

LOUISIANA PUBLIC SERVICE COMMISSION

GENERAL ORDER

Docket No. R-26172, Sub Docket C. In re: Possible suspension of, or amendments to, the Commission's General Order dated November 3, 2006 (Market Based Mechanisms Order) to make the process more efficient and to consider allowing the use of on-line auctions for competitive procurement.

(Decided at the October 15, 2008 Business and Executive Session)

(as previously amended February 14, 2007)

(as previously amended February 16, 2004)

(as previously amended November 3, 2006)

Overview

A. Original Market Based Mechanism Order:

On April 10, 2002, the Louisiana Public Service Commission ("LPSC" or "Commission") issued a General Order ("Market Based Mechanism Order" or "MBM") which developed a market-based mechanism to evaluate proposals to construct or acquire generating capacity. In that order, the Commission directed that the market-based mechanism shall be a request for proposal ("RFP") competitive solicitation process. The adoption of the use of a market based mechanism was to demonstrate that applications for the construction and/or acquisition of additional regulated generation by utilities is the least cost alternative and in the public interest. The Commission believes that the process provides both the structure and use of the wholesale market sought by parties while at the same time preserving to the utilities their traditional responsibility for supply planning and acquisition. The Commission recognizes that the purpose of this process is to provide reliable service at the lowest reasonable cost, while allowing for the use of other public interest project selection criteria.

The use of the market based mechanism supplements the Commission's September 20, 1983 General Order that requires a public utility seeking to construct or convert an electric generating facility or enter into a purchase power contract to obtain a certificate of public convenience and necessity from the Commission.

B. Subsequent Revisions to the MBM Order:

At its May 21, 2003 Business and Executive Session, the Commission directed Commission Staff ("Staff") to obtain input with respect to any needed modifications and/or improvements in the process established by the Market Based Mechanism Order. Many of the interveners recommended various modifications, including, but not limited to, an independent monitor, greater protection against misuse of bid information by utilities or its affiliates, a more

detailed description of bid evaluation methodology and transforming the RFP design process into a docketed proceeding. On February 16, 2004, the Commission amended the Market Based Mechanism Order with some of these modifications.

At the May 25, 2006, B&E, the Commission directed the Staff to propose a change to the Market Based Mechanism General Order dated February 16, 2004. The intent of the proposed change was to allow projects or contracts involving the development of solid fuel and nuclear resources an exception to the RFP competitive solicitation process. The Commission noted the need for utilities to have a better fuel mix and cited the utilities' dependence on natural gas and volatility of natural gas prices as having a negative impact on customers. After reviewing the comments submitted by the parties, Staff did not recommend amending the Order to include an exemption for non-nuclear solid fuel resources. At the July 12, 2006 B&E, the Commission accepted Staff's recommendation and directed Staff to request comments regarding the nuclear resource exemption only. [*See* Special Order 33-2006.]

An exemption for nuclear resources was considered at the Commission's Open Session held on October 11, 2006. The Commission voted to accept the Staff recommendation that an explicit exemption for nuclear construction be included in the Market Based Mechanism Order. The Commission also voted that modifications or alternative rules to the certification approval process for nuclear construction be addressed in docket number R-29172, Louisiana Public Service Commission, ex parte. In re: Investigation into the ratemaking and generation planning implications of nuclear construction in Louisiana.

In Docket No. R-28376, the Commission considered whether revisions to the MBM were needed in order to address the claim by some qualifying facilities ("QFs") that Public Utilities Regulatory Policies Act of 1978 ("PURPA") entitles QFs to an exemption from or other special preference in the LPSC's RFP competitive solicitation process. The Staff recommended that the Commission's Market Based Mechanism General Order dated February 16, 2004 ("MBM Order") and its General Order of February 27, 1998 ("Avoided Cost Order") be modified to encourage, but not require, QF participation in the RFP process, and to allow QFs to negotiate with the utilities for long-term contracts after the conclusion of an RFP for any capacity needs not met through the RFP process, using the winning bid prices out of the RFP process as a benchmark of avoided costs. The Commission approved this recommendation at the February 14, 2007 Open Session.

C. Consolidated Docket Nos. R-26172, Sub Docket C and R-30517.

Docket No. R-26172, Sub Docket C was initiated by the Louisiana Public Service Commission (“Commission”) on June 29, 2007. At that time, the Commission published notice of this rulemaking and provided an opportunity for interested parties to submit comments regarding the Commission’s Market Based Mechanisms (MBM) Order, dated February 16, 2004. In particular, the Commission requested comments to the following questions:

1. Should the Commission abolish the Market Based Mechanisms Order altogether? Include in your discussion the positives and negatives of requiring jurisdictional utilities to comply with the Market Based Mechanisms Order.
2. For utilities: If the Commission abolished the Market Based Mechanisms Order, would the utility continue to use a competitive procurement process? Why or why not?
3. If the Market Based Mechanisms Order is not abolished, does it need to be revised to streamline the competitive procurement process, i.e. does the current Order need to be revised to make the process more efficient or should the current Order be left as is? If recommending revisions, describe in detail any revisions that need to be made to streamline the process, including what actions can be taken by the Commission/Commission Staff, utilities and market participants to make the process more efficient.

Comments to the above-referenced questions were submitted by intervenors on August 31, 2007 and on November 2, 2007.¹ The rule-making was ultimately consolidated with Docket No. R-30517.²

The Staff issued a notice of a technical conference and provided the parties with its pre-Technical Conference comments. On May 13, 2008 a Technical Conference was held at which time the Staff’s pre-Technical Conference comments and those of the participating parties were discussed. Nearly all commenting parties actively participated in the Technical Conference.

At the Technical Conference, Staff sought to forge a consensus among the parties, or at least a narrowing of differences, on the principal rulemaking issues. To some extent this was achieved and reflected in the post Technical Conference comments.³ The emerging areas of agreement include the following:

¹ Southwestern Electric Power Company (SWEPCo) submitted comments on August 31, 2007.

² Docket No. R-26172, Sub Docket C was consolidated with Docket No. R-30517 due to the overlapping issues addressed in both proceedings.

³ Post Technical Conference comments were submitted by the Entergy Companies, the Joint Stakeholders. Cleco Power and SWEPCo. The Joint Stakeholders are comprised of the Louisiana Energy Users Group, SUEZ Energy North America, Calpine Corporation, and Entegra Power Group, LLC.

- All parties strongly support the retention of the MBM Order, in most cases with “fine tuning” modifications rather than any fundamental changes. The parties stressed the importance of the rigorous “market test” for new capacity resources that the MBM Order provides.
- The parties support or accept the participation in RFPs, where appropriate, of self-build projects, but recognize the need for stricter oversight and procedures for accounting for changes in projected construction costs.
- Several Staff suggestions for streamlining or clarifying the MBM Order were accepted by the parties.

On July 22, 2008 the Staff submitted its Draft Initial Report. As a part of the Draft Initial Report, the Staff provided specific recommendations to streamline the MBM Order. The Draft Initial Report provided a comprehensive review of the issues that were addressed at the technical conference, including a review of the intervenors’ comments and the Staff’s position(s). Moreover, the Draft Initial Report contained specific streamlining-proposals for the MBM.

On August 12, 2008 AEP/Southwestern Electric Power Company, Entergy Louisiana, L.L.C. and Entergy Gulf States, L.L.C. (“Entergy”), CLECO Power, L.L.C. (“CLECO”), and the Joint Stakeholders submitted comments to the Draft Initial Report of the LSPC Staff. While there appeared to be a great deal of consensus regarding the proposed revisions, the parties nonetheless stated additional amendments that they felt should be included in the MBM Order. The Staff provided a summary and response to the comments on August 26, 2008.

Thereafter, the Staff provided a revised MBM Order to the parties on October 1, 2008. In addition to the revised MBM Order, the Staff provided a “Staff Report” that included a discussion of additional issues that were relevant to the rule-making, but did not need to be included in a final order. The Staff Report is attached hereto as Attachment A.

Commission Jurisdiction

The Commission exercises jurisdiction in this proceeding pursuant to Article 4, Section 21 of the Louisiana Constitution, and La. R.S. 45:1163(A)(1).

Louisiana Constitution, Article 4, Section 21 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. [Emphasis added.]

La. R.S. 45:1163 provides in pertinent part:

A. (1) The Commission shall exercise all necessary power and authority over any street, railway, gas, electric light, heat, power, waterworks, or other local public utility for the purpose of fixing and regulating the rates charged or to be charged by and service furnished by such public utilities.

Commission Action

This matter was considered at the Commission's Open Session held on October 15, 2008. On motion of Commissioner Bossiere, seconded by Commissioner Campbell, and unanimously adopted, the Commission voted to accept the Proposed General Order.

THEREFORE IT IS ORDERED:

1. Electric utilities subject to the Commission's jurisdiction shall employ a market-based mechanism to support the acquisition of generating capacity or purchase power contracts intended to serve LPSC-jurisdictional retail customers. 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 purchase power contract 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. resources less than 50 MW summer rating, LPSC jurisdictional share.
 - 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 Commission, but subsequently changing 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. The utility may propose an alternative market-based mechanism or procedure if it can demonstrate that circumstances indicate that a formal RFP would not be in the public interest.
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, the Commission's General Order in Docket No. R-28376, and other applicable 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.⁴
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 purchase power contract, the utility retains the obligation to prudently implement, construct and/or manage the resource consistent with the objective to provide reliable service at lowest reasonable cost.
7. Any utility capacity project or purchase power contract 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 purchase power contract 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 purchase power contracts, the utility is required to submit an informational filing with the Commission containing but not limited to the following items:
 - a. A description of the utility's proposed capacity addition including timing, amount and type;
 - b. 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 (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.
 - c. Supporting information and documentation justifying the amount of capacity need and the proposed resources to be acquired;
 - d. Supporting information and documentation justifying the type of resources which the electric utility proposes or expects to construct and/or acquire; along with resource alternatives considered but rejected.
 - e. 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.
 - f. A description of the methods and criteria that the utility intends to use to evaluate RFP bid responses;
 - g. A description of any requirement or preferences regarding transmission arrangements and deliverability of the power supply to the utility's customers, including a description of how the utility intends to incorporate transmission issues into its bid evaluation process.
 - h. 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

⁴ This exemption is dependent upon docket number R- 29712 in which alternative rules for nuclear projects exempt from the Market Based Mechanism Order will be developed.

improperly used by the utility or its affiliates nor provided to a utility's merchant affiliate.

- i. If the utility's RFP permits affiliate bids, a description of the methods and safeguards the utility will use to ensure the utility's merchant affiliate bid 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.
 - j. A draft purchase power agreement or a description of key contract elements;
 - k. A draft RFP solicitation document; and
 - l. 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.
 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 purchase power contracts offers and/or rejecting RFP bids in favor of its own capacity construction process.
 11. The electric utility shall conduct its planning and RFP process with the objective being the provision of reliable electric service at lowest reasonable cost. The selection of projects or purchase power contracts also may consider public interest criteria such as: project or contract risk attributes; fuel diversity; and other factors deemed relevant.
 12. If a utility's corporate affiliate submits a bid in the RFP process, 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"), and if so, 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; 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 provide the Commission with at least 30 days advance 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. 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 for a term 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.
 - (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 bidders.

16. Self-Build Cost Changes:

- (a) In the event of a material change to the estimated self-build project cost, 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 submission shall promptly and full notify the utility's RFP staff. The utility RFP team must promptly notify the Independent Monitor 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 that is selected for award in the RFP. For purposes of this Order, a "material change" is defined as either an increase in construction 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 is selected, the RFP team must certify its best estimate of the construction 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 Independent Monitor 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 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 Independent Monitor and Commission Staff.

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).

- (e) In any such updated bid ranking process, the utility RFP staff shall consult with the Independent Monitor and Commission Staff as to whether the third-party suppliers competing with the selected self-build project should be permitted to refresh their bids for purposes of an updated bid evaluation. The Independent Monitor 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 Commission Staff or the Independent Monitor.
 - (f) To the extent the utility RFP team concludes the self-build project 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 relative to the cost risk of competing third-party bids.
 - (g) The bid re-screening requirements pursuant to Sections 16(d) and 16(e) above do not necessarily apply to transmission upgrade cost changes that might be associated with the self-build project. 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 Independent Monitor 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 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.
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.

**BY ORDER OF THE COMMISSION
BATON ROUGE, LOUISIANA
October 29, 2008**

**/S/ JACK “JAY” A. BLOSSMAN
DISTRICT I
CHAIRMAN JACK “JAY” A. BLOSSMAN**

**/S/ LAMBERT C. BOISSIERE, III
DISTRICT III
VICE CHAIRMAN LAMBERT C. BOISSIERE, III**

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