"Attachment A"

BEFORE THE
LOUISIANA PUBLIC SERVICE COMMISSION

IN RE: POSSIBLE SUSPENSION OF, OR AMENDMENT TO, THE COMMISSION'S GENERAL ORDER DATED NOVEMBER 6, 2006 (MARKET BASED MECHANISMS ORDER) TO MAKE THE PROCESS MORE EFFICIENT AND TO CONSIDER ALLOWING THE USE OF ON-LINE AUCTIONS FOR COMPETITIVE PROCUREMENT	)	DOCKET NO. R-26172 SUBDOCKET C
IN RE: POSSIBLE MODIFICATIONS TO THE SEPTEMBER 20, 1983 GENERAL ORDER TO ALLOW: (1) FOR MORE EXPEDITIOUS CERTIFICATIONS OF LIMITED-TERM RESOURCE PROCUREMENTS; AND (2) AN EXCEPTION FOR ANNUAL AND SEASONAL LIQUIDATED DAMAGES BLOCK ENERGY PURCHASE	)	DOCKET NO. R-30517

FINAL REPORT OF THE

COMMISSION STAFF

OCTOBER 7, 2008

TABLE OF CONTENTS

BEFORE THE
LOUISIANA PUBLIC SERVICE COMMISSION

IN RE: POSSIBLE SUSPENSION OF, OR AMENDMENT TO, THE COMMISSION'S GENERAL ORDER DATED NOVEMBER 6, 2006 (MARKET BASED MECHANISMS ORDER) TO MAKE THE PROCESS MORE EFFICIENT AND TO CONSIDER ALLOWING THE USE OF ON-LINE AUCTIONS FOR COMPETITIVE PROCUREMENT	)	DOCKET NO. R-26172 SUBDOCKET C
IN RE: POSSIBLE MODIFICATIONS TO THE SEPTEMBER 20, 1983 GENERAL ORDER TO ALLOW: (1) FOR MORE EXPEDITIOUS CERTIFICATIONS OF LIMITED-TERM RESOURCE PROCUREMENTS; AND (2) AN EXCEPTION FOR ANNUAL AND SEASONAL LIQUIDATED DAMAGES BLOCK ENERGY PURCHASE	)	DOCKET NO. R-30517

FINAL REPORT OF THE
COMMISSION STAFF

I. BACKGROUND AND INTRODUCTION

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] In addition to addressing the questions listed above, Entergy Gulf States, LLC and Entergy Louisiana, LLC ("the Entergy Companies") suggested that the length of current and past certification proceedings in Louisiana might persuade market participants to shop their products to other jurisdictions that have shorter timeframes for certification. As a result, the Entergy Companies suggested that modifications to the Commission's General Order of September 20, 1983 ("1983 General Order") might be necessary to address these market conditions.

As a result, the Commission initiated a rule-making to determine whether modifications were needed to the 1983 General Order, in order to address the concerns raised by the Entergy Companies. In particular, the Commission published notice of Docket No. R-30517 in its March 7, 2008 Official Bulletin, in which it sought comments to the following proposed modification:

> When a utility makes a certification filing for a limited-term, third-party resource(s) that has been selected through a RFP process, parties will have 30 days, from the date of publication, to object to the proposed certification. If no objection is received within the 30 day time period, the resource will be deemed approved and placed on the next Business and Executive Session agenda for final certification by the Commission.

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

> If an objection is filed within 30 days from the date of publication, a hearing may be held; however, there will be a rebuttable presumption that certification of the third-party resource would serve the public convenience and necessity. The Commission shall have 120 days to complete the hearing and render a final decision.

In addition to the above, the Commission sought comments on ways to streamline discovery related to utility certification applications of limited-term, third-party resources. Finally, the Commission sought comments regarding a possible exception to the 1983 General Order that would allow utilities to enter into contracts for annual and seasonal liquidated damages block energy purchases before receiving a certificate of public convenience and necessity from the Commission. Comments were filed by interested parties on March 27, 2008.

Thereafter, at the April 2008 Business and Executive Session, the Commission retained Exeter Associates, Inc. to assist the Commission Staff in both Docket Nos. R-26172, Sub Docket C and R-30517. In addition, the Commission voted to consolidate both rulemaking proceedings.

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.

Shortly thereafter, the Staff provided a "Remaining Procedural Schedule" for the consolidated rulemakings. The schedule was amended to accommodate intervenors' requests for extensions. On June 16, 2008, some of the parties submitted Post Technical Conference comments, and on July 2, 2008 two parties (the Entergy Companies and the Joint Stakeholders) submitted Cross-Answering Post-Technical conference comments. Appendix A to this report provides a listing of parties submitting comments in these consolidated dockets.

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.[2] The emerging areas of agreement include the following:

- 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 requires.

- All parties support or accept some streamlining of the procedures under the 1983 General Order for certifying limited-term purchase power agreements (PPAs), provided such procedures provide for adequate regulatory oversight and due process rights.

- Several Staff suggestions for streamlining or clarifying the MBM Order were accepted by the parties.

The most important area of disagreement by the parties pertained to utility "self-build" projects under the MBM Order. Specifically, the post-Technical Conference comments differ over the procedures to be followed in the event of a change in the utility's cost estimate for its proposed self-build projects.

On July 22, 2008, the Staff issued its "Draft Initial Report" discussing the post-Technical conference comments of the parties and setting forth Staff's recommended rule modifications for both general orders. These recommendations incorporated a number of the suggestions of the parties and reflected the narrowing of differences achieved at the Technical Conference. The three utility parties and the Joint Stakeholders filed comments on August 12, 2008, agreeing with

[2] Post-Technical Conference comments were submitted by the Entergy Companies, the Joint Stakeholders, Cleco Power and SWEPCo. These were also the only four parties submitting comments subsequent to the issuance of Staff's Draft Initial Report.

much of the Staff report but suggesting some additional modifications.[3] Staff distributed a letter to the parties on August 27, 2008 adopting a number of these suggestions and clarifying Staff's position. After the issuance of that letter, Staff had the opportunity to engage in informal discussions with interested parties to further clarify the proposed changes. On October 1, 2008, Staff distributed to the parties its proposed modified general orders incorporating our final recommendations. On October 2, 2008, the Joint Stakeholders submitted a letter to Staff Counsel and the parties expressing general agreement (with perhaps one exception) with Staff's proposals.

As discussed in detail in this report, Staff is recommending procedures that will greatly streamline certification of "Limited Term" PPAs (i.e., PPAs with terms not exceeding five years). In the vast majority of cases, this will permit the completion of regulatory review within approximately 60 days of the date of filing. However, for contested cases, the rule protects the procedural rights of all parties.

Our proposed changes to the MBM Order provide for streamlining and added flexibility by clarifying the exemptions and raising the threshold requirement for MBM-compliant RFPs from the current one year to three years. That is, RFPs will now be required under this Order only if the contract term exceeds three years. While we strongly encourage utilities to employ structured RFPs for PPAs with terms less than three years, raising the threshold provides both utilities and competitive suppliers with flexibility to address unique circumstances and market opportunities. Our changes to the MBM Order also provide stricter oversight of changes in cost for utility self-build proposals that prevail in RFPs.

Section II of this report is a summarization of the initial comments of the parties. Some of these initial recommendations were either modified or not pursued further after the Technical

[3] Two parties, the Entergy Companies and Joint Stakeholders submitted cross-answering comments on July 2, 2008.

Conference. Section III described Staff's initial recommendations for modifying the two General Orders. Section IV summarizes the parties' comments on Staff's initial recommendations and describes the final resolution of the issues. Appendices B and C provide listings of the final changes to the 1983 General Order and the MBM General Order, respectively.

II. INITIAL COMMENTS OF THE PARTIES

A wide range of parties submitted initial comments prior to the discussions that took place at the May 13, 2008 Technical Conference. The initial commenting parties included all four investor-owned electric utilities, customer representatives and unregulated merchant generators. (Please see Appendix A for a complete listing.) In most cases, the merchant generators limited their comments to the MBM Order.

This section briefly summarizes the initial comments. Many parties chose not to submit comments after the Technical Conference, and some of those that did modified their initial positions.

The Entergy Companies

The Entergy Companies submitted extensive comments on both General Orders advocating substantial streamlining and a few clarifications. For the MBM Order, the Companies proposed reducing the pre-notification period to 30 days and eliminating the stakeholder process for limited-term RFPs (although holding a bidders conference to answer questions). No changes to long-term resource RFPs were proposed, although the Companies advocated removing IRP issues from the stakeholder process. The Companies also sought clarification concerning when an Independent Monitor is required and clearer standards for exempting resource acquisitions from the RFP requirement under that Order.

The Companies sought extensive streamlining for limited-term (non-RFP, non-affiliate) PPAs under the 1983 General Order. This included a "deemed certified" result if no objection is raised 30 days after filing an application and a "rebuttable presumption" of approval for any RFP-vetted PPA. In such a certification proceeding, the Companies advocated intervenor discovery limitations. Block energy (liquidated damage) contracts need not be certified if not

acquired as a capacity resource, and such contracts (when certification is required) may be filed after the contract commences.

Cleco/SWEPCo

The Cleco and SWEPCo comments were quite limited and expressed strong support for the MBM Order and the current regulatory framework. These comments seem to support streamlining conceptually but did not go into as much detail as Entergy. Cleco warned against making fundamental change to a process that has worked well, but did express the need to avoid unnecessary duplication and conflicts with the IRP docket. SWEPCO argued against making the MBM Order overly prescriptive.

NRG Companies

NRG proposed or discussed several changes to the MBM Order that are quite substantial. This included conferring authority on the Independent Monitor to rank the bids and select winners and at least a consideration of cost capping self-build projects. NRG also supported certain less controversial features including the streamlining of time lines in the Order, greater clarity on the "market test" and assigning the Independent Monitor an explicit role in due diligence oversight.

Entegra Power Group

Entegra is part of the Joint Stakeholders but also submitted additional comments separate from the Joint Stakeholders on the MBM Order. Entegra proposed prohibiting the screening out bids at the initial stage based on bidder financial capability, ensuring that a third party reviews debt imputation calculations, and for self-builds, either cost cap or assigning a cost risk factor (as compared to fixed-price third party bids).

Occidental Chemical/Cottonwood Energy

Occidental and Cottonwood submitted substantially similar comments on the MBM Order, and Occidental (not Cottonwood) submitted comments on the 1983 General Order. Occidental is a large retail customer of one of the Entergy Companies. Both commenters would accept some modest streamlining of the front-end stakeholder process, but also suggest some streamlining may be appropriate for the utility bid selection process. These comments further argue that delisting and redispatch to provide transmission service must not favor self-builds/affiliates and must be applied on a non-discriminatory basis.

Occidental also supported some degree of streamlining under the 1983 General Order. However, Occidental does not see a reason to limit the proposed exemption to block energy-type contracts and believes other one-year-or-less contracts should receive similar treatment. Occidental also opposes the "rebuttal presumption" and "deemed approved" concepts supported by the Entergy Companies.

Louisiana Energy Users Group (LEUG)

LEUG is participating as part of Joint Stakeholders but also is submitting its own comments (as a retail customer representative) on the 1983 General Order. The LEUG comments overlap considerably with those of Occidental on this Order. LEUG supported the concept of streamlining but did not recommend specific streamlining procedures. In general, LEUG believes the existing process for certification of limited-term contracts has functioned reasonably well in providing effective oversight, but LEUG sees merit in expediting uncontested stipulations. Like Occidental, LEUG does not support the "deemed certified" or "rebuttable presumption" concepts. LEUG indicated that relaxed rules for block energy contracts may have merit, but ratemaking approvals must be addressed at some point.

Joint Stakeholders

The Joint Stakeholders includes LEUG, Entegra, SUEZ Energy North America and Calpine Corporation and initially submitted comments only on the MBM Order. The Joint Stakeholders joined other commenters in supporting the basic framework of that order and the concept of mandatory competitive procurement. The comments supported limited streamlining of the stakeholder process but noted that the principal timing problem seems to be the length of the utility evaluation and bid selection period, suggesting possible limits on that. This group argued for greater emphasis on displacement of older capacity as a goal.

III. STAFF'S DRAFT INITIAL REPORT

A. The 1983 General Order Changes

Two parties, the Entergy Companies and the Joint Stakeholders, submitted detailed Post Technical Conference comments on how best to streamline the certification procedures for limited-term PPAs under the 1983 General Order. These comments benefitted from the attempts to reach consensus at the Technical Conference. Notable, the Entergy Companies dropped their "deemed certified", "rebuttable presumption" and restricted discovery proposals. They also agreed to extending the initial 30-day regulatory review to the 45-60 days suggested by the Joint Stakeholders but expanded the expedited process to include affiliate and non-RFP PPAs. All parties accept a definition of "limited term" as up to five years.

Staff suggested an exemption for all PPAs of up to one year, though leaving in place a voluntary certification option for the utility. This would appear to address Entergy's concerns over block energy contracts and was generally found to be acceptable. Cleco further suggested that resources of 5 MW or less be granted a similar exemption, regardless of term. Staff emphasized that any exempt resource would remain subject to regulatory review in the appropriate proceeding when the utility seeks cost recovery, similar to other test year expenses, or fuel audit.

The Joint Stakeholders argued that in a contested case parties' full procedural rights should be retained, including post-hearing briefing and discovery rights. The time limit in the rule for such cases should be extended from 120 to 180 days with the Commission retaining the ability to extend the deadline. In uncontested cases, Joint Stakeholders support forwarding the Application (or settlement agreement) to the Commission but with supporting Staff testimony. The one major area of disagreement, however, is that Joint Stakeholders do *not* support the

application of the expedited procedures to affiliate transactions, non-RFP PPAs, self-build or long-term resources. The latter two items may reflect a miscommunication since no party supports using the expedited process for self-builds or long-term resources.

Given this substantial, though not complete, consensus, Staff recommended the following process for certification of limited-term PPAs. This shall apply to all (non-affiliate) PPAs with terms not exceeding 5 years.

- The utility submits its fully-supported Application, inclusive of the PPA contract and its proposed confidentiality agreement. The intervention period shall be 15 days from the notice date in the Commission's Official Bulletin.
- At the end of 30 days, parties have an opportunity to state any objection to a PPA (or any aspect of the Application). If no objection is set forth, Staff files supporting testimony, and the Application is forwarded to the Commission for its action. No hearing is required. If an objection is stated, this becomes a contested case.
- A second option for a party is to request a 30-day extension for review which shall automatically be granted. At the end of the extension period (day 60), the parties must state any objection to the Application. Again, absent an objection, Staff submits supporting testimony and the Application is forwarded to the Commission.
- A more likely scenario is that the utility and Staff reach a stipulated settlement within the 60-day period or shortly thereafter. The parties then would have ten days after the filing of a settlement to state any objections. If unopposed, the Application and settlement agreement would be forwarded to the Commission, with supporting testimony, but no hearing would be required.

- In the event of a contested case, the opposing party shall file its testimony within ten days of the opposition statement deadlines stated above. An evidentiary hearing then shall be scheduled to take place no less than ten days thereafter. Parties may present rebuttal testimony at the hearing.
- The current 120-day time limit for Commission decision is revised to 180 days, with the Commission having the ability to further extend the time limit. The presiding Administrative Law Judge (ALJ) may modify the procedural dates described above, as appropriate. While discovery rights are not limited by this Rule, the ALJ may consider the Commission's intent in this Rule to expedite the certification process when ruling on motions to limit the amount or scope of discovery.
- PPAs of one-year terms or less and resources of 5 MWs are exempt from the certification requirement, but the utilities shall retain a voluntary certification option for such resources.

The intent of these proposed changes is to provide an expedited but flexible process for limited-term PPAs. Our experience in certification cases in recent years is that limited-term PPAs, particularly those procured from RFPs, typically are not controversial.

One remaining area of disagreement is whether affiliate PPAs should be eligible for the proposed streamlined rules. Entergy supports that treatment, while Joint Stakeholders oppose. Staff suggests a possible middle ground for consideration. The affiliate PPA would not automatically fall under the Appendix B rules, but the utility's Application may request such treatment. If no party objects to this request within 30 days, then the affiliate PPA will follow the expedited rules. In the event that a party does object, then the expedited rules will not apply,

and the ALJ will establish a "contested case" procedural schedule for decisions within the 180-day time limit.

Another 1983 General Order issue is the Joint Stakeholders request for a rule that requires that the utility specify the year by which a self-build project becomes economic, i.e., first provides net savings to ratepayers. This apparently is based on the assumption that a self-build's ratepayer benefits are likely to be "back-end load." Utilities argue that this is an improper way to judge the merits of a self build.

Staff's view is that this dispute is moot. Parties may differ on whether the timing of self-build benefits is or is not a material factor in approving a project. However, the net savings timing information that the Joint Stakeholders seek has been readily available in certification cases, either reported in utility testimony or obtainable in discovery requests. Utilities already are required to prepare a year-by-year revenue requirements and evaluation analysis for self build projects under the MBM Order. Since this requirement already exists (and experience to date shows the information is available in certification cases), the recommended rule is not needed. Nonetheless, while no rule change is needed here, Staff strongly urges that utilities make this type of information available in certification cases (subject to appropriate confidentiality protection) either as part of filed testimony or through responses to data requests. We realize that the value of this information is both subjective and case specific, but it should be available by some means for the parties.

B. <u>The MBM Order Changes</u>

All parties expressed strong support for the Commission's competitive procurement framework and in most cases recommended only clarifying or "fine tuning" - type changes to the existing Order. There are two proposed changes, however, that are of fundamental importance.

NRG proposed that the Independent Monitor be given bid ranking and selection authority, rather than allowing the utility to make those decisions. The second is a proposal (or series of proposals) concerning either cost capping self-build projects or somehow penalizing the utility for unexpected cost increases.

The NRG proposal was not supported by other parties and was not pursued in any Post Technical Conference comments of the parties. While Staff understands NRG's concerns and recognizes that this approach has been used in other jurisdictions, it is contrary to the MBM Order's principle of utility accountability for its planning and procurement decisions.

Cost Cap for Self Builds

Staff explained in its pre Technical Conference report that a cost capping *rule* would be very problematic due to the utility being the only party with an obligation to serve. We are also concerned that a cost cap rule could distort utility incentives. These concerns were discussed in detail in the comments of the parties. Partly in deference to these concerns, the Joint Stakeholders suggested possible remedies to the self build cost escalation problem other than cost caps.

We believe that it is important to make a distinction between a cost capping *rule* and the use of cost caps as a *regulatory tool*. Staff does not believe that it is workable, as a practical matter, to require a cost cap on self-build projects as part of a generic Commission rule. However, there may be occasions where establishing a cost cap is reasonable as a condition of certification, and we are not intending to preclude the use of that tool in a certification case. As an example, Staff proposed and SWEPCO accepted a cost cap protective mechanism for its Arsenal Hill self-build project in Docket No. U-29702, Phase II. The appropriate use of such a tool would be case-by-case and depend on circumstances.

It is also clear that self build cost escalation has emerged as a significant issue, in large part due to the enormous industry-wide cost escalation problem afflicting all types of utility infrastructure. Louisiana utilities are no exception, and this recently has complicated the RFP process where self builds have been selected. In that regard, it would be useful to amend the MBM Order to address this issue. Thus, Staff has recommended updated bid screening, in order to recognize the self build cost increase. The utilities to date have agreed with this, and no one seems to object in principle to updating.

To the extent that there is a disagreement, it is over how this updating process should be conducted. Utilities would limit the updating to the shortlisted bids competing with the self-build project, whereas the Joint Stakeholders go further and argue for bid refreshing and a more comprehensive updating. Depending on circumstances, they suggest that it may be appropriate to open the process to all bidders and even to parties that did not previously bid. The utility response is that this would be an unreasonably time consuming process that is tantamount to "starting over". Even allowing non shortlist bidders to be considered might require that the utility conduct new due diligence studies for those bidder projects.

Staff concludes that the MBM Order should be amended to specify a utility's responsibility to account for cost increases (including major schedule or design change) for its self build, but the modified rule should be reasonably flexible. Staff's proposal would require that the utility staff preparing the self build cost estimates promptly notify the utility RFP team of any material change, with the utility immediately informing the Independent Monitor and Commission Staff. (Or, the self-build team could directly inform the Independent Monitor if that method of communication is preferred). This proposal makes clear that there is an explicit utility

responsibility to promptly report "material" cost increases.[4] Additionally, the utility conducting the RFP must determine a date by which the RFP is concluded and certify to Staff and the Independent Monitor its best cost estimate for any selected self build at that time.

Once a material cost increase is identified, the winning self build must be rescreened against the competing bids. However, how this is done by the utility should be determined in consultation with the Independent Monitor and Staff. The proper course of action must depend on circumstances, which obviously cannot be defined in a rule. The Independent Monitor and Staff shall provide recommendations on the refreshing of bids, including the possibility of considering refreshed bids from non shortlisted bidders or even non-bidders, as suggested by the Joint Stakeholders. If the utility disagrees with those recommendations, it should explain its position in writing. Staff and the Independent Monitor shall oversee on a timely basis any rescreening process necessitated by the self-build cost change.

Certain commenters have suggested that self build cost risk should be included as an evaluation factor vis a vis fixed-price type competing bids from third parties. Staff agrees with that recommendation. In addition, we encourage utilities to include a reasonable cost range (or sensitivity) for its self-build proposal as an explicit part of the bid screening process to further recognize uncertainty.

We do not fully disagree with the Joint Stakeholders that this updating process must cover transmission costs. Experience has shown enormous uncertainty over the costs of transmission network upgrade costs, but this is *not* a self build issue. Transmission upgrade cost uncertainty applies equally to third-party projects, as recently emerged in Entergy's acquisition of the Ouachita plant from Cogentrix (Docket No. U-30422).

[4] In this context, we view "material" as being large enough to plausibly affect bid ranking. For example, in a robust RFP, a self build prevails by $50 million, even a $5 million increase would not be material.

Streamlining the RFP

The Post Technical Conference comments seemed to converge on the streamlining issue. The parties and Staff appear to be in agreement that the LPSC pre-notification minimum can be reduced to 30 days (although we request that utilities attempt to provide up to 60 days if feasible). Entergy now has agreed to include a 30-day stakeholder process for the limited-term product RFPs and 60 days for the long-term product RFPs. These are minimum time periods and refer to the time period after the draft RFP package is published until final RFP publications. In addition, the current definition of limited-term PPAs is changed from up to 4 to up to 5 years.

Some commenters suggested that limits be placed on the utility evaluation period. However, such limits, as part of a Commission rule, do not seem either practical or enforceable. Staff will continue to address RFP time schedules and delays as part of its oversight function.

RFP Exemptions

The parties were in agreement concerning exemptions recommended by Staff. This includes increasing the capacity threshold from 35 MW to 50 MW, defining capacity as LPSC jurisdictional summer peak capacity and exempting "change-in-status" transactions for capacity resources (such as the exercise of a purchase option or an intercompany reallocation) already certified by this Commission.[5] Staff further recommended increasing the PPA term threshold for requiring an MBM RFP from one to three years.[6] This was supported by SWEPCO, and no party has objected.

[5] An example would include the exercise of the Ouachita asset purchase options by EGSL or a reallocation of a portion of the Little Gypsy repowering from ELL to EGSL. Staff would like to emphasize here that the "change-in-status" exemption is not a new policy. It was always our position and understanding that such a change-in-status did not require a new MBM process.

[6] The Final Proposed General Order specifically provides the following, "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." Thus, affiliate contracts of one year or less must still be selected as a result of a RFP.

SWEPCO appears to propose a blanket exemption for renewable resources. Staff does not at this time agree, and we generally support a competitive procure approach to renewable resources. However, we do support clarifying language stating that the MBM Order is not intended to prevent or inhibit the acquisition of renewable resources as a separate product. That is, the MBM Order does not specifically require that renewable resources compete head-to-head with conventional supplies. No party objected to Staff's clarification on this issue.

Entergy did seek additional language on the MBM Order intending to remove potential improper barriers to exemptions. This might include a clarification stating that an exemption request does not bear a higher standard of proof than an RFP-procured resource. Staff and the Joint Stakeholders oppose such a change. Staff is concerned that this might send the wrong message to the market, and in any event is not needed. Entergy in recent years has encountered no undue difficulty in obtaining Commission certification for projects that did not go through an MBM Order RFP but were warranted by circumstance. To date, no request for an MBM exemption has been rejected in a Commission certification case.

Independent Monitor Requirement

Entergy requested clarification that the retention of an Independent Monitor is required for an RFP only if affiliates are permitted to bid or if a self-build/self-supply project is proposed. All parties appear to agree with Entergy's position, and this clarification should be adopted.

Issues Not Requiring a Rule Change

The parties have raised a number of other issues that have merit, but at this time do not require a rule change. Part of the reason for our reluctance for recommending a rule change is to prevent the MBM Order from becoming inflexible and overly prescriptive. These would include the following:

Financial Issues. Staff agrees that minimum net worth standards and debt imputation should not automatically disqualify a bid from proceeding to economic evaluation. The utilities indicate that while these financial capability issues are legitimate considerations, they are not used for bidder disqualification. Staff agrees that such financial capability factors are legitimately part of the RFP process and utilities can employ counterparty standards, as long as they are reasonable. They should not be used for automatic disqualification.

Independent Monitor Oversight. Parties requested that the Independent Monitor carefully review debt imputation calculation and utility due diligence of third-party projects. This is, indeed, part of the Independent Monitor's responsibilities in overseeing bid evaluations.

Untimely Third-Party Bids. SWEPCO states that bids submitted after an RFP is completed are improper and should not be tolerated. Staff agrees, but this is already clear in the existing MBM Order.

Coordination with IRP Docket. Entergy and Cleco seek assurances that the MBM process will not conflict or lead to unnecessary duplication with the current IRP docket. At this point in time, Staff is not aware of an undue conflict or complication. It is not clear that a rule change is needed to accommodate this concern.

Transmission Service. Occidental/Cottonwood requested a rule that would require the use of delisting/redispatch to obtain transmission service (or for transmission evaluations) not favor self builds or utility affiliates. While Staff fully agrees, the MBM Order already includes applicable and clear nondiscrimination language covering this issue. Hence, an additional rule for this item is not needed.

Product Flexibility. The Joint Stakeholders seek a rule change that would allow bidders the flexibility to specify their own product definitions rather than be bound to the utility product definitions. Entergy responded that such a rule would disrupt and impair its RFP process. Staff believes that it would be preferable for bidders to suggest new products as part of the stakeholders' process or even prior to the RFP initiation. Moreover, it is unreasonable to prevent the utility from defining the power supply products that it believes that it needs to meet its planning objectives.

IV. FINAL RECOMMENDATIONS AND COMMENTS

The three utility parties and the Joint Stakeholders submitted comments on the Staff Draft Initial Report on August 12, 2008. Two of the utility commenters (Cleco and SWEPCO) submitted only brief comments, expressing agreement with the Staff recommendations. The comments of the Entergy companies and the Joint Stakeholders agreed in large part with the Staff report but proposed certain modifications. The Staff responded to these suggested modifications in its letter to the parties on August 27, 2008, agreeing to incorporate some of the suggested changes but objecting to others. After the issuance of our August 27, 2008 letter response, we held informal discussions with both parties to resolve final differences.

A. The Entergy Comments and Resolutions

Subject to one clarification, Entergy expressed agreement to Staff's proposed changes to the MBM General Order. Specifically, Entergy (and all parties) agree that any resource previously certified by the Commission experiencing a "change in status" (such as an intercompany reallocation) is not required to be tested through the MBM process since the resource already has been found to be in the public interest. However, Entergy requested that Staff clarify that this exemption is consistent with current practice and is not a policy change. Staff agrees with this clarification and so states in this report.

Entergy proposed one major change and two minor changes to the Staff recommendations on the 1983 General Order. Entergy opposed Staff's recommendation of a 180-day time period for a decision in a fully contested case instead of the current 120 days. While Staff understands the Companies' concern, we do not believe the 120-day deadline is feasible in such cases, and we demonstrated the basis for that opinion in our August 27 letter.

After further discussion, we understand that Entergy no longer contests the Staff recommendation on the 180-day deadline.

Entergy also requested two relatively minor modifications, which Staff has accepted. Entergy sought clarification that a prehearing conference will be held in an uncontested case even if no party requests a 30-day extension. Second, in a contested case, Entergy recommends that the presiding ALJ determine whether surrebuttal and rejoinder testimony be permitted on a case-by-case basis. These two changes, which Staff adopts, appear to be acceptable to all parties.

Finally, Entergy stated that they are reserving their legal rights to oppose the imposition of a cost cap for a self-build project, should the Commission consider imposing one, including the threshold issue of whether such a cap would be legally permissible. The Staff clarifies that the added language in the order regarding cost caps for self-build projects is not intended to affect a party's legal rights to oppose the imposition of a cost cap on a self-build project.

B. <u>The Joint Stakeholders Comments and Resolutions</u>

The Joint Stakeholders suggested several changes to the Staff recommendations for both General Orders. With one possible exception, all of these issues have been satisfactorily resolved either by Staff accepting the proposed change, through further discussions, or both.

For the 1983 General Order, Joint Stakeholders proposed the following:

1. If a utility seeks use of the streamline procedures for an affiliate contract, this request must be fully supported in the filed Application.

   Staff agrees to this clarification as reasonable.

2. Joint Stakeholders requested a minor rewording of paragraph 5(a) from Appendix B of the Draft Initial Staff Report.

   Staff finds the language clarification to be helpful and it is incorporated.

3. In an uncontested case, Staff testimony or report supporting the Application should be made available to the parties with adequate time for review prior to a Commission vote.

Staff has agreed to make reasonable efforts to do so, although no specific deadline is specified in our recommended rule.

4. If a utility/Staff settlement is reached prior to the 30 or 60-day review period, this settlement cannot be filed prior to those deadlines.

Staff has fully addressed this concern by clarifying that if a settlement is filed "early," the parties will be allowed additional review time (i.e., additional time beyond the specified ten days) so that they are not disadvantaged.

5. In the case of a self-build proposal, the utility must identify the first year when that project becomes economic, i.e., the first year when the utility's model identifies a revenue requirement net savings from the self-build.

Staff believes this is not a necessary change to the 1983 General Order since this information has been routinely made available in certification cases. Joint Stakeholders regard the Staff position on this issue as satisfactory as long as the Staff Report states that utilities should cooperate in making this information available to the parties when requested. That indeed is Staff's opinion, subject to the normal confidentiality protections.

6. Joint Stakeholders requested certain clarifying language concerning discovery disputes.

Staff's proposed rule addresses the requested language changes.

7. Oral surrebuttal and rejoinder testimony in a contested case may be allowed by the ALJ on a case-by-case basis when new evidence is introduced on rebuttal.

Staff has incorporated this requested change.

The Joint Stakeholders also offered several suggestions concerning the Staff recommendations on the MBM Order.

1. With respect to a self-build cost change that would require a rescreen of the bid, the "material change" trigger would be a 20 to 25 percent cost increase.

   Staff accepts the suggested 20 percent minimum as an *additional* trigger for rescreening, i.e., in addition to Staff's proposed trigger.

2. Transmission cost changes should be included as part of the self-build cost changes that trigger a rescreening requirement.

   Staff recognizes that the ability to incorporate the transmission cost changes into a rescreen evaluation is case specific. Consequently, if revised transmission upgrade cost information for a self-build becomes available during an RFP, the utility must report the cost change, and the Staff and Independent Monitor shall consider this new information and make the appropriate recommendations concerning rescreening. The Joint Stakeholders indicated that the Staff revised recommendation is acceptable.

3. Allow bidders flexibility to define products bid into the RFP.

   Staff indicated that it is impractical to allow bidders, rather than the utility, to define the products being solicited in the RFP. Doing so would greatly complicate the evaluation process and may inhibit the utility from obtaining the products it most needs. Staff indicated that it would be preferable for bidders to address this issue during the RFP stakeholder process and in other forums. Moreover, increasing the MBM RFP

threshold for PPAs from one to three years potentially may allow bidders to seek further opportunities for alternative product designs outside of RFPs.

After discussing the issue, the Joint Stakeholders continue to support greater bidder flexibility for product designs than recommended by Staff in this rulemaking. However, they also recognize Staff's position that increasing the MBM PPA threshold to three years could help address their concern.

4. Joint Stakeholders raised a concern regarding increasing the PPA exemption from one year currently to three years.

This was discussed further, and Staff clarified that the increase in the PPA term threshold to three years would not apply to affiliate PPAs. Affiliate PPAs exceeding terms of one year remain subject to the MBM Order. The Joint Stakeholders found this change to be acceptable.

APPENDIX A

LIST OF COMMENTING PARTIES

A. 1983 General Order

(1) Entergy Louisiana, LLC/Entergy Gulf States Louisiana, LLCC (the Entergy Companies)

(2) Louisiana Energy Users Group (LEUG)

(3) Joint Stakeholders (LEUG, SUEZ Energy North American, Calpine Corporation, Entegra Power Group, LLC)

(4) Occidental Chemical Corporation (Oxy Chem)

(5) Cleco Power, LLC (Cleco)

(6) Southwestern Electric Power Company (SWEPCO)

B. Market Based Mechanism General Order

(1) The Entergy Companies

(2) NRG (on behalf of several affiliates)

(3) Cottonwood Energy Company

(4) Entegra Power Group, LLC

(5) Oxy Chem

(6) Joint Stakeholders

(7) Cleco

(8) SWEPCO

C. Comments on the Staff's July 22, 2008 Report

(1) Cleco

(2) SWEPCO

(3) The Entergy Companies

(4) Joint Stakeholders

APPENDIX B

SUMMARY OF STAFF PROPOSED FINAL CHANGES TO THE 1983 GENERAL ORDER

1. The streamline procedures in this rule are applicable to "Limited Term" (i.e., not to exceed 5 years) contracts.

2. Extend the Commission's decision deadline from 120 to 180 days, with the Commission having the authority to extend the 180-day deadline when circumstances merit.

3. PPAs not exceeding one year and resources not exceeding five MWs are exempt from Commission certification requirements, but the utility retains the option to voluntarily seek certification. All "exempted" resources remain subject to prudence review in other dockets or fuel audits.

4. Utility shall submit a complete Application for a Limited-Term PPA. If no party objects 30 days after filing, the PPA and Application may be forwarded for Commission approval without hearing or an ALT Recommended Decision. Alternatively, any party may request a 30-day extension for review purposes, which shall automatically be granted. In that event, if no objection is raised at the end of 60 days, the PPA is submitted to the Commission, without hearing or Recommended Decision, for approval. If a party objects, the contested case procedures apply.

5. The Application shall include the utility's Confidentiality Agreement. Discovery may begin upon the filing of the Application.

6. The ALJ (or Hearing Examiner) shall set the contested case procedural schedule, taking into account the 180-day decision deadline. The ALJ also may rule on discovery disputes taking into account the 180-day deadline.

7. The ALJ may modify the procedural schedule, as appropriate, within the 180-day decision deadline. The Commission may consider discovery dispute issues in considering a request to extend the 180-day deadline.

8. In the event of an uncontested case under either the 30-day or 60-day review period, the Staff shall file supporting testimony or other documentation within a reasonable amount of time prior to the Commission vote on the Application providing the parties with adequate time to review the Staff position.

9. For a contested case, an opposing party must state its objection 30 days after the Application is filed (or within 60 days if an extension is requested) and file its opposing testimony within ten days of the initial 30- (or 60-) day deadline. No less than ten days after the opposing testimony is filed a hearing shall be held. At that hearing oral rebuttal testimony may be presented. At the discretion of the ALJ, parties may present oral surrebuttal and rejoinder testimony in cases where the oral rebuttal testimony presents new evidence. The ALJ shall render a recommended decision within a reasonable amount of time to allow parties to submit exceptions and responses to exceptions.

10. If Staff and the utility reach a settlement, parties shall have no less than ten days beyond the initial 30- and 60-day review periods (whichever is applicable) to object to the settlement, including the filing of opposing testimony. If there is no objection to the settlement, then the "uncontested case" procedures apply, with the settlement promptly forwarded to the Commission for its approval, with no public hearing or ALJ

Recommended Decision. If there is an objection, then the "contested case" procedures apply.

11. The utility in all cases retains an affirmative obligation to prudently manage any PPA approved by the Commission under this rule.

APPENDIX C

SUMMARY OF STAFF PROPOSED FINAL CHANGES TO THE MBM GENERAL ORDER

1. There are several modifications or clarifications to the capacity resources that would be covered under this rule:
    a. The 35 MW size threshold is increased to 50 MW (based on the LPSC jurisdictional amount, summer peak rating).
    b. The one-year PPA term is increased to three years for unaffiliated transaction. (The one-year term is retained for affiliate transactions.)
    c. A resource previously certified by the Commission but undergoing a "change in status" (i.e., an intercompany reallocation or exercise of a purchase option) is exempt.
2. The 60-day Commission pre-notification requirement is shortened to 30 days (although utilities are encouraged to provide the 60-day notice when feasible). For limited-term resource solicitations (five years or less), the stakeholder process is shortened from 60 days to no less than 30 days. For long-term resources, the stakeholder process is shortened from 75 days to no less than 60 days.
3. In the event of a "material change" to the estimated cost of a utility self-build proposal selected in the RFP (including material schedule or design changes) occurring after the date of the "best and final" bids:
    a. The utility self-build staff must immediately report the change to the utility RFP team, who in turn, must promptly report the change to the Independent Monitor and Staff.

b. "Material change" is defined as either (1) a construction cost estimate increase (inclusive of transmission upgrade costs) of 20 percent or more; or (2) any cost, design or schedule change that plausibly could alter the bid ranking and the selection of the self-build.

c. If a "material change" is triggered, the utility shall rescreen the self-build against the remaining third-party bids. Staff and the Independent Monitor shall review contemporaneously the updated screening and recommend whether it is sufficient just to use short-listed bids or whether other bids should be permitted (potentially including new bidders). This may include a consideration of whether the "refreshing" of the third-party bids should be considered. If the utility disagrees with any such Staff or Independent monitor recommendation, it must state its disagreement in writing.

d. The utility conducting the RFP must declare the completion date for its RFP process. At that date the utility must state its cost estimate for the selected self-build project, along with its projected completion schedule and any design changes.

e. Communications between the utility RFP staff and utility RFP team required under this rule do not constitute a code of conduct violation.

f. The utility is encouraged to employ a cost range for its self-build proposal in the event of uncertainty over cost estimates. The utility should factor self-build cost risks, relative to the risks associated with third-party projects, into its bid evaluation and ranking process.

g. The utility shall consult with Staff and the Independent Monitor concerning the appropriate treatment of changes in transmission upgrade costs associated with a selected self-build project.

4. The use of an Independent Monitor is required only in the event that the RFP incorporates a self-build (or self-supply) proposal or allows affiliate bidding.

5. Nothing in this rule is intended to inhibit or prevent the utility from soliciting renewable resources as a separate product in the RFP or using separate evaluation criteria. However, such resources remain subject to the Commission's certification rules.

6. Nothing in this rule is intended from preventing any party from proposing or the Commission from adopting a "cost cap" or similar protective mechanism in a certification or other proceeding.