



CITY OF ALEXANDRIA, LOUISIANA
MAYOR JACQUES M. ROY

FOR IMMEDIATE STAFF USE AND PUBLIC DISTRIBUTION

March 31, 2017
Office of the Alexandria City Attorney
Alexandria, Louisiana

UTILITY REBATE INITIAL PLAN OF ACTION

City Releases Plan of Action to Administrative Law Judge for Review

Alexandria, Louisiana—The City of Alexandria enacted an ordinance relative to the settlement of previous litigation, its proceeds, value, reimbursement of costs, and milestone payment in the matter of the City of Alexandria versus Cleco Corporation, Docket No. 1:05-cv-01121 (“City-Cleco Litigation”).

I. INTRODUCTION

The purpose of the ordinance, No. 178-2016 (the “Ordinance”), among others, was to authorize the processes for determining the availability, entitlement, and eligible classes of individuals, commercial entities, and other juridical and public entities relative to monetary payments, credits, and rebates; to authorize the mayor to contract the necessary professional services, attorneys, and experts for determining and certifying the value of any and/or all additional rebates owed to citizens through settlement of the City-Cleco Litigation; and to authorize and direct the mayor to implement the procedures outlined therein to deal with all claims against those proceeds, values, and decisions.

The City settled the City-Cleco Litigation based on a fixed-value settlement. The fixed-value settlement sought was to have a total monetary and projected forward economic value of \$50 million for ratepayer and corporate city losses. The methodology for achieving this fixed-value settlement was to use a combination of cash and an under-market value “settlement power deal” with Cleco, in which the market-best proposal through an RFP process established a baseline (variable “x”). Thereafter, Cleco was required to provide a wholesale energy agreement (the “WEES”) at a predetermined value less than that market-best alternative (variable “y”), creating a difference between the two expressed as $(x - y)$ in which that amount, plus cash in the amount of \$9.5 million, should equal \$50,000,000: $x - y = \Delta$; when Δ should equal \$50,000,000. In this way, the City would avoid variable determinants in past attempts at settlement and “fix” the settlement value to objective determinants, i.e., the market. The only remaining variables would thereby not be controlled, or “black boxed,” by Cleco: i.e., the market price of fuel would remain the only real variable.

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Thus, the City made two key commitments upon settlement of the City-Cleco Litigation relative to the value achieved by the below-market Cleco WEES: the value portion and cash payments should achieve \$50,000,000 in total value and, at least, \$9,000,000 of that total would be in cash available to rate payers entitled to any additional rebates, subject to offset. The cash portion was payable to a “lockbox,” a restricted purpose account untouched until the end of the WEES. Today, there is \$15 million for approved public purposes in a restricted fund balance, with \$9.5 million of that amount in a certificate of deposit.¹

The City therefore submits this determination of value achievement² is properly before the process of review; however, the City submits the decision to settle for \$50,000,000 in this combinative value is unreviewable, as a discretionary act of the Alexandria City Council and is subject to collateral estoppel and/or *res judicata*. Relatedly, the City shows the value achieved did not involve any assistance from the attorneys for any litigants in that litigation known as the Franklin Litigation, as detailed in the Ordinance, *Section III*, which section is adopted in totality by reference as if stated verbatim.

II. PERIOD OF TIME COMPENSATED BY THE PAYMENT

The period of time involving \$107,754,905 in total Cleco purchased power is limited to losses incurred during the Entitlement Period, i.e., during the years between 1995 and 2005 (the “Entitlement Period”). The City submits this period of time was established by the lawsuit allegations, adopted and accepted by the Alexandria City Council as an unreviewable discretionary act of the Alexandria City Council and “thing adjudged,” subject to the doctrines of collateral estoppel and/or *res judicata*.

III. PAYMENTS AND THE REBATE PROCESS

The Ordinance confirms a restricted fund balance to be appropriated for the purpose of payments or credits to qualified recipients damaged during the period set forth by the suit

¹ The \$50,000,000 value was not arbitrary, but was based on an assessment by experts of potential damages, such that this amount would be sufficient to cover ratepayer and corporate losses. Corporate losses are not due directly as cash rebates to the ratepayer since these are the equivalent of “lost profits” to the City’s utility for insufficient crediting of the use of City capacity at D.G. Hunter (“sale of excess generation”). Instead, the recovery of corporate loss would benefit the utility and thereby indirectly benefit the ratepayer through savings. These savings would address opportunity costs, principally by allowing the City to re-direct a greater amount of expenses now lowered to other utility-related activities.

² The City submitted the data supporting achieved value in conjunction with the Ordinance. The total achieved value was \$47,805,482, with 100% of the ratepayer-estimated loss achieved on the highest side of the range. Sale of excess generation, the corporate loss not due ratepayers directly, had a range of \$6 million to \$15 million. Approximately \$12.2 million of this speculative count was achieved. The prediction was off as a result of the single variable, the price of gas in the market dropping to record lows. Nonetheless, the performance overall met 94% of goals, and 100% of ratepayer loss on the highest estimated end.

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during the Entitlement Period for purposes hereunder (the “Qualified Recipients”). The Qualified Recipients are entitled to any additional cash or credit rebates (the “Rebates”) due from the City-Cleco Litigation, in an amount that is subject to offset and allocation of administrative cost sharing plus interest and other values (the “Payment”)—all subject to the guidelines under which the Payment will be made, in addition to the requirements set forth throughout the Ordinance, *Section IV* (the “Policy”), which is adopted in totality by reference as if stated verbatim.

IV. ELIGIBILITY TO RECEIVE THE PAYMENT

Upon final approval of this proposed Plan of Action, by the Legal Division of the City of Alexandria, and a final, unappealable judgment by the appropriate court, the Payment shall be made according to *Section IV* of the Ordinance. The Policy sets forth all requirements and eligible classes, which is adopted in totality by reference as if stated verbatim.³

V. BASIS AND RANGES FOR FUNDING OF THE PAYMENT

The Payment shall be funded according to the expert data accepted and relied upon previously by the Council, and based on the counts in the City-Cleco Litigation and the timeframe alleged in the suit. This determination is subject to the finality of the Plan of Action contained in the Ordinance, *Section VII*.⁴

As a starting metric, it should be noted the City shows the Entitlement Period involves \$107,754,905 in total purchased power (and related transmission charges). The lawsuit

³ The Policy includes classes of Qualified Recipients who require an “equalization algorithm” still under construction and proofing, but substantially reported as stated in the Ordinance, Section IV(6)(a-b). Most notably, Class C ratepayers are those who are not Qualified Recipients but who received the benefit of the under-market WEES, thereby gaining a benefit of the settlement not due them. Normally, those savings would be due back to the corpus for redistribution to the Qualified Beneficiaries in some manner, or by some other equalization going forward created for Qualified Beneficiaries. However, since the Qualified Beneficiaries will receive 100% of their value, plus potential cash rebates for damages and lost use of their funds during the Entitlement Period (not received by Class C), the City submits there is no need to equalize and offers the benefits achieved by the WEES to citizens as a measure of the good faith and practice of the municipal utility. To grant additional benefits to qualified beneficiaries only creates another class of persons receiving a benefit not due them. To attempt a further equalization would require more costs to the Plan of Action than is justified by the benefit the City might gain to corporate losses unrealized based on a 94% recovery rate for the settlement.

⁴ The values in the counts are the summary conclusions for each count of damages, based on the City’s expert’s review of the court-sanctioned KPMG Report (the “R.W. Beck review”). The values contained in the R.W. Beck review summary were adopted and accepted by the Alexandria City Council in support of the settlement decision, i.e., the decision to settle for \$50,000,000 in combinative value. The City submits this decision and the use of this data pursuant to the R.W. Beck review is unreviewable and a reasonable and permitted act of settlement and thereby a discretionary act of the Alexandria City Council.

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was organized into four counts for purposes of settlement, with counts I and III, only, involving ratepayer loss. Counts II and IV involved corporate loss. Since counts I and III are the only two counts in which ratepayers could have been harmed, the City’s settlement decision recovered 23.3% of its total expenditures over the Entitlement Period. This percentage exceeded the historically probable 10%-15% expected in fraud analysis.

The City and its experts considered 23.3% a high recovery percentage for irregular or alleged fraudulent activity for the period.

The City therefore calculated recovery and Rebates to Qualified Recipients for purposes of the Payment by:

- Assuming a reasonable rate of return for the funds involved as though citizens may have prudently invested such funds during the period, by adding to damages an interest rate of 1.6% compounded annually.
- Assuming a damage multiplier of 150% for those funds as general damages, over and above the actual loss.

The following tables demonstrate this information.

Low (millions)	High (millions)	Count from Lawsuit
8.2	21.8	Count I — Purchases Power Cost
6.0	15.0	Count II — Sale of Excess Generation
2.2	3.3	Count III — Transmission Cost
0.007	0.265	Count IV — Natural Gas Cost
16.4	40.4	Total

Therefore, summing \$21.8M and \$3.3M, the City certified the ratepayer loss, on the high end, was \$25,100,000 before the damage multiplier and application of interest.

Accordingly, the next tables apply the calculated recovery:

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Rate of Return:		1.600%
Multiplier:		1.172
Low	High	Count from Lawsuit
(millions)	(millions)	
8.200	21.800	Count I — Purchases Power Cost
6.000	15.000	Count II — Sale of Excess Generation
2.200	3.300	Count III — Transmission Cost
0.007	0.265	Count IV — Natural Gas Cost
16.400	40.400	Total
Low	High	Count from Lawsuit
(millions)	(millions)	
9.660	25.550	Count I — Purchases Power Cost
7.068	17.580	Count II — Sale of Excess Generation
2.592	3.868	Count III — Transmission Cost
0.008	0.311	Count IV — Natural Gas Cost
19.328	47.309	Total
Low	High	Count from Lawsuit
(millions)	(millions)	
9.660	25.550	Count I — Purchases Power Cost
0.000	0.000	Count II — Sale of Excess Generation
2.592	3.868	Count III — Transmission Cost
0.000	0.000	Count IV — Natural Gas Cost
12.252	29.418	Total
Gen. Damages Multiplier:		1.500
Low	High	Total, All Counts
(millions)	(millions)	
24.504	44.127	Total
	(32.763)	Less, Realized Savings
	(1.100)	Less, Legal and Professional Fees
	10.264	Net Proceeds for Rebate

UTILITY REBATE INITIAL PLAN OF ACTION**VI. PARAMETERS, CREDITS AND OFFSETS OF THE PAYMENT**

- The realized WEES value is applied to Qualified Recipients' Rebates to determine the Payment due, if any.
- One-third of administrative costs and professional fees was allocated to the ratepayers.
- The Payment is paid on a "one-time" basis only.
- The Payment is not "recurring."
- The ratepayer v. corporate city losses are described as follows: Count II addresses DG Hunter sales that may have profited the City's utility, as a corporate gain, and does not represent a loss to the ratepayer by direct pecuniary loss; however, the indirect loss of these funds represents loss to the system and potential investment in the system, all of which would theoretically hurt or benefit citizens through inter-fund transfer or better utility infrastructure. For this reason, the damages included the 150% general damages increase for Qualified Recipients and the City's decision to allow Class C the benefit of the realized savings of the WEES.
 - The calculation of compensatory damages (general and special damages) is uncertain and dependent upon the type of breach and type of loss incurred.
 - Some general guidelines are:
 - An amount allowing the ratepayer a substitute for the benefit that would have been received if Cleco had performed correctly.
 - Damages may be measured by the difference between the improper or irregularly calculated contract prices and the market price, on some level.
 - Use of a formula is sometimes advisable in mixed tort and contract cases not involving personal injury or known psychic injury. Most notably, the special damages multiplied by a general damage multiplier equal the total damages. In tort cases, a general damage multiplier ranges from 1.5 times to 5 times the special damages. In this case, where there is no personal injury or provable loss, 1.50 is a rational, reasonable approach.

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The Payment made to each Qualified Recipient is the actual share of \$10,264,000 for electric consumption during the Entitlement Period. Disbursement of the Payment will take place following certification provided by *Section VII* of the Ordinance. The Payment shall be made as follows:

- (a) When a current account holder is owed, the account holder shall be paid by receiving a credit on that account, as Payment in full. In cases in which the Qualified Recipient cannot receive a credit (e.g., no longer an account holder), then a combination of cash and credit is allowed, at the discretion of the Utility Director.
- (b) When an account is stranded (closed but with identifying information), or is an account listed as uncollectible (i.e., a balance owed or bad debt), then any Payment shall be offset, even if it was previously “written off.”
- (c) When a stranded account is barred by statute of limitation from collection by the City, then any Payment nonetheless shall be offset since a prescribed City claim is a natural obligation of the ratepayer who may be due a Payment. As such, the ratepayer’s former obligation may be used as a defense by the City against a claim for a rebate. The City will apply the clean hands doctrine and will attempt to avoid unjust enrichment.
- (d) Bankruptcies shall be handled according to law, with discharged and completed bankruptcies under appropriate articles to allow any due Payment to be made to an appropriate charitable organization. If trustees are due the Payment, then the City shall pay according to law. Bankruptcies shall be treated case by case to the extent allowed by law.
- (e) Unclaimed property shall be provided for by special retention fund for a fixed period, if available, and shall not cede to the state of Louisiana.
- (f) Attorney fees and administrative costs shall be subtracted from the Payment.
- (g) Payments subject to heirs and succession issues may be placed in the court registry; under no circumstances will the City adjudicate claims due multiple parties, in contention with one another. The City Attorney is authorized to use a concursus proceeding. Claims of account interposition “straw accountholders,” landlord pass throughs, etc., will not be



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adjudicated by the City. The City makes Payments to documented account holders of record.

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