

19<sup>TH</sup> JUDICIAL DISTRICT COURT  
PARISH OF EAST BATON ROUGE  
STATE OF LOUISIANA

ALLIANCE FOR AFFORDABLE  
ENERGY, SIERRA CLUB,  
LOUISIANA ENVIRONMENTAL  
ACTION NETWORK, GULF  
RESTORATION NETWORK, and  
SAL GIARDINA JR.,  
Petitioners,

v.

LOUISIANA PUBLIC SERVICE  
COMMISSION,  
Respondent.

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No.: 568378  
Sect.: 8

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**PETITION FOR JUDICIAL REVIEW AND APPEAL**

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1. This is an appeal by the Alliance for Affordable Energy, Sierra Club, Louisiana Environmental Action Network (“LEAN”), Gulf Restoration Network, and Sal Giardina Jr. (collectively, “Petitioners”) of final action of the Louisiana Public Service Commission (“Commission”). Specifically, Petitioners appeal the Commission’s Order No. U-30192 entered on March 19, 2008 (“Order”) approving Entergy Louisiana, LLC’s (“Entergy”) application for a certificate of public convenience and necessity and authority to construct and repower the Little Gypsy Unit 3 power plant (“Repowering Project”).

**PARTIES**

2. Each Petitioner is a person aggrieved by the Commission’s Order and each Petitioner participated in the administrative adjudication before the Commission as an intervenor.

3. Petitioner Alliance for Affordable Energy is a non-profit Louisiana corporation that is dedicated to creating a fair, affordable, environmentally responsible energy policy for the citizens of Louisiana. The Alliance has members who are Entergy ratepayers, and who live, work, or recreate in the area that the Commission’s Order affects.

4. Petitioner Sierra Club is a non-profit California corporation with more than 700,000 members nationwide. Sierra Club seeks to promote the responsible use of resources and to protect and restore environmental quality. Sierra Club has approximately 4,000 members in

Louisiana, including members who are Entergy ratepayers, and who live, work, or recreate in the area that the Commission's Order affects.

5. Petitioner LEAN is a non-profit Louisiana corporation whose purpose is to preserve and protect Louisiana's land, air, water, and other natural resources, and to protect its members and other residents of the state from threats of pollution and threats to the state's natural resources. LEAN has members who are Entergy ratepayers, and who live, work, or recreate in the area that the Commission's Order affects.

6. Petitioner Gulf Restoration Network is a non-profit Louisiana corporation that works to create and serve a network of environmental, social justice, and citizens' groups and individuals committed to restoring the resources of the Gulf Region to an ecologically and biologically sustainable condition. Gulf Restoration Network has members who are Entergy ratepayers, and who live, work, or recreate in the area that the Commission's Order affects.

7. Petitioner Sal J. Giardina, Jr., is a resident of LaPlace, St. Charles Parish, Louisiana—an area serviced by Entergy. Mr. Giardina is an Entergy rate payer and lives and recreates in the area that the Commission's Order affects.

8. The Commission's decision will impose excessive costs on members of the Alliance for Affordable Energy, Sierra Club, LEAN, and Gulf Restoration Network, and on Mr. Giardina. This is because the plant is not the lowest reasonable cost alternative and will most likely result in high regulatory costs associated with controlling emissions of carbon dioxide and other pollutants. In addition, the decision imposes unreasonable environmental risks and damage on members of Sierra Club, LEAN, Gulf Restoration Network, and Alliance for Affordable Energy, and on Mr. Giardina. This is because the Repowering Project will result in a coal and petroleum coke-fired plant that will emit harmful air pollutants into the air, exacerbate global warming, and contribute to an increased risk of catastrophic storms and coastal loss in southeastern Louisiana.

9. The Commission is a constitutional entity empowered by La. Const. art. IV § 21(B) with the authority to regulate public utilities, and has the power to sue and be sued.

10. The Commission made the final decision in the proceeding below.

### **JURISDICTION AND VENUE**

11. Jurisdiction and venue are proper in this Court pursuant to La. Const. Art IV § 21(E) and La. R.S. §§ 45:1191, 45:1192.

12. Petitioners filed a timely motion for rehearing on March 31, 2008 within 10 days of the Commission's Order in accordance with Rule 43 of the Commission's Rules of Practice and Procedure, which suspended the 45-day period in which to file an appeal pursuant to La. R.S. § 45:1192.

13. At the Commission's Open Session on May 14, 2008, the Commission denied Petitioners' Motion for Rehearing.

14. Petitioners file this appeal within 45-days of the Commission's denial of their motion for rehearing.

### **DETAILED ALLEGATIONS**

15. On July 11, 2007, Entergy filed an application with the Commission seeking a certificate of public convenience and necessity and authorization to convert Little Gypsy Unit 3 in Montz, St. Charles Parish, Louisiana from a natural gas-fired power plant to a coal and petroleum coke-fired plant. Entergy instituted this proceeding as Docket U-30192 and sought an expedited 120-day review under the Commission's 1983 General Order.

16. The Commission's 1983 General Order prohibits construction of the Repowering Project without Commission approval and without advance certification that the proposed project serves the public convenience and necessity.

17. To determine whether the Repowering Project would serve the public convenience and necessity, the 1983 General Order requires the Commission to find whether the project is Entergy's lowest reasonable cost alternative consistent with its obligation to provide safe and reliable electric service.

18. Entergy had the burden of proving to the Commission that the Repowering Project will serve the public convenience and necessity in accordance with the terms of the 1983 General Order.

19. The Commission's 1983 General Order requires Entergy to provide in its application, among other things, "the specific data utilized by the utility in justification of the generation . . . [and] an itemized projection of total costs" for the Repowering Project.

20. The Commission's Market Based Mechanisms Order requires Entergy to employ the best information available regarding market alternatives. *See* General Order, Docket No. R-26172 (Feb. 16, 2004).

21. In conjunction with its July 11, 2007 application Entergy filed its original case-in-chief, *i.e.*, evidence to support its applications, including expert testimony to support Entergy's assertion that the Repowering Project is "the lowest reasonable cost alternative" and is in the public interest.

22. The Commission appointed a hearing examiner to preside over the proceeding for the purpose of establishing a record for the Commission's review and decision.

23. Petitioners intervened in this proceeding on July 30, 2007. Other intervenors included Louisiana Energy User's Group, Occidental Chemical Corporation, Marathon Oil Company, SUEZ Energy North America, Inc., Wal-Mart Louisiana, LLC, Cajun Gas, and NRG and several of its affiliates.

24. After a scheduling conference, the hearing examiner entered a Notice of Procedural Schedule and Notice of Hearing on August 23, 2007. This scheduling order was based on the fact that Entergy had already submitted its direct evidence with its July 11, 2007, application. The schedule allowed the Petitioners a fourteen (14) day period (from August 24, 2007 until September 7, 2007) for deposing Entergy's witnesses on their direct testimony. In addition, the schedule allowed twenty (20) days (until September 12, 2007) for the Petitioners to propound written discovery. The schedule allowed the Petitioners a total of twenty-two (22) days (until September 14, 2007) to develop testimony in response to Entergy's direct testimony. Finally, the schedule allowed Entergy twenty (20) days (until October 4, 2007) to submit "Rebuttal Testimony and Workpapers." This October 4, 2007 deadline was five business days before the hearing that began on October 11, 2007.

25. Entergy's original case-in-chief relied on Entergy's "PROSYM analysis." "PROSYM" is a computer model designed to simulate a power system's costs, including fuel costs, operation and maintenance costs, and startup costs, over time.

26. The PROSYM analysis compared the expected costs of the Repowering Project to those of a natural gas powered plant.

27. When using the PROSYM analysis to compare expected costs of the Repowering Project to those of a natural gas powered plant, Entergy and its witnesses assumed that the Repowering Project would not result in any costs from complying with government regulation of carbon dioxide emissions.

28. An important difference between a coal and petroleum coke burning plant (such as the Repowering Plant) and a natural gas burning plant, is that burning coal and petroleum coke results in significantly more carbon dioxide emissions than burning natural gas. Carbon dioxide is an air pollutant associated with global warming.

29. At the time Entergy submitted its direct testimony, several bills were pending in the U.S. Congress to respond to global warming by regulating carbon dioxide emissions at significant cost to the emitting facilities.

30. Entergy knew when it submitted its direct testimony that regulation of carbon dioxide emissions is virtually certain to occur by the time the plant would be built.

31. The Repowering Project will, if constructed, emit millions of tons of carbon dioxide per year.

32. On September 17, 2007, Petitioners and other intervenors filed their direct testimony and work papers responding to Entergy's application and direct testimony. The Petitioners showed that Entergy's failure to include regulatory costs associated with carbon dioxide emission in the PROSYM analysis was unreasonable and that Entergy's comparison of costs between the Repowering Plant and natural gas burning alternatives was invalid.

33. The Petitioners' evidence showed that Entergy had not met its burden of showing that the Repowering Project was the lowest reasonable cost alternative.

34. Entergy apparently agreed that its case-in-chief was inadequate to meet its burden of proof. But rather than resubmitting its application with reasonable assumptions, or requesting

leave to restart the hearing with new direct testimony and new cost comparisons, Entergy replaced the PROSYM and other analyses of its direct testimony with new analyses (constituting a new case-in-chief) and asserted incorrectly that its replaced direct testimony was a “rebuttal.”

35. “Rebuttal evidence” is “[e]vidence offered *to disprove or contradict* the evidence presented by an opposing party,” not evidence that replaces the analysis offered in a party’s case-in-chief. *Black’s Law Dictionary* 599 (8th ed. 2004) (emphasis added).

36. On October 4, 2007—five business days before the hearing—Entergy replaced its direct testimony with a new case-in-chief (its so-called “rebuttal”). This new evidence consisted of 250 pages of testimony from 10 witnesses (5 new to the proceeding and 5 who were among the original 12 witnesses), 15 exhibits; and 15 work papers.

37. Entergy’s new PROSYM analysis, which formed the basis of Entergy’s new case-in-chief on costs, included new cost estimates, now assuming regulatory costs associated with carbon dioxide emissions. Because these estimates increased the projected cost of the project, Entergy also developed new analyses to spread costs over a longer “useful life” and to increase projected costs of natural-gas burning alternatives. Entergy’s new case-in-chief included exhibits and work papers that presented new economic and modeling analyses based on new assumptions.

38. Under the scheduling order, the Petitioners were supposed to have twenty-two (22) days to respond to Entergy’s case-in-chief. By replacing the key analyses of its original case-in-chief, however, and submitting a new version a mere five business days before the hearing, Entergy made it impossible for the Petitioners and their expert witnesses to submit relevant responsive testimony.

39. Holding an adjudicative hearing on a complex regulatory matter a mere five business days after submission of the proponent’s case-in-chief defeats the purpose of holding the hearing and denies the decisionmaker the benefit of a record developed through an adversary proceeding.

40. On October 8, 2007, Petitioners filed a motion to continue the hearing or to exclude Entergy’s new case-in-chief (*i.e.*, its so-called “rebuttal” testimony).

41. The Commission denied the Petitioners’ motion to continue or exclude.

42. This procedure violated Petitioners' due process right to a fair opportunity to respond to Entergy's new case-in-chief and to protect their rights as ratepayers.

43. If the Petitioners had had an opportunity to respond to Entergy's new case-in-chief, the Petitioners would have shown that Entergy's new assumptions are not reasonable, that the Repowering Project is not the lowest reasonable cost alternative and that the project is not in the public interest.

44. Entergy's construction of its Repowering Project will be delayed for about a year because of Entergy's failure to timely show that it would install state-of-the-art technology to control hazardous air pollutants. Accordingly, a remand to the Commission would not prejudice Entergy. Moreover, Entergy's construction delays and obligation to control hazardous air pollutants will make the Repowering Project even more expensive. Entergy and the Commission should share the Petitioners' interest in obtaining a revised Commission decision that considers all relevant facts, including these new delays and expenses.

45. Even Commission staff was not in a position to fully evaluate Entergy's new case-in-chief. Staff witness Matthew I. Kahal stated that he did not have a chance to look into the analysis presented in Entergy's new case-in-chief. *See Hr'g Tr.*, 13: 8-18, Oct. 12, 2007 ("Q. [Y]ou have not had a chance to go and I think you said dig behind that analysis to look at the supporting data and work papers to see if ... if those numbers that [Mr. Walz] used are legitimate, right? Or accurate? A. Right. Legitimate is kind of a loaded term. Q. Accurate? A. I haven't—yeah, right.").

46. Despite the fact that no party could respond to Entergy's new case-in-chief, the Commission concluded that the new PROSYM analysis in Entergy's new case-in-chief was the "best evidence presently available" on the cost-effectiveness of the project. Order at 20-23.

47. The Commission based its decision to certify the project as serving the public convenience and necessity on Entergy's new PROSYM analysis in its new case-in-chief.

48. Upon information and belief, the Repowering Project is not the lowest reasonable cost alternative and is not in the public interest.

49. On October 11, 2007—the day the hearing began—Chairman Blossman announced that "Little Gypsy repowering is a smart project" and is "still cheaper in the long run

than doing anything else.” This statement demonstrates that he had prejudged the key facts to be adjudicated, that is, whether the project was in the public interest and whether it was the lowest reasonable cost alternative.

50. Louisiana law requires that an adjudication comprise a hearing that is fair and impartial in reality and in appearance. Thus, the law requires that decisionmakers who prejudge adjudicative facts recuse or be disqualified.

51. Participation of a decisionmaker who had prejudged the adjudicative facts tainted and affected the outcome of the Commission’s decision.

52. The right to an impartial decision maker in administrative adjudications is based on due process, and applies to agency adjudications as well as court decisions.

53. Petitioners moved to disqualify Chairman Blossman on Oct. 30, 2007.

54. Chairman Blossman participated in, and, in fact led, the Commission’s decision made at the November 8, 2007 Business & Executive Session to approve Entergy’s application. Chairman Blossman’s failure to recuse himself—and the Commission’s failure to disqualify him—violated the Alliance’s due process right to a “neutral and detached decision maker.”

#### **ASSIGNMENTS OF ERROR**

55. The Commission erred by reaching its decision without first disqualifying Chairman Blossman who had, in reality and appearance, prejudged key adjudicative facts in dispute in this proceeding.

56. The Commission erred in denying the Petitioners a reasonable opportunity to respond to Entergy’s new testimony and analyses, which constituted a new case in chief, and which Entergy improperly styled as “rebuttal testimony.”

57. The Commission’s decision violates the 1983 General Order.

58. The Commission’s decision violates the Market Based Mechanisms Order.

59. The Commission’s decision is arbitrary, capricious, and not reasonably supported by the evidence.

60. These assignments of error are not exclusive, and Petitioners reserve the right to specify additional assignments of error in their brief which they will file per schedule set by the Court.



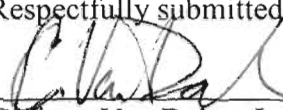
**DESIGNATION OF RECORD FOR APPEAL**

61. Petitioners designate the following as the record on appeal in this matter: all documents and other materials filed in Docket No. U-30192 that exist as of the date of the filing of this Petition for Judicial Review and Appeal, excluding documents and other materials filed after December 4, 2007 in the second phase of this docket (Phase II). Petitioners also designate all statements made by the Chairman and Commissioners relating to the proceeding below.

**WHEREFORE**, Petitioners respectfully request that this Court:

- a. Vacate the Commission's Order;
- b. Remand the matter to the Commission for a new administrative hearing;
- c. Assign all costs in this matter to the Commission; and
- d. Award all other relief the Court finds proper.

Respectfully submitted this 30th day of June, 2008 by:

  
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***PLEASE SERVE:***

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19<sup>TH</sup> JUDICIAL DISTRICT COURT  
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SIERRA CLUB, LOUISIANA  
ENVIRONMENTAL ACTION  
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LOUISIANA PUBLIC SERVICE  
COMMISSION, Respondents.

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**ORDER**

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The Court received the Petition for Judicial Review and Appeal appealing the Louisiana Public Service Commission's Order No. U-30192 entered on March 19, 2008 that Petitioners Sierra Club, Louisiana Environmental Action Network, Alliance for Affordable Energy, Gulf Restoration Network, and Sal Giardina Jr. filed with the Court of the 30th day of June, 2008.

The record designated by the Petitioners shall be compiled and forwarded to the Nineteenth Judicial District Court, and the appeal shall be returnable to the 19th Judicial Court on or before the \_\_\_\_ day of \_\_\_\_\_, 2008.

Baton Rouge, Louisiana, this \_\_\_\_ day of \_\_\_\_\_, 2008.

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DISTRICT JUDGE  
NINETEENTH JUDICIAL DISTRICT COURT