

LOUISIANA PUBLIC SERVICE COMMISSION

GENERAL ORDER 10-14-2024 (R-34247)

LOUISIANA PUBLIC SERVICE COMMISSION, EX PARTE

Docket No. R-34247, In re: Rulemaking to consider changes to Commission General Order dated October 29, 2008 (Docket No. R-26172 Subocket C) ("Market Based Mechanisms Order") to incorporate formal complaint procedures.

(Decided at the September 17, 2024 Business and Executive Session.)

(This rule amends and supersedes all previous versions of the Market Based Mechanism General Order).

ORDER

I. BACKGROUND

This order addresses issues raised in three separate Louisiana Public Service Commission ("LPSC" or "Commission") proceedings, all proposing separate amendments to the Commission's October 29, 2008 Market Based Mechanisms Order, Docket No. R-26172, Sub Docket C ("MBM Order"). In lieu of addressing three proceedings separately, this order addresses all proposed amendments together to ensure that forward-looking changes to the MBM Order are consistent, issued at the same time, and that the MBM rules attached to this order will be available in one location. Pursuant to notices by the Staff of the Louisiana Public Service Commission ("Staff") in Docket Nos. R-34003 and R-35462, the comprehensive review of the MBM Order and proposed amendments thereto were combined within Docket No. R-34247.

The original MBM Order was issued on April 10, 2002, and it required that an RFP competitive solicitation process be utilized by jurisdictional electrical utilities to evaluate proposals to construct or acquire specified generating capacity.¹ That original MBM Order was later modified and amended by orders issued on February 16, 2004, November 3, 2006, April 26, 2007, and October 29, 2008.² The 2008 amendments addressed changes in thresholds to the MBM requirements, pre-notification time requirements, and material changes in the cost estimates of utility self-build proposals selected in the RFP occurring after the date of "best and final bids."³

Docket No. R-34003 was initiated to address how to account for intermittent resources in the Market Based Mechanisms ("MBM") process. Prior to consolidating Docket No. R-34003 herein, Staff addressed the intermittent resource issue, proposed amendments to the MBM order,

¹ General Order dated April 10, 2002, Docket No. R-26172.

² General Order dated February 16, 2004, Docket No. R-26172 Sub Docket A; General Order dated November 3, 2006, Docket No. R-26172 Sub Docket B; General Order dated April 26, 2007, Docket No. R-28376; and General Order dated October 29, 2008, Docket No. R-26172 Sub Docket C.

³ See General Order dated October 29, 2008, Docket No. R-26172, Sub Docket C, Appendix C.

and received comments on the same. The resulting proposed amendments to the MBM Order are included in the Final Rule attached hereto. Docket No. R-34247 was first initiated to address whether certain issues should be waived if not raised prior to a final Request for Proposals ("RFP") for generating resources. Prior to consolidating Docket Nos. R-34003 and R-34247, Staff addressed these waiver issues, after receiving two rounds of comments, and the amendments to the MBM Order are incorporated in the Final Rule attached hereto. After a review of Docket Nos. R-34003 and R-34247, Staff determined that any final recommendation in both dockets could be incorporated into one recommendation and one proposed order amending the MBM General Order. It was Staff's opinion that a consolidation of the two dockets was appropriate in order to avoid duplication of efforts and potential conflicts. On April 28, 2023, Staff filed a "*Consolidation of Rulemakings by Dismissal of Docket No. R-34003*" in both dockets. As a result, Docket No. R-34003 was dismissed, and the record therein was combined with Docket No. R-34247. All parties to both dockets became parties to Docket No. R-34247, and the Staff's Final Proposed Rule addressed the issues and comments from both proceedings.

Docket No. R-35462 was initiated to investigate a number of issues being investigated in this Commission's Customer Centered Options ("CCO") docket. On March 28, 2023, a "*Notice of Staff's Intent to Proceed and Fourth Request for Comments*" was filed into the record of Docket No. R-35462 and served upon all parties in that Docket. Subsequently, on August 29, 2023, Staff issued its Phase I Report in the CCO docket, wherein it suggested new requirements and enhancements to the current RFP processes under the Commission's MBM Order. Those proposals are intended to ensure that the choices made regarding generation options provide the Commission and customers with information and participation from multiple generation options. In that Phase I Report, the Staff directed that these new RFP process enhancements be addressed within Docket No. R-34247, with an opportunity for comment.

On March 1, 2024, Staff issued a report in Docket No. R-34247 that explained and included a proposed modified MBM rule that: (1) incorporated the final amendments addressing the waiver and intermittent resource issues, initially addressed separately in Docket Nos. R-34247 and R-34003, respectively, and (2) proposed amendments to address the new RFP process enhancements initially proposed in Docket No. R-35462. Those new proposed modifications were intended to ensure that RFPs issued under the MBM rules include a broad spectrum of supply-side options to provide the Commission, stakeholders, and customers with information and participation from

multiple generation types. The March 1, 2024 report included proposed language requiring the MBM RFP process, "be constructed as broadly as possible to allow for review of all available options to add generation capacity...including, but not limited to, conventional resources, intermittent resources, hybrid resources, and storage." As the waiver and intermittent resource issue had been previously vetted, Staff requested comments solely on the new RFP processes issues within 30 days of that report.⁴ After receiving those comments, Staff issued a Final Report with its Final Proposed Rule on August 22, 2024.

II. COMMISSION JURISDICTION

The Commission has been vested with the authority to regulate public utilities and common carriers and exercises jurisdiction in this proceeding pursuant to Article IV, Section 21(b) of the Louisiana Constitution of 1974, which provides in pertinent part:

The commission shall regulate all common carriers and public utilities and have such other regulatory authority as provided by law. It shall adopt and enforce reasonable rules, regulations, and procedures necessary for the discharge of its duties, and shall have other powers and perform other duties as provided by law.

III. STAFF'S FINAL PROPOSED RULE

Staff's Final Proposed Rule (1) incorporated the final amendments addressing the waiver and intermittent resource issues, initially addressed separately in Docket Nos. R-34247 and R-34003, respectively, and (2) addressed the new RFP process enhancements initially proposed in Docket No. R-35462.

A. Former Docket No. R-34003

Docket No. R-34003, *In re: Proposed Modification to the Commission's Market Based Mechanism Rules*, was initiated on March 10, 2016 for the sole purpose of considering a single modification to the Commission's MBM Order. Specifically, the modification was suggested in anticipation of the increased acquisition of intermittent resources by regulated utilities, such as wind and solar generation, and to address when such resources shall require a competitive solicitation process. Further, the modification was proposed to address the Commission's directive in Order No. I-33013, *Southwestern Electric Power Company, ex parte* issued March 2, 2016, to open a rulemaking to review the MBM Order for modifications necessary to properly account for

⁴ Cleco, ELL, LEUG, and SWEPCO timely filed comments.

the intermittency of renewable resources.⁵ Docket No. R-34003 was published in the Commission's Official Bulletin No. 1110 dated March 11, 2016. Cleco Power, LLC ("Cleco"), Entergy Louisiana, LLC ("ELL"), Southwestern Electric Power Company ("SWEPCO"), Occidental Chemical Corporation ("OCC"), Louisiana Energy Users Group ("LEUG"), Dixie Electric Membership Corporation ("DEMCO"), and Southwest Electric Membership Corporation ("SLEMCO") intervened.

The previous MBM Order provided an exemption from the formal use of a market-based mechanism for all generating capacity investments or contracts that have a "summer" rating of less than 50 megawatts (MW). A "summer rating" is equivalent to "net summer capacity," which is defined as "[t]he maximum output...that generating equipment can supply to the system load as demonstrated by a multi-hour test, at the time of summer peak demand (period of June 1 through September 30)." The Commission considered changing the type of rating in the exemption to a nameplate rating for two reasons: 1) to address the anticipated increased acquisition of intermittent resources, such as wind and solar generation, by regulated utilities, and 2) to comply with the Commission's directive in Order No. I-33013, which directed Staff to review the MBM Order for "modifications necessary to properly account for the intermittency of renewable resources...."

Staff's initial proposed ordering language would have substituted the word "nameplate" for the word "summer." Thus, Staff's initial proposed ordering language read as follows:

The following generating capacity investments or contracts do not require the formal use of a market-based mechanism:

- a. resources less than 50 MW ~~summer~~nameplate rating, LPSC jurisdictional share.

No intervenors challenged the validity of Staff's reasoning for the proposed change. Nevertheless, two intervenors, Cleco and ELL, raised the concern that the proposed change would require jurisdictional utilities to subject more generators to the expensive and time-consuming MBM process, since the nameplate rating of a generator is always higher than its summer rating. Thus, by setting the exception at less than 50 MW nameplate rating, those generators with a summer rating of less than 50 MW, but with a nameplate rating equal to or greater than 50 MW, would be subjected to the MBM process.

⁵ Order No. I-33013, *In re: 2013 Integrated Resource Planning ("IRP") process for Southwestern Electric Power Company pursuant to General Order dated April 20, 2012* (March 2, 2016), p. 5.

Based on their concerns, Cleco and ELL each filed comments that advanced two alternatives to Staff's proposed ordering language. Cleco recommended changing "summer rating" to "unforced capacity", given differing Midcontinent Independent System Operator, Inc. ("MISO") capacity calculations when considering intermittent resources. Cleco also proposed adding the phrase "or 100 MW nameplate rating" as a backstop that would require the use of a market-based mechanism for intermittent resources with a nameplate rating of 100 MW or more, regardless of those resources' unforced capacity rating.

ELL recommended adding the word "conventional" to apply to the 50 MW summer rating as well as the phrase "or intermittent resources less than 50 MW nameplate rating." ELL argued that its proposed change would provide utilities with greater flexibility in evaluating smaller capacity investments and contracts and would also avoid unintentionally lowering the threshold for conventional resources.

ELL's proposed modification to Staff's initial proposed ordering language is reasonable because it addresses the Commission's concerns regarding intermittent resources while keeping the existing exception for conventional resources. This modification would account for the intermittent resources that the Commission foresees being constructed or acquired by regulated utilities, and, due to the lower threshold for intermittent resources, intermittent resources will be subject to the MBM Order relatively on par with conventional resources.

In the light of the concerns raised by the Intervenors and the need to regulate intermittent generators going forward, the Commission adopts Staff's recommendation to amend the MBM process to exempt any non-conventional resource with a nameplate rating of under 50 MW, while keeping all conventional resources exempted under the 50 MW summer rating rule. Accordingly, the Commission adopts the Staff recommendation that the Commission issue a General Order consistent with ordering language as follows:

The following generating capacity investments or contracts do not require the formal use of a market-based mechanism:

- a. **Conventional** resources less than 50 MW summer nameplate rating **and intermittent resources less than 50 MW nameplate rating**, LPSC jurisdictional share **(for both)**.

B. Docket No. R-34247

Docket No. R-34247, *In Re: Proposed Modification to the Commission's Market Based Mechanism Rules*, was initiated by a directive approved at the August 31, 2016 Business & Executive Session of the Commission. The Staff was directed to open a rulemaking docket to consider changes to the MBM Order that could require:

- 1) Any complaints or concerns of any party regarding a draft Request for Proposals ("RFP") related to the acquisition or construction of additional generation must be raised at one time, or be forever waived, prior to the issuance of the final RFP; 2) Any such complaints or concerns will be reviewed solely by the full Commission during an open meeting on an expedited basis (e.g., 45-60 days – to be determined); 3) Failure of any party or Intervenor to raise complaints or concerns, 90 days or more, prior to the issuance of a final RFP shall constitute a complete and total waiver for those issues not properly raised; and 4) All issues regarding the RFP must be raised prior to the issuance of a final RFP and no issues regarding the structure and/or content of the RFP may be raised during the certification phase of the proceeding.

Notice of the docket was published in the Commission September 23, 2016 Official Bulletin No. 1110 providing for a 25-day intervention period. Timely requests for intervention were filed on behalf of ELL, Marathon Petroleum Company, LP ("MPC"), Cleco, SWEPCO, LEUG, NRG Power Marketing, LLC ("NRG"), and OCC.

Docket No. R-34247 was initiated after RFP concerns were raised in a certification proceeding filed by ELL. In Docket No. U-33770, ELL filed an application for approval to construct the St. Charles Power Station ("SCPS") near Montz, Louisiana. The SCPS was selected out of the ELL 2014 Amite South RFP. SCPS was an ELL self-build proposal, and the RFP process was conducted under the Commission's MBM requirements. During the certification phase in Docket No. U-33770, certain parties alleged that ELL had placed arbitrary parameters on the 2014 Amite South RFP designed to exclude potential competitors in that RFP process. Two Intervenors sought to have the RFP re-issued as a remedy. Those concerns were raised for the first time in the certification phase of the docket, after the RFP process had ended.

While Commission precedent is that a challenge to allegedly invalid RFP parameters must be raised during the RFP process,⁶ those Intervenors defended the timing of their RFP-related complaints by urging that no clear rules and deadlines were set forth in the MBM requirements related to raising concerns over the RFP content and process. Further, the Intervenors argued that, since the RFP stage is undocketed, there was no designated repository into which those concerns

⁶ See, e.g., *Southwestern Electric Power Co.*, 2008 La PUC Lexis 149 at *92 (LPSC April 29, 2008).

could be lodged. However, by raising concerns regarding the RFP process in the certification phase of the proceeding, after the project was awarded and pricing data had potentially been made public, the Commission could be placed in the difficult position of choosing either to reject any arguably legitimate concerns, which, if they had been incorporated into the RFP process, could have potentially improved that process and yielded a better result, or order that the lengthy RFP process be redone, which could potentially result in higher costs to ratepayers to acquire or construct the same or a similar facility.

On April 11, 2017, a "*Notice of Initial Report and Proposed Amendments and Request for Comment*" was issued on behalf of the Commission Staff in Docket No. R-34247. It set a May 26, 2017 deadline for intervening parties to file comments in response to the Initial Report and/or to request a technical conference to discuss the proposed amendments to the MBM rules. Timely comments were submitted on behalf of ELL, Cleco, SWEPCO, LEUG, and OCC.

The Initial Report recommended a procedure requiring any party that has objections to an RFP required under the MBM Order to file and serve within 15 days after the first RFP technical conference a "petition providing with specificity all complaints and concerns regarding the RFP content, requirements, or process detailing allegations of how those actions violate or are inconsistent with the Commission's Orders, rules, or procedures, including the MBM Order, detailing any requested remedies, and including any evidence in support." The Initial Report also recommended that an informational docket be opened in which these petitions and other materials related to the RFP process shall be filed. Any objections would be resolved by the Commission on an expedited basis, and failure to file the petition and raise each required issue timely would result in the waiver of the issue, and "the issue will be forever barred from being raised by any party or Intervenor in the RFP phase or in future certification proceedings."

Comments from ELL, Cleco and SWEPCO all supported a requirement to raise RFP concerns during the RFP process; however, each questioned the procedure to allow for an objection, and all three were concerned whether such requirements would delay the RFP process. LEUG expressed concerns regarding the lack of a clearly defined set of issues that the Initial Report required to be raised in the RFP stage, argued that the deadlines for raising issues were too short and needed to be significantly extended, sought more clarity around the procedures to be used for the hearing of disputed issues before the Commission, and also raised questions regarding other terms used in the Initial Report's recommendations, including "participating person or

organization," "forever barred," "RFP process," and "self-supply option." OCC argued that the proposed rule changes were "fatally flawed," denied any complaining Intervenors a fair opportunity to review and evaluate the RFP, deprived the Commission from having information needed to properly evaluate the RFP, shifted the burden of proof to the Intervenors, and violated procedural due process requirements.

After consideration of the comments submitted, Staff modified its proposed MBM revisions in its "Second Report and Proposed Amendments to the October 29, 2008 Market Based Mechanisms Order, Docket No. R-26172, Sub-Docket C" issued on May 5, 2023. Those proposed modifications retained the requirement to raise specified RFP-related issues during the RFP process and created a repository for formally filing any such objections. However, Staff recommended a narrowed specific list of issues that were required to be raised during the RFP process, and it only required a notice-type pleading for those issues. Staff maintained the recommendation that the failure to timely raise an issue from the narrowed list during the RFP process would result in the party being barred from raising the issue in the certification phase of the MBM process. In addition, the proposed modifications no longer required that the Commission resolve any issues raised prior to the certification proceedings. The risk of resolving the issues or continuing the RFP/certification process remained with the utility. These proposed changes addressed the major concerns of the commenting parties and were consistent with existing Commission precedent requiring objections to the RFP scope and parameters being raised during the RFP process or waived.⁷ Intervenors were given 45 days from the date of the Second Report to file comments and/or to request a technical conference to discuss the proposed amendments.

Timely comments were submitted on behalf of ELL, Cleco, SWEPCO, and OCC. ELL commented that it was difficult to evaluate the proposed changes in this proceeding because unidentified potential changes to the MBM Order were currently under consideration by the Commission Staff in the CCO docket. In the CCO docket, Staff had issued a "*Notice of Staff's Intent to Proceed and Fourth Request for Comments*" in which Staff indicated that it would propose measures intended to ensure that the choices made regarding generating options provide customers with information from multiple generation provider options. ELL argued that the

⁷ See Order No. U-33770, at 28, Entergy Louisiana, LLC, Entergy Gulf States Louisiana, L.L.C. and Entergy Louisiana Power LLC, *Joint Application for Approval to Construct St. Charles Power Station, and for Cost Recover*, and U-29702 consolidated with Order No. U-27866 Subdocket-B, at 33, SWEPCO ex parte, *Application of Southwestern Electric Power Company for certification of contracts for the purchase of capacity and to purchase, operate, own and install peaking, intermediate and baseload generating facilities in accordance with the Commission's General Order dated September 20, 1983*.

"piecemeal" approach to addressing the MBM changes failed to provide a big picture of how the final MBM Order will operate and recommended delaying the final order in this proceeding until after other proposed changes are evaluated in the CCO docket. ELL also urged that the new 30-day minimum wait time between the first technical conference and the issuance of the Final RFP might increase the timeline of the total process to the disadvantage of customers, particularly as it relates to solar resources, and ELL requested that the RFP timeline be streamlined. ELL also stated that its ability to submit Critical Energy Infrastructure Information ("CEII"), Confidential, and Highly Sensitive Protected Materials ("HSPM") with required informational filings should be preserved. In addition, ELL urged that the "Notice" requirement in paragraph 9 should be better defined. Finally, ELL argued that an added "and" in the subsection related to exemptions to the MBM requirements is misplaced and should be removed.

Cleco filed comments on June 19, 2023. Cleco supported the new "Notice" requirement and the change that no longer required the Commission to resolve objections raised prior to the certification proceedings, because the change prevents unnecessary delay and supports orderly utility planning.

SWEPCO filed comments on June 20, 2023. Similar to ELL, SWEPCO raised concerns that MBM changes were being considered both in this docket and the CCO docket, and SWEPCO suggested that any MBM changes be considered in the CCO docket. In addition, SWEPCO expressed concerns that the additional delays to the RFP timeline could result in added risks and costs to ratepayers and expanded litigation. Further, SWEPCO argued that the proposed revisions to the MBM Order would allow any third parties to file objections to the draft RFP, whether or not they intend to participate in the RFP process, attend the technical conference, or are impacted by the RFP. SWEPCO recommended that parties eligible to object should be limited to those submitting bids or those participating in the technical conference. SWEPCO asked that the Commission consider further modifications or exemptions to the RFP process to allow for renewable solicitations and other similar time sensitive projects. SWEPCO also expressed concern over the added "and" in the exemption section of the MBM Order and requested that it be removed.

OCC filed comments on June 19, 2023. In those comments OCC sought clarification that the 20-day time period for objections was intended to be 20 days "after" the first technical conference and that the issue of "need" related to an RFP resource was not included in the objections that must be raised early or waived. In addition, OCC urged that the proposed rule

should not require that changes made in the RFP documents as to the "type, location, or size of the resources solicited" made after the objection period should not be subject to the objection or waiver requirement; if the utility changes the RFP requirements after the draft RFP document, then no objections should be required. In addition, OCC urged that the final rule make clear that the new objection requirement does not change the burden of proof in the certification proceedings.

With regard to the waiver issues that Docket No. R-34247 was initially intended to address, both ELL and SWEPCO expressed concerns regarding the Staff's new proposed requirements and urged that such could prevent a final RFP from being issued sooner than 30 days after the first technical conference, if an objection is timely raised. ELL and SWEPCO urged that the RFP process should not be lengthened because shorter times are now needed due to time-sensitive renewable procurements. However, this 30-day rule replaced the previously proposed requirement that the Commission resolve objections within 90 days. This shortens the previously proposed process considerably, and there must be time available for the parties to discuss any objections made before a final RFP is issued. As indicated above, these proposed modifications were intended to address a problem that arose in a prior certification proceeding, Docket No. U-33770, that could recur. Staff's proposed modifications are an attempt to ensure future RFP processes are not de-railed by objections raised for the first time in the certification phase that could have been raised earlier during the RFP process. A 10-day period (which follows the 20-day objection deadline) is a reasonable solution that should not unduly delay the RFP process.

ELL expressed concerns that changes made to paragraphs 8 and 14 may limit the ability of utilities to submit CEII, Confidential, or HSPM data to the Commission. There was never any intention for this Final Proposed Rule to limit the ability of the utilities and the parties to submit CEII, Confidential, HSPM, public or redacted data or information. The Commission's filing and confidentiality rules shall continue to apply to the information submitted in compliance with this Final Proposed Rule. Staff included suggested language to clarify that issue.

ELL commented that the requirements for "Notice" in paragraph 9 needed clarification. First, ELL stated that the notice was described both as an opportunity and a requirement, and that the notice requirement was unclear as to whether the type of resource requirement was focused merely on type of resource or the type of technology. First, Staff's proposed modifications provide parties an *opportunity* to give notice of objections but did not intend to *require* objections. However, Staff's proposed modifications do require objection notices in order to preserve those

delineated issues for the certification proceeding(s) for the selected resources. Second, the "type" of resource was intended to be broad enough to include both the type of resource and the type of technology. Clarifications are included in the attached amended rules.

Both ELL and SWEPCO expressed concerns that the word "and" was added between subsections "f" and "g" of paragraph 2 and that the addition of "and" changed the exemptions from being independent of each other. While the Commission does not necessarily agree that this requested change is necessary, the word "and" is removed from the attached proposed revisions.

OCC suggested that the requirement in Section 9 that the objections be filed within 20 days "of" the first technical conference be changed to within 20 days "*after*" the first technical conference. That was always the intent of that language; thus, that change is included in the modifications included herein. OCC argued that it should be made clear that the issue of "need" *i.e.*, whether or not the utility can or has demonstrated that it needs the solicited resources to serve its customers, is not included in the "type, location, or size of the resources solicited" objection requirement. Need was intentionally not included in the requirement to object; "type, location, or size" was an exclusive list, and language is included clarifying this issue. In addition, OCC argued that the report should make clear that if the utility makes changes to the "type, location, or size of the resource solicited" after the objection deadline has passed, then any objections regarding the amended "type, location, or size" should be preserved for the certification phase without an objection. A modification is included reflecting this change. Finally, OCC commented that the rule should make clear that the Pre-RFP objection requirement does not shift the burden of proof. The Commission agrees, and the Final Rule reflects this change.

C. Docket No. R-35462

Docket No. R-35462, *In re: Rulemaking to research and evaluate customer-centered options for all electric customer classes as well as other regulatory environments*, was initiated by a directive at the Commission's December 18, 2019 Business and Executive Session. Interventions were sought and granted to the Alliance for Affordable Energy ("AAE"), LEUG, Beauregard Electric Cooperative, Inc. ("Beauregard"), Washington - St. Tammany Electric Cooperative, Inc. ("WST"), DEMCO, Walmart Inc. ("Walmart"), Gulf States Renewable Energy Industries Association ("GSREIA"), SLEMCO, Advanced Energy Management Alliance ("AEMA"), South Louisiana Electric Cooperative Association ("SLECA"), Association of Louisiana Electric

Cooperatives, Inc. ("ALEC"), Jefferson Davis Electric Cooperative, Inc. ("JDEC"), Cleco, ELL, EP2 Consulting, LLC., SWEPCO, Northeast Louisiana Power Cooperative, Inc. ("Northeast"), NRG, Voltus, Inc. ("Voltus"), Claiborne Electric Cooperative, Inc. ("Claiborne"), AARP Louisiana ("AARP"), Calpine Corporation ("Calpine"), Panola-Harrison Electric Cooperative, Inc. ("Panola Harrison"), Exelon Generation Company, LLC ("Exelon") and Constellation. The proposed changes to the MBM Order raised in Docket No. R-35462 were published for the first time in the March 1, 2024 Staff Report filed in Docket No. R-34247.

Docket No. R-35462 is a broad rulemaking first initiated through a Notice of Proceeding issued on January 9, 2020, after a directive from Commissioner Greene at the December 18, 2019 LPSC Business and Executive Session ("B&E"). In the "Notice of Proceeding," Staff was directed to research "customer-centered options" for electric utility customers to ensure that customers are the focus in Louisiana. This broad task has been handled by Staff through a series of requests for comments and a technical conference, all intended to determine the issues that should be considered within that docket and to develop a plan to address those issues, whether within the CCO docket itself or through other related rulemakings.

On March 28, 2023, after its analysis of the parties' comments, Staff issued a *"Notice of Staff's Intent to Proceed and Fourth Request for Comments,"* which was filed into the record and served upon all parties in Docket No. R-35462. There, Staff stated that it expects:

to issue a proposed rule that would introduce new requirements and enhancements to the current Request for Proposal ("RFP") process required under the Commission's Market Based Mechanisms ("MBM") Order. This measure is intended to ensure that the choices made regarding generating options provide customers with information and participation from multiple generation provider options. As noted above, any such proposed rule would be accompanied by a comment period to allow the parties to address the LPSC Staff's proposed rule.

Subsequently, on August 29, 2023, Staff issued its Phase I Report in the CCO docket, wherein it suggested new requirements and enhancements to the current RFP processes required under the Commission's MBM Order. These proposed modifications were intended to ensure that the choices made regarding generation options provide customers with information and participation from multiple generation types. In that Phase I Report, Staff did not propose specific edits to the MBM Order. Rather, it directed that those modifications be addressed in this docket: "Staff has

raised a few concerns that should be addressed in modifying the MBM Order to be consistent with a customer centric view. Those issues will be addressed in Docket No. R-34247.⁸

Staff incorporated proposed edits to the MBM Order in its March 1, 2024 Report in this docket to address the concepts raised in Staff's Phase I Report filed in the CCO docket. Comments on those proposed edits were submitted by ELL, Cleco, SWEPCO, and LEUG.

The genesis of the RFP-related issues raised in the CCO docket, and now addressed herein, was a concern raised by the Commission in Docket No. U-36385, Southwestern Electric Power Company, ex parte, *In re: Application for Certification of certain renewable resources and approval of natural gas Capacity Purchase Agreements*. Docket No. U-36385 is a Commission docket in which SWEPCO sought certification of intermittent resources as well as natural gas capacity purchase agreements. At the April 26, 2023 B&E, the Commission voted against an uncontested stipulated settlement that would have approved SWEPCO's certification request with conditions. Several Commissioners expressed concerns that SWEPCO's RFP was too restrictive because it excluded Power Purchase Agreements ("PPAs") for wind and solar resources that would have given the Commission and the Commission Staff additional information needed to evaluate the reasonableness of the costs and the resources selected by SWEPCO. At the May 17, 2023 B&E, the Commission considered a motion for rehearing of its April decision, and the Commission voted to approve the stipulated settlement subject to modifications and conditions, including a requirement that SWEPCO "consider qualified unsolicited offers for PPAs to compare to the Selected Solar Facility and Wind Facility at either the June B&E meeting, if available, or at a July Special Meeting to be called if needed." SWEPCO thereafter solicited PPA offers consistent with the Commission's condition, the Staff analyzed those offers, filed a confidential memorandum providing that analysis, and the Commission gave final approval to the stipulated agreement approving SWEPCO's certification request at a June 29, 2023 special meeting of the Commission.

During the April B&E meeting, several Commissioners commented that the MBM Order should be changed to require utilities acquiring capacity to explore all market options during the RFP process and not be allowed to exclude, for example, PPAs from that process. Those Commissioners expressed a strong desire for the MBM Order to include a requirement that RFPs evaluate all market options so that the best options for ratepayers be evaluated and that the

⁸ See, Staff Phase I Report, Docket No. R-35462, page 43. The Commission issued General Order dated August 1, 2024 in Docket No. R-35462, *In re: Rulemaking to Research and Evaluate Customer-Centered Options for all Electric Customer Classes as well as Other Regulatory Environments* addressing the Phase 1 CCO Report.

Commission and its Staff have the best and most complete market information available to evaluate utility RFPs and certification requests. The Commission approves the Staff proposed amendments in the attached Final Rule that satisfy the Commission's concerns.

Comments were timely submitted by Cleco, ELL, SWEPCO, and LEUG. Cleco stated that it had no further comments. LEUG supported the new paragraph 3 requirements but asked that the word "should" be changed to "shall" to make certain that the new RFP rules are mandatory and not suggestive. The rules are required and "should" is changed to "shall" in the Final Proposed Rule. The LEUG comments also addressed the standing language in Paragraph 9, which allows "any person or entity with standing to participate" to object in the RFP process. LEUG sought clarification that the standing language was not intended to change the Commission's Rules of Practices and Procedures" Rule 10, which provides in pertinent part:

[a]ny party actually in interest may appear in any proceeding before the Louisiana Public Service Commission. All appearances shall be subject to a motion to strike upon a showing that the party has no justiciable or administratively cognizable interest in the proceeding.

LEUG sought to confirm that, as a trade association of industrial electric consumers, it has standing to participate as it has for years. That language was not intended to change the Commission's Rules of Practices and Procedures, including Rule 10, or to limit the participation of the LEUG in Commission proceedings. Language has been added to the Final Proposed Rule to address that concern. LEUG also sought clarification that a party need not object to an RFP in order to preserve an objection for the certification stage of any potential violation of the new requirements of Rule 3 that, "the RFP competitive solicitation process developed by the utility shall include the solicitation and evaluation of PPAs and shall solicit and evaluate all available market options, including, but not limited to conventional resources, intermittent resources, hybrid resources, and storage." Rule 9, however, requires objections "as to the type, location, or size of resources solicited." It is the Commission's view that the solicitation and evaluation of "all available market options" would generally fall within the requirement to object to "the type" of resources solicited. Thus, no changes are included in the Final Rule to address that concern.

SWEPCO continued to express concerns about the delays that the changes to the MBM Order proposed in the original, historic Docket No. R-34247 could create. It urged that those delays could increase costs and that additional discussions/comments on those delays should be allowed. In addition, SWEPCO objected to the new proposed requirement that the "RFP competitive solicitation process developed by the utility shall include the solicitation and

evaluation of PPAs and shall solicit and evaluate all available market options, including, but not limited to conventional resources, intermittent resources, hybrid resources, and storage." SWEPCO argued that the Commission already has in place Integrated Resource Planning ("IRP") rules that allow the utility the "flexibility and autonomy" to plan its generation resources consistent with its IRP. SWEPCO stated that the new proposed rules conflict with the IRP requirements, and that, "[i]t is nonsensical to request that bidders offer wind or solar resources when the IRP preferred plan is calling for fossil fueled generation or vice-versa." SWEPCO urged that the Commission refrain from adopting MBM requirements in a manner that would take away the flexibility currently allowed by the MBM and IRP rules.

ELL expressed concerns similar to SWEPCO in its April 2, 2024 comments. ELL argued that times have changed, and that the MBM process impedes the ability of utilities to adapt. It urged that the delays associated with the MBM order processes and the 1983 General Order certification requirements are creating a competitive disadvantage for LPSC-regulated utilities to acquire capacity, because sellers of capacity need to close deals quickly and will often choose to transact with the many neighboring entities that do not have to follow certification processes. If those sellers do agree to sell to Louisiana utilities, there is a price premium required. ELL stated that it "has lost the opportunity to procure attractively priced resources from which its customers would benefit for this very reason."

ELL also urged that the new proposed requirement that, "[t]he RFP competitive solicitation process developed by the utility shall include the solicitation and evaluation of PPAs and shall solicit and evaluate all available market options" limits the ability of the utility to design RFPs to meet the needs of customers, mandates solicitations that are too broad, requires utilities to solicit resources that do not meet their planning needs, misleads bidders, and will lead to delays and costs that will ultimately harm customers. ELL asserted that, if renewables are needed to fill a planning need why should the utility be required to also solicit gas and coal fired resources; if dispatchable generation is needed to meet reliability needs, why require solicitation of renewables. ELL recommended that utilities retain sufficient discretion to make reasonable supply planning decisions and that Section 3 of the rule be amended to allow utilities the flexibility to use their own business judgment and that "all-source" solicitations not be required. Finally, ELL recommended that Staff find ways to streamline the RFP/MBM process to allow utilities a better opportunity procure generating resources in a timelier and more cost effective manner.

The Final Rule provides a balance between the need for quick, efficient RFP processes and the need for a fair amount of time for Staff and Intervenors to review and object to deficient RFP processes. It also allows a utility to adjust the RFP if it desires to address any objections raised by Staff and Intervenors prior to issuing final documents. At the very most, Staff's modifications to the rules add 30 days to the total RFP timeline.

With regard to the requirement that the RFP shall solicit all available market options, Staff appreciates the concerns raised by ELL and SWEPCO. The Commission agrees that there could be times when limiting the type of resources solicited may be appropriate and that not doing so could sometimes lead to a waste of resources spent on soliciting and evaluating resources that inevitably will not be selected because they may not have the characteristics needed by the utility at the time of the RFP. The Final Rule, however, is intended to provide the flexibility to address this concern while setting the default standard that RFPs consider all options. Those revisions provide that an RFP "shall be constructed as broadly *as possible* to allow for review of all available options to add generating capacity" and "shall solicit all available market options." Utilities, however, are allowed to propose an alternative approach if they can demonstrate through sworn testimony that such an approach is warranted. To make this intent clearer the Commission has added the following provision: "This alternative market-based mechanism can include justified limitations on the type or types of market options if that alternative is supported by both a fully vetted Integrated Resource Plan that has been submitted to the Commission and sworn support justifying the need for the limitations."

IV. COMMISSION CONSIDERATION

This matter was considered by the Commission at its September 17, 2024 Business and Executive Session. On motion of Commissioner Skrmetta, seconded by Commissioner Greene, with Chairman Francis and Vice Chairman Lewis concurring, and Commissioner Campbell temporarily absent, the Commission voted to accept the Final Proposed Rule filed into the record on August 22, 2024.

THEREFORE, IT IS ORDERED:

1. Staff's Final Report and Recommendation of Final Proposed Rule filed into the record on August 22, 2024 is accepted; and

2. The rules titled "Rules Regarding Market Based Mechanisms" and included as "Attachment A Final Rule" are adopted.

This order is effective immediately.

BY ORDER OF THE COMMISSION
BATON ROUGE, LOUISIANA
October 14, 2024



A handwritten signature of Brandon M. Frey.

BRANDON M. FREY
SECRETARY

A handwritten signature of Mike Francis.

DISTRICT IV
CHAIRMAN MIKE FRANCIS

A handwritten signature of Dwayne Lewis.

DISTRICT III
VICE CHAIRMAN DAVANTE LEWIS

ABSENT

A handwritten signature of Foster L. Campbell.

DISTRICT V
COMMISSIONER FOSTER L. CAMPBELL

A handwritten signature of Eric F. Skrmetta.

DISTRICT I
COMMISSIONER ERIC F. SKRMETTA

A handwritten signature of Craig Greene.

DISTRICT II
COMMISSIONER CRAIG GREENE

ATTACHMENT A
FINAL RULE

LOUISIANA PUBLIC SERVICE COMMISSION
RULES REGARDING MARKET BASED MECHANISMS

PURPOSE

The Louisiana Public Service Commission (“LPSC”) establishes the following rule to clarify and modify the Market Based Mechanism (“MBM”) process as established in General Order dated October 29, 2008 (Docket No. R-36172 Subocket C), to codify Commission precedent, and to make changes needed to require utilities to evaluate all market options.¹ This rule amends and supersedes all previous versions.

AUTHORITY

Article IV, Section 21 of the Louisiana Constitution of 1974 provides the Commission with the following authority:

Powers and Duties. The Commission shall regulate all common carriers and public utilities and have such other regulatory authority as provided by Law. It shall adopt and enforce reasonable rules, regulations and procedures necessary for the discharge of its duties, and shall have other powers and perform other duties as provided by Law.

Consistent with the above authority, the Commission has adopted rules and regulations through Commission Orders that apply to utilities in general, and in some instances, electric utilities specifically. The blanket authority to regulate public utilities granted above; however, is not absolute, as it is subject to the following limitations regarding utilities owned, operated, or regulated by a political subdivision:

Limitation. The Commission shall have no power to regulate any common carrier or public utility owned, operated, or regulated on the effective date of this constitution by the governing authority of one or more political subdivisions, except by the approval of a majority of the electors voting in an election held for that purpose; however, a political subdivision may reinvest itself with such regulatory power in the manner in which it was surrendered. This paragraph shall not apply to safety regulations pertaining to the operation of such utilities.

¹ This Order addresses all issues regarding changes to the 2008 MBM Order raised in Docket Nos. R-34247, R-34003, and R-35462.

RULE

1. Electric utilities subject to the Commission's jurisdiction shall employ a market-based mechanism to support the addition of generating capacity intended to serve LPSC-jurisdictional retail customers, whether through the construction of that capacity, the acquisition of that capacity, or the contracting for that capacity through a Purchase Power Agreement ("PPA"). The results and analysis from employing this mechanism shall serve as part of the "justification" required in paragraph (2) of the 1983 General Order. This requirement shall not apply to non-jurisdictional affiliates of a Louisiana utility except in cases where the affiliate enters into a PPA on behalf of the Louisiana utility.
2. The following generating capacity investments or contracts do not require the formal use of a market-based mechanism:
 - (a) Conventional resources less than 50 MW summer rating and intermittent resources less than 50 MW nameplate rating, LPSC jurisdictional share (for both);
 - (b) modifications to an existing unit which expand the unit's capacity either by less than 10 percent or by less than 50 MW;
 - (c) return to service of a unit in extended reserve shutdown if the total refurbishment costs (inclusive of new environmental controls and start up O&M) are less than \$100 per kW;
 - (d) a project whose incremental installed cost for the increased capacity is less than \$100 per kW;
 - (e) contracts for the purchase of economy energy or emergency power;
 - (f) contracts of three years or less in duration with an un-affiliated entity, or one year or less with an affiliated entity provided that the utility expects to receive power supply under the contract within one year of contract execution;
 - (g) resources that have been previously certified by the Commission, but subsequently change in status (e.g., the exercise of an asset purchase option or reallocation of capacity among utility affiliates under LPSC jurisdiction).
3. The market-based mechanism shall be a Request for Proposal ("RFP") competitive solicitation process that shall be constructed as broadly as possible to allow for review of all available options to add generating capacity. The RFP competitive solicitation process developed by the utility shall include the solicitation and evaluation of PPAs and shall solicit and evaluate all available market options, including, but not limited to conventional resources, intermittent resources, hybrid resources, and storage. The utility may propose an alternative market-based mechanism or procedure if it can demonstrate to the Commission with sworn support from a Company representative that sufficient circumstances exist such that a RFP competitive process subject to the requirements herein would not be in the public interest. This alternative market-based mechanism can include justified limitations on the type or types of market options, if that alternative is supported both by a fully vetted Integrated Resource Plan that has been submitted to the Commission and sworn support justifying the need for the limitations. In no event, however, shall such a proposed alternative market-based mechanism be limited to self-build or utility-owned resources.
4. This Rule does not preclude the utility from entering into a capacity contract with a Qualifying Facility certified by the Federal Energy Regulatory Commission outside of an RFP process under the rules and procedures of the Commission's February 27, 1998 Avoided Cost General Order, as amended, the Commission's General Order in Docket No. R-28376, and other applicable Commission orders, rules and regulations. Any such contract shall be subject to approval by this Commission.

5. The use of a market-based mechanism shall not be required for the construction of nuclear resources.²
6. Any capacity investment exempt from the market-based mechanism must be supported with the appropriate justification at the time the utility seeks Commission approval or rate recovery for that investment. For any such exempt capacity addition or PPA, the utility retains the obligation to prudently implement, construct and/or manage the resource consistent with the objective to provide reliable service at the lowest reasonable cost.
7. Any utility capacity project or PPA approved subject to the market-based mechanism and the 1983 General Order remains subject to prudence review in subsequent rate and/or fuel clause audit proceedings with respect to the utility's obligation to prudently implement, construct and/or manage the capacity project or PPA consistent with the objective of providing reliable service at lowest reasonable cost.
8. In order to implement the market-based mechanism for capacity investments or PPAs, the utility is required to submit an informational filing with the Commission. The informational filing will be made in the Pre-RFP docket created as set forth in paragraph 14 below. The informational filing shall contain, but not be limited to, the following items:
 - (a) A description of the utility's proposed capacity addition or PPA including timing, amount and type;
 - (b) All information demonstrating compliance with Section 3 above, including, but not limited to, information regarding the RFP responses and pricing information needed for Staff and the Commission to evaluate whether the winning proposals are in the best economic and other interests of ratepayers.
 - (c) In the case that the electric utility's proposal is to construct generating capacity or to acquire (through contract, asset purchase or other means) an existing capacity resource(s) (that is owned by the utility or an affiliated retail regulated utility) that is not part of the electric utility's LPSC-jurisdiction regulated operations, the filing shall describe the plan and the resource(s), including a detailed estimate of the resource's cost, revenue requirement impacts and support for that cost estimate. The cost and revenue requirement data may be submitted subject to appropriate confidentiality protection. Absent a Commission waiver, such acquisition(s) shall be priced no higher than the cost of service associated with the asset(s). This is not intended to preclude Commission approval of a formula rate or alternative regulatory plan for the utility.
 - (d) Supporting information and documentation justifying the amount of capacity need and the proposed resources to be acquired;
 - (e) Supporting information and documentation justifying the type of resources which the electric utility proposes or expects to construct and/or acquire, along with the source alternatives considered but rejected;
 - (f) The utility's proposed schedule for conducting and completing its RFP process and resource acquisition process. This would include the anticipated schedule for undertaking and completing any proposed power plant construction. This proposed schedule for conducting the RFP shall include adequate time for Staff review and discovery;
 - (g) A description of the methods and criteria that the utility intends to use to evaluate RFP bid responses;
 - (h) A description of any requirement or preferences regarding transmission arrangements and deliverability of the power supply to the utility's customers,

² This exemption is dependent upon compliance by the utility with the provisions of the General Order in Docket No. R-29712 (May 18, 2007) in which alternative rules for nuclear projects were adopted.

including a description of how the utility intends to incorporate transmission issues into its bid evaluation process;

- (i) A description of the methods and safeguards the utility will use to protect the confidentiality of bids and bidder information and to ensure such information is not improperly used by the utility or its affiliates nor provided to a utility's merchant affiliate;
- (j) If the utility's RFP permits affiliate bids, including a self-build or self-supply option, a description of the methods and safeguards the utility will use to ensure the utility's merchant affiliate bid or self-build or self-supply option receives no preferential treatment, preferential access to information or unfair or improper advantage. This submission would include all existing codes of conduct (internal or approved by a regulatory agency) governing such bids and contracts or self-build or self-supply option;
- (k) A draft PPA or a description of key contract elements;
- (l) A draft RFP solicitation document; and
- (m) A draft or sample confidentiality agreement.

9. The electric utility shall hold one or more technical conferences with Commission Staff and participating organizations to review the utility's filing and proposals. The electric utility may proceed with the RFP process after completion of a consultation process with Staff and participants. If requested by Commission Staff, the utility shall hold a technical conference to review the utility's experience and results in conducting its RFP. Within 20 days after the date of the first technical conference, any person or entity qualifying to appear in Commission proceedings pursuant to the "Rules of Practices and Procedures of the Louisiana Public Service Commission," including Rule 10,³ will be given the opportunity to object to any requirements in the initial draft RFP as to the type, location, or size of resources solicited.⁴ That objection shall be in the form of a written notice ("Notice") specifically describing the objections raised and the alleged basis for any such objections. That Notice shall be brought in good faith and shall be filed in the Pre-RFP Docket. The Notice required is a necessary pre-requisite for raising the objections required by this paragraph in a subsequent certification docket seeking approval of resources selected as a result of the RFP. Any person or entity shall be precluded from raising in a certification proceeding a challenge to the RFP that was required to be first raised in the Pre-RFP Docket that was not timely raised. If any objection is timely raised in the Notice in the Pre-RFP docket, the final RFP shall not issue any sooner than 30 days after the first technical conference in order to allow the opportunity for the utility, LPSC Staff, and any person or entity to consider and consult over the issues raised. Any Notice filed in the Pre-RFP docket shall not divulge any confidential or highly sensitive information received from the utility or any information related to a specific resource or proposal that could compromise the integrity of the competitive procurement process. Nothing in this proposed rule is intended to change or affect the burden of proof required in the certification proceedings.

10. "The electric utility shall provide RFP bid results and its evaluation of those bids to Commission Staff and participating organizations deemed eligible to review such material subject to appropriate confidentiality protections. The electric utility shall provide an opportunity for Staff and eligible participant consultation before selecting PPA offers and/or rejecting RFP bids in favor of its own capacity construction process.

³ This Rule is not intended to change, limit, or expand the entities that are allowed to participate in Commission proceedings under current rules and precedent.

⁴ "Type" shall include the fuel (including renewable fuel) type and the technology type, *e.g.*, CCGT, CT, Storage etc. The "type, location, and size" is intended to be exclusive and does not include, *e.g.*, objections to the need for the facilities. Objections shall not be required prior to the certification phase to any changes to the type, location, or size of resources solicited made by the utility after the first technical conference. Persons and Entities are encouraged, but not required, to raise any other RFP-related objections they may have in the Notice.

11. The electric utility shall conduct its planning and RFP process with the objective being the provision of reliable electric service at the lowest reasonable cost. The selection of projects or PPAs also may consider public interest criteria such as: project or PPA risk attributes; fuel diversity; and other factors deemed relevant.
12. If a utility's affiliate submits a bid in the RFP process, or a self-build project or self-supply option is bid, the utility must ensure that the affiliate has no preferential access to information or has any unfair advantage over other potential bidders.
13. Any bidder whose bid is not selected by the utility for acquisition or contract award may request and the utility on a timely basis shall provide a written explanation for bid rejection. At a minimum, the explanation shall state:
 - (a) If the bid was rejected due to its failure to meet RFP requirements ("nonconforming bid"), an identification of the RFP requirement(s) that the bid failed to meet;
 - (b) If the bid was judged to be conforming, but was rejected due to a technical or business flaw(s), an identification of any such flaw(s); and/or
 - (c) If applicable, that the bid was judged to be conforming and technically acceptable, but was rejected on the basis of economic attractiveness.
14. The electric utility shall file with the Commission, with at least 30 days advance notice, notice of its intent to conduct an RFP prior to submitting its informational filing required under this General Order; however, the Commission strongly encourages utilities to provide 60 days advance notice. The Commission shall assign a docket number at the time that notice is filed. ("Pre-RFP Docket"). That Pre-RFP docket shall be noticed in the Commission's Official Bulletin and interventions shall be allowed. No Administrative Law Judge shall be assigned to that docket, no discovery shall be allowed, and no hearing procedures shall be initiated. The Pre-RFP docket will serve as a repository for filing the Notice described in paragraph 9 above and may be used to file any other documents or information related to the Pre-RFP Docket. The Pre-RFP Docket does not prohibit the utility from establishing a RFP-related website or webpage. Any CEII, HSPM, or Confidential materials may be filed under seal and protected from disclosure consistent with the Commission's Rules of Practice and Procedure along with public redacted versions. Any such notification does not commit the utility to proceed with its RFP, nor does it prevent the utility from delaying the filing date. In the case of an RFP that seeks resources with terms of five years or less, the utility shall allow not less than 30 days from its informational filing to the issuance of its RFP to allow for review and consultation with Commission Staff and interested parties. In the case of an RFP that seeks proposals for resources with terms greater than five years, the minimum review period shall be 60 days. These requirements may be waived or modified by the Commission for good cause.
15. Upon the filing of its RFP pre-notification, the electric utility shall identify an entity to be retained to serve as an independent monitor (IM).⁵ This entity shall have had no other business relationship (other than as IM) with the utility or any of its affiliates within the last three years. The Commission may reject the utility's IM selection and request the utility to submit another IM choice. The IM selected by the utility shall coordinate with and report its findings to Staff and the utility, including its Final Report.
 - (a) The IM will review and track the utility's conduct of the RFP to ascertain that no undue preference is given to affiliates and their bids, self-build or self-supply projects. This will include, to the extent necessary, reviewing the draft RFP and the utility evaluation of bids, monitoring communications (and communications protocols) with market participants; monitoring adherence to codes of conduct; and monitoring contract negotiations.

⁵ The requirement for an Independent Monitor is only applicable if a utility proposes a self-build, permits affiliate bidding or proposes self-supply (i.e., an existing utility-owned or controlled resources not in base rates, but that will be moved into base rates upon acquisition).

- (b) The IM shall report to the Commission Staff at appropriate intervals and facilitate regular communication between Commission Staff and the utility on the RFP process. The IM will immediately report any irregularities, problem or concerns with the RFP process to the utility and Staff. The IM shall also submit a final RFP evaluation report to Commission Staff and the Commission, including any recommendations for improving the process.
- (c) The utility may fund the cost of the IM in part or whole through bid fees, not to exceed \$5,000.00 per bid, with any excess revenue returned to the rejected bidders. Proposed bid fee arrangements shall be identified in the utility's draft RFP. If bid fees do not fully recover IM costs, the utility may recover the remaining amount from the winning bidder.

16. Self-Build Cost Changes:

- (a) In the event of a material change to the estimated self-build or self-supply project cost option, projected completion date or design attributes (e.g., rated capacity, heat rate, etc.) subsequent to the submission date of the "best and final" bids, the utility staff responsible for the self-build plan or self-supply option submission shall promptly and full notify the utility's RFP staff. The utility RFP team must promptly notify the IM and the Commission Staff of the change. This mandatory notification requirement shall continue throughout the end of the RFP process. This reporting obligation applies only to a self-build project or self-supply option that is selected for award in the RFP. For purposes of this Order, a "material change" is defined as either an increase in construction or supply costs of 20% or more or a change in cost, schedule or design that plausibly could alter the project evaluation rankings.
- (b) The utility conducting the RFP process shall identify the date at which the RFP is completed. If a self-build project or self-supply option is selected, the RFP team must certify its best estimate of the construction, supply and transmission costs as of that RFP completion date, its best estimate of the self-build project commercial operation date and any material changes to the project design attributes compared to the "best and final" submission. This information shall be promptly provided to the IM and Commission Staff.
- (c) For purposes of this RFP, the communication of information on changes in cost, completion schedule or design attributes by the utility self-build staff to the utility RFP staff, subsequent to the "best and final" bid submission date, pursuant to this rule, does not constitute a violation of the RFP's code of conduct.
- (d) In the event of a material change in project cost, schedule or design attribute for the selected self-build project or self-supply option subsequent to the utility's completion of its bid ranking process, the utility shall perform an updated bid ranking. This updated analysis shall be contemporaneously or timely reviewed by the IM and Commission Staff.
- (e) In any such updated bid ranking process, the utility RFP staff shall consult with the IM and Commission Staff as to whether the third-party suppliers competing with the selected self-build project or self-supply option should be permitted to refresh their bids for purposes of an updated bid evaluation. The IM or Staff also may consider whether circumstances would support allowing additional potential suppliers or non-shortlist suppliers to participate in the update. In the event of any disagreement, the utility shall state its reasons in writing for opposing a refreshing of the bids, as may be recommended by Commissions Staff or the IM.
- (f) To the extent the utility RFP team concludes the self-build project or self-supply option costs to be uncertain (i.e., beyond allowances built into the project construction budget for cost escalation and contingency), the utility is encouraged to develop a range of costs for bid ranking purposes. The bid

ranking evaluation process also shall consider the cost risk of the self-build or self-supply relative to the cost risk of competing third-party bids.

- (g) The bid re-screening requirements pursuant to Section 16(d) and 16(e) above do not necessarily apply to transmission upgrade cost changes that might be associated with the self-build project or self-supply option. To the extent that a material cost increase arises in whole or in part due to estimated transmission upgrade cost changes, the utility shall give notice to and must consult with LPSC Staff and IM regarding whether such transmission upgrade cost increases shall require the re-screen process. However, the utility should use the best available information on transmission costs associated with both the self-build project or self-supply option and competing resources.
- (h) Nothing in this Rule is intended to restrict any party from proposing and the Commission from adopting a "cost cap" or similar protective mechanism as part of a certification or other proceeding for a self-build project or self-supply option.

17. Nothing in this Rule is intended to inhibit or restrict the utility from acquiring renewable resources through its RFP as a separate product using separate evaluation criteria. However, the acquisition of such renewable resources remains subject to the Commission's rules for certification and approval.

ATTACHMENT A1
FINAL RULE
(Redline Version)

Changes highlighted in yellow addressed the issues that originated in Docket No. R-35462.

LOUISIANA PUBLIC SERVICE COMMISSION

RULES REGARDING MARKET BASED MECHANISMS

PURPOSE

The Louisiana Public Service Commission (“LPSC”) establishes the following rule to clarify and modify the Market Based Mechanism (“MBM”) process as established in General Order dated October 29, 2008 (Docket No. R-36172 Subocket C), to codify Commission precedent, and to make changes needed to require utilities to evaluate all market options.⁶ This rule amends and supersedes all previous versions.

AUTHORITY

Article IV, Section 21 of the Louisiana Constitution of 1974 provides the Commission with the following authority:

Powers and Duties. The Commission shall regulate all common carriers and public utilities and have such other regulatory authority as provided by Law. It shall adopt and enforce reasonable rules, regulations and procedures necessary for the discharge of its duties, and shall have other powers and perform other duties as provided by Law.

Consistent with the above authority, the Commission has adopted rules and regulations through Commission Orders that apply to utilities in general, and in some instances, electric utilities specifically. The blanket authority to regulate public utilities granted above; however, is not absolute, as it is subject to the following limitations regarding utilities owned, operated, or regulated by a political subdivision:

Limitation. The Commission shall have no power to regulate any common carrier or public utility owned, operated, or regulated on the effective date of this constitution by the governing authority of one or more political subdivisions, except by the approval of a majority of the electors voting in an election held for that purpose; however, a political subdivision may reinvest itself with such regulatory power in the manner in which it was surrendered. This paragraph shall not apply to safety regulations pertaining to the operation of such utilities.

⁶ This Order addresses all issues regarding changes to the 2008 MBM Order raised in Docket Nos. R-34247, R-34003, and R-35462.

RULE

1. Electric utilities subject to the Commission's jurisdiction shall employ a market-based mechanism to support the addition of generating capacity intended to serve LPSC-jurisdictional retail customers, whether through the construction of that capacity, the acquisition of that capacity, or the contracting for that capacity through a Purchase Power Agreement ("PPA"). The results and analysis from employing this mechanism shall serve as part of the "justification" required in paragraph (2) of the 1983 General Order. This requirement shall not apply to non-jurisdictional affiliates of a Louisiana utility except in cases where the affiliate enters into a PPA on behalf of the Louisiana utility.
2. The following generating capacity investments or contracts do not require the formal use of a market-based mechanism:
 - (a) Conventional resources less than 50 MW summer rating and intermittent resources less than 50 MW nameplate rating, LPSC jurisdictional share (for both);
 - (b) modifications to an existing unit which expand the unit's capacity either by less than 10 percent or by less than 50 MW;
 - (c) return to service of a unit in extended reserve shutdown if the total refurbishment costs (inclusive of new environmental controls and start up O&M) are less than \$100 per kW;
 - (d) a project whose incremental installed cost for the increased capacity is less than \$100 per kW;
 - (e) contracts for the purchase of economy energy or emergency power;
 - (f) contracts of three years or less in duration with an un-affiliated entity, or one year or less with an affiliated entity provided that the utility expects to receive power supply under the contract within one year of contract execution;
 - (g) resources that have been previously certified by the Commission, but subsequently change in status (e.g., the exercise of an asset purchase option or reallocation of capacity among utility affiliates under LPSC jurisdiction).
3. The market-based mechanism shall be a Request for Proposal ("RFP") competitive solicitation process that shall be constructed as broadly as possible to allow for review of all available options to add generating capacity. The RFP competitive solicitation process developed by the utility shall include the solicitation and evaluation of PPAs and shall solicit and evaluate all available market options, including, but not limited to conventional resources, intermittent resources, hybrid resources, and storage. The utility may propose an alternative market-based mechanism or procedure if it can demonstrate to the Commission with sworn support from a Company representative that sufficient circumstances exist such that a RFP competitive process subject to the requirements herein would not be in the public interest. This alternative market-based mechanism can include justified limitations on the type or types of market options, if that alternative is supported both by a fully vetted Integrated Resource Plan that has been submitted to the Commission and sworn support justifying the need for the limitations. In no event, however, shall such a proposed alternative market-based mechanism be limited to self-build or utility-owned resources.
4. This Rule does not preclude the utility from entering into a capacity contract with a Qualifying Facility certified by the Federal Energy Regulatory Commission outside of an RFP process under the rules and procedures of the Commission's February 27, 1998 Avoided Cost General Order, as amended, the Commission's General Order in Docket No. R-28376, and other applicable Commission orders, rules and regulations. Any such contract shall be subject to approval by this Commission.

5. The use of a market-based mechanism shall not be required for the construction of nuclear resources.⁷
6. Any capacity investment exempt from the market-based mechanism must be supported with the appropriate justification at the time the utility seeks Commission approval or rate recovery for that investment. For any such exempt capacity addition or PPA, the utility retains the obligation to prudently implement, construct and/or manage the resource consistent with the objective to provide reliable service at the lowest reasonable cost.
7. Any utility capacity project or PPA approved subject to the market-based mechanism and the 1983 General Order remains subject to prudence review in subsequent rate and/or fuel clause audit proceedings with respect to the utility's obligation to prudently implement, construct and/or manage the capacity project or PPA consistent with the objective of providing reliable service at lowest reasonable cost.
8. In order to implement the market-based mechanism for capacity investments or PPAs, the utility is required to submit an informational filing with the Commission. The informational filing will be made in the Pre-RFP docket created as set forth in paragraph 14 below. The informational filing shall contain, but not be limited to, the following items:
 - (a) A description of the utility's proposed capacity addition or PPA including timing, amount and type;
 - (b) All information demonstrating compliance with Section 3 above, including, but not limited to, information regarding the RFP responses and pricing information needed for Staff and the Commission to evaluate whether the winning proposals are in the best economic and other interests of ratepayers.
 - (c) In the case that the electric utility's proposal is to construct generating capacity or to acquire (through contract, asset purchase or other means) an existing capacity resource(s) (that is owned by the utility or an affiliated retail regulated utility) that is not part of the electric utility's LPSC-jurisdiction regulated operations, the filing shall describe the plan and the resource(s), including a detailed estimate of the resource's cost, revenue requirement impacts and support for that cost estimate. The cost and revenue requirement data may be submitted subject to appropriate confidentiality protection. Absent a Commission waiver, such acquisition(s) shall be priced no higher than the cost of service associated with the asset(s). This is not intended to preclude Commission approval of a formula rate or alternative regulatory plan for the utility.
 - (d) Supporting information and documentation justifying the amount of capacity need and the proposed resources to be acquired;
 - (e) Supporting information and documentation justifying the type of resources which the electric utility proposes or expects to construct and/or acquire, along with the source alternatives considered but rejected;
 - (f) The utility's proposed schedule for conducting and completing its RFP process and resource acquisition process. This would include the anticipated schedule for undertaking and completing any proposed power plant construction. This proposed schedule for conducting the RFP shall include adequate time for Staff review and discovery;
 - (g) A description of the methods and criteria that the utility intends to use to evaluate RFP bid responses;
 - (h) A description of any requirement or preferences regarding transmission arrangements and deliverability of the power supply to the utility's customers,

⁷ This exemption is dependent upon compliance by the utility with the provisions of the General Order in Docket No. R-29712 (May 18, 2007) in which alternative rules for nuclear projects were adopted.

including a description of how the utility intends to incorporate transmission issues into its bid evaluation process;

- (i) A description of the methods and safeguards the utility will use to protect the confidentiality of bids and bidder information and to ensure such information is not improperly used by the utility or its affiliates nor provided to a utility's merchant affiliate;
- (j) If the utility's RFP permits affiliate bids, including a self-build or self-supply option, a description of the methods and safeguards the utility will use to ensure the utility's merchant affiliate bid or self-build or self-supply option receives no preferential treatment, preferential access to information or unfair or improper advantage. This submission would include all existing codes of conduct (internal or approved by a regulatory agency) governing such bids and contracts or self-build or self-supply option;
- (k) A draft PPA or a description of key contract elements;
- (l) A draft RFP solicitation document; and
- (m) A draft or sample confidentiality agreement.

9. The electric utility shall hold one or more technical conferences with Commission Staff and participating organizations to review the utility's filing and proposals. The electric utility may proceed with the RFP process after completion of a consultation process with Staff and participants. If requested by Commission Staff, the utility shall hold a technical conference to review the utility's experience and results in conducting its RFP. Within 20 days after the date of the first technical conference, any person or entity qualifying to appear in Commission proceedings pursuant to the "Rules of Practices and Procedures of the Louisiana Public Service Commission," including Rule 10,⁸ will be given the opportunity to object to any requirements in the initial draft RFP as to the type, location, or size of resources solicited.⁹ That objection shall be in the form of a written notice ("Notice") specifically describing the objections raised and the alleged basis for any such objections. That Notice shall be brought in good faith and shall be filed in the Pre-RFP Docket. The Notice required is a necessary pre-requisite for raising the objections required by this paragraph in a subsequent certification docket seeking approval of resources selected as a result of the RFP. Any person or entity shall be precluded from raising in a certification proceeding a challenge to the RFP that was required to be first raised in the Pre-RFP Docket that was not timely raised. If any objection is timely raised in the Notice in the Pre-RFP docket, the final RFP shall not issue any sooner than 30 days after the first technical conference in order to allow the opportunity for the utility, LPSC Staff, and any person or entity to consider and consult over the issues raised. Any Notice filed in the Pre-RFP docket shall not divulge any confidential or highly sensitive information received from the utility or any information related to a specific resource or proposal that could compromise the integrity of the competitive procurement process. Nothing in this proposed rule is intended to change or affect the burden of proof required in the certification proceedings.

10. "The electric utility shall provide RFP bid results and its evaluation of those bids to Commission Staff and participating organizations deemed eligible to review such material subject to appropriate confidentiality protections. The electric utility shall provide an opportunity for Staff and eligible participant consultation before selecting PPA offers and/or rejecting RFP bids in favor of its own capacity construction process.

⁸ This Rule is not intended to change, limit, or expand the entities that are allowed to participate in Commission proceedings under current rules and precedent.

⁹ "Type" shall include the fuel (including renewable fuel) type and the technology type, *e.g.*, CCGT, CT, Storage etc. The "type, location, and size" is intended to be exclusive and does not include, *e.g.*, objections to the need for the facilities. Objections shall not be required prior to the certification phase to any changes to the type, location, or size of resources solicited made by the utility after the first technical conference. Persons and Entities are encouraged, but not required, to raise any other RFP-related objections they may have in the Notice.

11. The electric utility shall conduct its planning and RFP process with the objective being the provision of reliable electric service at the lowest reasonable cost. The selection of projects or PPAs also may consider public interest criteria such as: project or PPA risk attributes; fuel diversity; and other factors deemed relevant.
12. If a utility's affiliate submits a bid in the RFP process, or a self-build project or self-supply option is bid, the utility must ensure that the affiliate has no preferential access to information or has any unfair advantage over other potential bidders.
13. Any bidder whose bid is not selected by the utility for acquisition or contract award may request and the utility on a timely basis shall provide a written explanation for bid rejection. At a minimum, the explanation shall state:
 - (a) If the bid was rejected due to its failure to meet RFP requirements ("nonconforming bid"), an identification of the RFP requirement(s) that the bid failed to meet;
 - (b) If the bid was judged to be conforming, but was rejected due to a technical or business flaw(s), an identification of any such flaw(s); and/or
 - (c) If applicable, that the bid was judged to be conforming and technically acceptable, but was rejected on the basis of economic attractiveness.
14. The electric utility shall file with the Commission, with at least 30 days advance notice, notice of its intent to conduct an RFP prior to submitting its informational filing required under this General Order; however, the Commission strongly encourages utilities to provide 60 days advance notice. The Commission shall assign a docket number at the time that notice is filed. ("Pre-RFP Docket"). That Pre-RFP docket shall be noticed in the Commission's Official Bulletin and interventions shall be allowed. No Administrative Law Judge shall be assigned to that docket, no discovery shall be allowed, and no hearing procedures shall be initiated. The Pre-RFP docket will serve as a repository for filing the Notice described in paragraph 9 above and may be used to file any other documents or information related to the Pre-RFP Docket. The Pre-RFP Docket does not prohibit the utility from establishing a RFP-related website or webpage. Any CEII, HSPM, or Confidential materials may be filed under seal and protected from disclosure consistent with the Commission's Rules of Practice and Procedure along with public redacted versions. Any such notification does not commit the utility to proceed with its RFP, nor does it prevent the utility from delaying the filing date. In the case of an RFP that seeks resources with terms of five years or less, the utility shall allow not less than 30 days from its informational filing to the issuance of its RFP to allow for review and consultation with Commission Staff and interested parties. In the case of an RFP that seeks proposals for resources with terms greater than five years, the minimum review period shall be 60 days. These requirements may be waived or modified by the Commission for good cause.
15. Upon the filing of its RFP pre-notification, the electric utility shall identify an entity to be retained to serve as an independent monitor (IM).¹⁰ This entity shall have had no other business relationship (other than as IM) with the utility or any of its affiliates within the last three years. The Commission may reject the utility's IM selection and request the utility to submit another IM choice. The IM selected by the utility shall coordinate with and report its findings to Staff and the utility, including its Final Report.
 - (a) The IM will review and track the utility's conduct of the RFP to ascertain that no undue preference is given to affiliates and their bids, self-build or self-supply projects. This will include, to the extent necessary, reviewing the draft RFP and the utility evaluation of bids, monitoring communications (and communications protocols) with market participants; monitoring adherence to codes of conduct; and monitoring contract negotiations.

¹⁰ The requirement for an Independent Monitor is only applicable if a utility proposes a self-build, permits affiliate bidding or proposes self-supply (i.e., an existing utility-owned or controlled resources not in base rates, but that will be moved into base rates upon acquisition).

- (b) The IM shall report to the Commission Staff at appropriate intervals and facilitate regular communication between Commission Staff and the utility on the RFP process. The IM will immediately report any irregularities, problem or concerns with the RFP process to the utility and Staff. The IM shall also submit a final RFP evaluation report to Commission Staff and the Commission, including any recommendations for improving the process.
- (c) The utility may fund the cost of the IM in part or whole through bid fees, not to exceed \$5,000.00 per bid, with any excess revenue returned to the rejected bidders. Proposed bid fee arrangements shall be identified in the utility's draft RFP. If bid fees do not fully recover IM costs, the utility may recover the remaining amount from the winning bidder.

16. Self-Build Cost Changes:

- (a) In the event of a material change to the estimated self-build or self-supply project cost option, projected completion date or design attributes (e.g., rated capacity, heat rate, etc.) subsequent to the submission date of the "best and final" bids, the utility staff responsible for the self-build plan or self-supply option submission shall promptly and full notify the utility's RFP staff. The utility RFP team must promptly notify the IM and the Commission Staff of the change. This mandatory notification requirement shall continue throughout the end of the RFP process. This reporting obligation applies only to a self-build project or self-supply option that is selected for award in the RFP. For purposes of this Order, a "material change" is defined as either an increase in construction or supply costs of 20% or more or a change in cost, schedule or design that plausibly could alter the project evaluation rankings.
- (b) The utility conducting the RFP process shall identify the date at which the RFP is completed. If a self-build project or self-supply option is selected, the RFP team must certify its best estimate of the construction, supply and transmission costs as of that RFP completion date, its best estimate of the self-build project commercial operation date and any material changes to the project design attributes compared to the "best and final" submission. This information shall be promptly provided to the IM and Commission Staff.
- (c) For purposes of this RFP, the communication of information on changes in cost, completion schedule or design attributes by the utility self-build staff to the utility RFP staff, subsequent to the "best and final" bid submission date, pursuant to this rule, does not constitute a violation of the RFP's code of conduct.
- (d) In the event of a material change in project cost, schedule or design attribute for the selected self-build project or self-supply option subsequent to the utility's completion of its bid ranking process, the utility shall perform an updated bid ranking. This updated analysis shall be contemporaneously or timely reviewed by the IM and Commission Staff.
- (e) In any such updated bid ranking process, the utility RFP staff shall consult with the IM and Commission Staff as to whether the third-party suppliers competing with the selected self-build project or self-supply option should be permitted to refresh their bids for purposes of an updated bid evaluation. The IM or Staff also may consider whether circumstances would support allowing additional potential suppliers or non-shortlist suppliers to participate in the update. In the event of any disagreement, the utility shall state its reasons in writing for opposing a refreshing of the bids, as may be recommended by Commissions Staff or the IM.
- (f) To the extent the utility RFP team concludes the self-build project or self-supply option costs to be uncertain (i.e., beyond allowances built into the project construction budget for cost escalation and contingency), the utility is encouraged to develop a range of costs for bid ranking purposes. The bid

ranking evaluation process also shall consider the cost risk of the self-build or self-supply relative to the cost risk of competing third-party bids.

- (g) The bid re-screening requirements pursuant to Section 16(d) and 16(e) above do not necessarily apply to transmission upgrade cost changes that might be associated with the self-build project or self-supply option. To the extent that a material cost increase arises in whole or in part due to estimated transmission upgrade cost changes, the utility shall give notice to and must consult with LPSC Staff and IM regarding whether such transmission upgrade cost increases shall require the re-screen process. However, the utility should use the best available information on transmission costs associated with both the self-build project or self-supply option and competing resources.
- (h) Nothing in this Rule is intended to restrict any party from proposing and the Commission from adopting a "cost cap" or similar protective mechanism as part of a certification or other proceeding for a self-build project or self-supply option.

17. Nothing in this Rule is intended to inhibit or restrict the utility from acquiring renewable resources through its RFP as a separate product using separate evaluation criteria. However, the acquisition of such renewable resources remains subject to the Commission's rules for certification and approval.