on the April 19, 2024 Business and Executive Session agenda until Wednesday. The parties who oppose ELL's motion are clearly prejudiced by this unnecessarily fast-tracked process.

CONCLUSION

WHEREFORE, for the reasons set forth above, the Alliance for Affordable Energy respectfully requests that the Commission deny ELL's motion and order that the proceeding continue before the ALJ.

Dated: April 17, 2024

Respectfully submitted,

Susan Stevens Miller

Susan Stevens Miller, Esq.
Senior Staff Attorney
Earthjustice
Counsel for the Alliance for Affordable Energy

CERTIFICATE OF SERVICE

I hereby certify that I have this 17th day of April, 2024, served copies of the foregoing pleading upon all other known parties of this proceeding, by electronic mail.

Jessica Hendricks
The Alliance for Affordable Energy