

**IN THE MATTER OF
THE SETTLEMENT OF CERTAIN LITIGATION
BETWEEN THE CITY OF ALEXANDRIA
AND CLECO CORPORATION,
AND THE DISTRIBUTION OF CERTAIN
PROCEEDS ARISING THEREFROM**

**ORDER OF APPEAL IN CONNECTION WITH THE REVIEW
HEARING CONTEMPLATED AND REQUIRED BY
ORDINANCE NO. 178-2016 OF THE CITY COUNCIL OF THE
CITY OF ALEXANDRIA, LOUISIANA**

Introduction

Pursuant to Ordinance No. 178-2016 of the City Council of the City of Alexandria, Louisiana, adopted on November 29, 2016 ("Ordinance No. 178-2016"), the undersigned was appointed as Administrative Law Judge and Special Referee (the "ALJ") to perform the duties and tasks specified therein.¹

Pursuant to such authority, particularly Section IV(6)(E) of Ordinance No. 178-2016, the undersigned ALJ convened a preliminary hearing at 9:00 o'clock A.M. on April 26, 2017, and reconvened such hearing at 9:00 o'clock A.M. on Thursday, May 4, 2017, to hear opening statements from interested persons, including the City of Alexandria, relative to the issues contemplated by Ordinance No. 178-2016.

At the conclusion of that second hearing, the undersigned ALJ issued an Order on May 4, 2017, certifying to the City Council of the City of Alexandria, Louisiana, the issues for appeal in this matter (the "Certification Order").

Scope of Administrative Review

Section IV(1) of Ordinance No. 178-2016 sets forth the requisite requirements for an administrative review, and particularly assigns to the undersigned ALJ the following responsibilities, to-wit:

- (i) To review all matters related to Ordinance No. 178-2016,

¹ Copies of all ordinances and orders noted herein are on file with the office of the Clerk of the City Council of the City of Alexandria, and are available for public review and inspection in accordance with the Louisiana Public Records Act, La. R.S. 44:1, *et seq.*

- (ii) To establish an orderly procedure for review,
- (iii) To determine if further evidence or traversal of the existing evidence is warranted,
- (iv) To certify written reasons by findings of fact and law, and
- (v) To issue an appeal order, creating an appealable judgment on behalf of the City Council to a court of proper jurisdiction as established by companion ordinance (Ordinance No. 177-2016 of the City Council of the City of Alexandria, Louisiana, adopted on November 29, 2016).

In order to comply with the directive of Section IV(1)(ii) of Ordinance No. 178-2016, the undersigned ALJ entered an order on May 5, 2017 (the "Procedural Order"), so as to establish the procedures to be followed in connection with an administrative review hearing to consider evidence and argument pertinent to the issues certified for appeal in this matter by the Certification Order, as same might have been modified by the City Council as permitted by Ordinance No. 178-2016.

No modifications to the issues set forth in the Certification Order having been made by the City Council of the City of Alexandria, Louisiana, within the time specified in the Certification Order, the administrative review hearing contemplated by the Procedural Order commenced at 10:00 o'clock A.M. on June 21, 2017, in the Chambers of the City Council of the City of Alexandria, Louisiana, City Hall, 915 Third Street, Alexandria, Louisiana.

Due and proper notice having been given, the administrative review hearing was convened, and the undersigned ALJ received commentary, evidence and oral argument from all persons desiring to be heard, particularly including counsel for the City of Alexandria.²

Comments were also received at the administrative review hearing from any interested persons who desired to be heard. One concerned citizen appeared at

² Copies of all documentary evidence and other exhibits introduced into the record of the hearings are on file with the office of the Clerk of the City Council of the City of Alexandria, and are available for public review and inspection in accordance with the Louisiana Public Records Act, La. R.S. 44:1, *et seq.*

the administrative review hearing and posed certain questions. Over objection by the City, the citizen was permitted to pose such questions, and the undersigned ALJ directed the City to provide responses to the questions posed within delays set by the undersigned ALJ, and a timely response was issued by the City in reference to the questions posed.

Findings of Fact

After a thorough review and evaluation of the record of all prior hearings, including the documentary evidence and other proofs offered by the City in support of the issues certified in the Certification Order, and set forth in Ordinance No. 178-2016, the undersigned ALJ issues the following Findings of Fact, as follows:

- (a) Adequate and sufficient proof has been offered in support of the several issues set forth in Ordinance No. 178-2016, and the Certification Order.
- (b) Although written objection was received and considered by the undersigned ALJ, no evidence has been offered in opposition to the various issues set forth in Ordinance No. 178-2016, and the Certification Order.
- (c) The Utility Rebate Initial Plan of Action dated March 31, 2017, as issued by the City of Alexandria, is reasonable and sufficient, and is not in any manner affected by actions or motives that could be characterized as arbitrary, capricious or an abuse of discretion.
- (d) The actions of the City of Alexandria, through its Utility System, with respect to the management or handling of the Cleco Litigation, the Franklin Litigation and the promulgation of the Utility Rebate Initial Plan of Action dated March 31, 2017, were reasonable and within its discretion as a rate making authority or body politic.
- (e) The Franklin Litigation should be dismissed with prejudice, and at the cost of the plaintiffs therein.
- (f) In particular reference to the issues that were required by Ordinance No. 178-2016 to be presented to the undersigned ALJ, and after receiving all testimony

and evidence, and hearing objections in writing, the undersigned ALJ finds,³ as follows:

- (i) The City settled the Cleco Litigation based on a fixed-value settlement, in which the market-best proposal through an RFP process was established as a baseline and Cleco was required to provide a wholesale energy agreement (the WEES) at a predetermined value less than that market-best alternative, plus cash in the amount of \$9.5 million. This effective settlement sum of value to return to citizens was agreed to have a total cash and forward value of \$50 million.
- (ii) The August 2015 milestone payment to the City from the Cleco Litigation settlement in the amount of \$6.5 million and an additional payment for costs and fees in the amount of \$3 million exist in a restricted fund balance within the AUS.
- (iii) Those funds are available for public purposes of the City or the AUS, as deemed appropriate and including for payment of cash rebates.
- (iv) There should be proper offset of value achieved by beneficiaries of the principal aspect of the settlement mechanism, the below-market wholesale power agreement.
- (v) Resolution No. 7816-2005 of the City Council of the City of Alexandria, Louisiana, adopted on September 13, 2005, mandates that any net proceeds of any settlement or judgment secured as a result of the Cleco Litigation will be refunded to ratepayers who bought power from the City Utility during a period from roughly 1995-2005.

³ All defined terms shall have the meanings as defined in Ordinance No. 178-2016.

- (vi) The rates applied as detailed in the Franklin Litigation were applied correctly or in favor of the eligible ratepayers, and not to the detriment of such ratepayers, resulting in no loss to the ratepayer as a result of any fault on the part of the City of Alexandria.

- (vii) There has been no substantive advancement of the claims in the Franklin Litigation. No class has been certified. Thus, the only Franklin Plaintiffs, as revealed in the pleadings are as follows: Armested Franklin, Diane Tatum, Julius C. Sweazie, Estella Deal, Henry E. Ceasor, Linda R. Strong, Curley Holden, Geraldette Johnson, Daniel Dodson, Alice Samuel, Stephanie Jenkins, Linda Gaston, Phyllis McKenzie, Vernon K. Miller, Mercedes Williams, Shawanda Piper, Pearl Madison, Teresa Smith-Hampton, Elizabeth Smith, Ruby Boney, Minerva Moore, Jeanette Reed, Gladys Batiste, Anna Jones, Joe K. Speed, Roe Mary Raymond, Mary Gurdry, Katherin Guidry, Emmie Stanley, LaShonda Johnson, Joyce Willis, Freddie Price, Willie R. Thomas, Regina Camp, Lillie R. Beed, Fannie Reed, Annie Weston, Debra Drayton, Alice Jackson, Shterroca Shotlow, Debra Well-Dodd, Joe Garmon, Debra Duncan, Sue Vallery, Elgie Dean Slaughter, Shantelle Slaughter, Kathy Slaughter, Connie M. Slaughter, Bertha M. Gorman, Curtis McDaniel, Kwanza Lewis, Ethel Hanes, Mary Bolque, Bridgette Williams and Helen Williams (the "Franklin Plaintiffs").

- (viii) The Utility Rebate Initial Plan of Action dated March 31, 2017, and the findings supporting same, do not prohibit rebates to ratepayers that may include the Franklin Plaintiffs; and the Franklin Plaintiffs had the opportunity (after being given actual notice of all hearings) to traverse and challenge the legislative findings of the City Council of the City of Alexandria, by utilizing the processes set forth in Ordinance No. 178-2016, and the Certification Order, and

thereafter review of these matters in accord with the Order of the Court dated September 13, 2016, in the Franklin Litigation, dismissing that case, without prejudice, for determinations by the ratemaking authority on the matters presented in the Franklin Litigation.

- (ix) The accuracy and methodology of the City's final determination of "corporate v. ratepayer" losses as claimed by the Cleco-City Litigation was reasonable, appropriate, supported by the record, and was not arbitrary, capricious or an abuse of discretion.
- (x) The City's determination of the offset methodology as indicated in Section IV of Ordinance No. 178-2016, and the Application of Realized Settlement Savings, was reasonable, appropriate, supported by the record, and was not arbitrary, capricious or an abuse of discretion.
- (xi) The final Payout Decision and Plan of Action is reasonable, appropriate, supported by the record, and was not arbitrary, capricious or an abuse of discretion.
- (xii) The finding by the Council that the Franklin Litigation may be dismissed was reasonable, appropriate, supported by the record, and was not arbitrary, capricious or an abuse of discretion.

The undersigned ALJ makes no determination as to, and expresses no opinion with respect to, any issues pertaining to damages or attorney's fees, as such claims were specifically reserved and retained for determination by the district court in the Franklin Litigation.⁴

⁴ See Second Ordering Paragraph of Judgment dated September 13, 2016, in the Franklin Litigation. See also *Daily Advertiser v. Trans-La*, 612 So. 2d 7 (La. 1993).

Conclusions of Law

After a thorough consideration of the issues certified in the Certification Order, and set forth in Ordinance No. 178-2016, and the law applicable thereto, the undersigned ALJ makes the following Conclusions of Law, as follows:

- (a) The City of Alexandria is a municipality operating under a Home Rule Charter form of government, established after the adoption of the 1974 Constitution. Home Rule Charter, adopted January 1, 1977.
- (b) As such, the City of Alexandria is immune from legislative action by enacting any law, the effect of which changes or affects the structure and organization or the particular distribution and redistribution of the powers and functions. LSA-Const. Art. VI, § 6.
- (c) The City of Alexandria shall have and exercise such other powers, rights, privileges, immunities, authority and functions not inconsistent with its charter as may be conferred on or granted to a local governmental subdivision by the constitution and general laws of the state, and more specifically, the City of Alexandria shall have the right and authority to exercise any power and perform any function necessary, requisite or proper for the management of its affairs, not denied by its charter, or by general law, or inconsistent with the constitution. Home Rule Charter, § 1-04.
- (d) Being a home rule charter created or established after the adoption of the 1974 constitution, the City of Alexandria may exercise home rule powers consistent with the constitution except when the exercise of such power is denied by general law. *City of Baton Rouge v. Williams*, 661 So.2d 445, 448 (La. 1995).
- (e) The City of Alexandria is authorized by law to construct, acquire, extend, or improve any revenue-producing public utility and property necessary thereto, either within or without its boundaries, and may operate and maintain the utility in the interest of the public. La. R.S. 33:4162A.

- (f) It is within the unregulated legislative authority of the City of Alexandria to establish electricity rates and earn a profit. *Michael v. City of Minden*, 704 So. 2d 409 (La. App. Ct. 2d 1996).
- (g) Any challenge to the actions of a rate-making authority must be addressed to that agency. *Daily Advertiser v. Trans-La*, 612 So. 2d 7 (La. 1993).
- (h) Under the “primary jurisdiction doctrine,” while challenges to the actions of a rate-making authority must be addressed to that agency, issues pertaining to damages or attorney’s fees are within the exclusive province of the district court. *Daily Advertiser v. Trans-La*, 612 So. 2d 7 (La. 1993).
- (i) The decision of the City of Alexandria to settle the Cleco Litigation is not to be disturbed unless it was arbitrary, capricious, or an abuse of discretion. *Michael v. City of Minden*, 704 So. 2d 409 (La. App. Ct. 2d 1996).
- (j) As a general proposition, and except as otherwise provided by the constitution, the funds, credit, property, or things of value of the City of Alexandria shall not be loaned, pledged, or donated to or for any person, association, or corporation, public or private. LSA-Const. Art. 7, § 14A.
- (k) The constitutional prohibition against the donation of public funds is violated when public funds or property are gratuitously alienated. *The Board of Directors of the Industrial Development Board of the City of Gonzales, Louisiana, Inc. v. All Taxpayers, Property Owners, Citizens of the City of Gonzales*, 938 So.2d 11 (La. 2006).
- (l) The head of the legal division of the City of Alexandria shall be the city attorney who shall be appointed by the mayor, subject to confirmation by the council, and shall serve at the pleasure of the mayor. The city attorney shall serve as chief legal adviser to the mayor, city council and all divisions or departments, offices and agencies, shall represent


the city in all legal proceedings and shall perform any other duties prescribed by this charter or by ordinance. Home Rule Charter, § 4-02A and B.

- (m) “An ordinance, like a state statute, is presumed to be constitutional and the party attacking the ordinance has the burden of proving its unconstitutionality. An ordinance will be upheld if there exists a reasonable relationship between the law and the public good.” *Theriot v. Terrebonne Parish Police Jury*, 436 So. 2d 515, 520 (La. 1983).

Conclusion

This Order is intended to constitute the “appeal order,” that creates an appealable judgment, and written reasons by findings of fact and conclusions of law, as required by Section IV(6)(F) of Ordinance No. 178-2016, and, to that end (and in conformity therewith), the undersigned ALJ hereby certifies this Order as appealable. A copy of this Order shall be provided to the presiding judge in the Franklin Litigation (as defined in Ordinance No. 178-2016), and to the Clerk of Court of the Ninth Judicial District Court, to serve as occasion may require.

ORDER SIGNED this 20th day of July, 2017.



PATRICK S. OTTINGER

ADMINISTRATIVE LAW JUDGE AND SPECIAL REFEREE