

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Acadia Power Partners, LLC	Docket Nos. ER02-1406-006 ER02-1406-007 ER02-1406-008 ER02-1406-009 ER03-1372-003
Cleco Power LLC	ER99-3855-004 ER99-3855-005 ER01-1099-008 ER03-1368-002
Cleco Marketing & Trading LLC	ER99-2300-006 ER99-2300-007 ER03-1369-002
Cleco Evangeline LLC	ER99-2928-003 ER99-2928-004 ER99-2928-005 ER03-1371-002
Perryville Energy Partners, LLC	ER01-1397-004 ER01-1397-005 ER01-1397-006 ER03-1370-003 EL05-113-000 EL05-113-001 EL06-4-000

ORDER ON MARKET-BASED RATES, SECTION 206 PROCEEDINGS AND
ORDER ON REHEARING

(Issued October 21 2005)

1. On May 25, 2005, the Commission issued an order¹ on the Cleco Companies' updated market power analysis filed on behalf of its public utility affiliates, Cleco Power LLC (Cleco Power), Cleco Evangeline LLC (Evangeline), Perryville Energy

¹ *South Point Energy Center, LLC*, 111 FERC ¶ 61,239 (2005) (May 25 Order).

Partners, L.L.C. (Perryville), and Acadia Power Partners LLC (Acadia) (collectively, the Cleco Companies), which instituted a proceeding pursuant to section 206 of the Federal Power Act (FPA)² to investigate generation market power issues in the Cleco Power home control area. In this order, the Commission finds that the Cleco Companies have rebutted the presumption of market power in Cleco Power's home control area and satisfy the Commission's generation market power standard in that control area. Accordingly, this order will terminate the section 206 proceeding in Docket Nos. EL05-113-000 and EL05-113-001.

2. However, in light of the Cleco Companies' failure to comply with the directive in the May 25 Order to file data and work papers supporting a simultaneous transmission import capability study for two of their first-tier control areas, the City of Lafayette Power Authority (Lafayette) and the Louisiana Energy and Power Authority (LEPA) control areas, the Commission institutes a section 206 proceeding to investigate whether the Cleco Companies may continue to charge market-based rates in the Lafayette and LEPA control areas.

3. Also in this order, the Commission accepts revisions to the Cleco Companies' market-based rate tariffs to incorporate the Commission's change in status reporting requirement.

4. Additionally, in this order, the Commission dismisses, grants in part and denies in part rehearing of both the May 25 Order and the June 15 Order³ on clarification of the May 25 Order.

Background

5. On June 24, 2005 and July 25, 2005, the Cleco Companies submitted two compliance filings in response to the Commission's May 25 Order on the Cleco Companies' updated market power analysis, which they submitted in compliance with the Commission's order of May 13, 2004.⁴

6. The Cleco Companies' generation market power analysis indicated that, among other things, the Cleco Companies failed the wholesale market share screen in three of the four seasons in the Cleco Power home control area.

² 16 U.S.C. § 824e (2000).

³ *Acadia Power Partners, LLC*, 111 FERC ¶ 61,395 (2005) (June 15 Order).

⁴ *Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (2004) (May 13 Order). The May 13 Order addressed the procedures for implementing the generation market power analysis announced on April 14, 2004 and clarified on July 8, 2004. *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

7. As the Commission stated in the April 14 Order, where an applicant is found to have failed either generation market power screen, such failure provides the basis for instituting a proceeding pursuant to section 206 of the FPA and establishes a rebuttable presumption of market power in the section 206 proceeding.⁵ Accordingly, because the Cleco Companies' market power analysis indicated that they failed the wholesale market share screen, the Commission instituted a section 206 proceeding to investigate generation market power in the Cleco Power control area.⁶ The Commission also established a refund effective date pursuant to the provisions of section 206.

8. For the Cleco Power home control area, the Cleco Companies were directed to: (1) file a Delivered Price Test analysis (DPT); (2) file a mitigation proposal tailored to their particular circumstances that would eliminate the ability to exercise market power; or (3) inform the Commission that they would adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates.⁷

9. In addition, the Commission's May 25 Order found that, because the Cleco Companies did not file a simultaneous transmission import capability study for the LEPA and Lafayette control areas, and provided no supporting work papers in that regard, the Cleco Companies conditionally satisfy the generation market power standard with respect to the Lafayette and LEPA control areas, pending Commission acceptance of the compliance filing. In particular, the Commission's May 25 Order directed the Cleco Companies to file a simultaneous transmission import capability study, including data and work papers, consistent with the requirements set forth in Appendix E of the April 14 Order, for the Lafayette and LEPA control areas. The Commission also directed the Cleco Companies to revise their market-based rate tariffs to incorporate the change in status reporting requirement adopted in Order No. 652.⁸

10. On June 15, 2005, the Commission issued an order clarifying that, in light of the May 25 Order and pending section 206 proceeding, the Cleco Companies would not be required to file a triennial market power analysis three years after their June 2002 triennial report, which would have required the Cleco Companies to file a market power analysis on or about June 17, 2005. Additionally, in the June 15 Order,

⁵ April 14 Order, 107 FERC ¶ 61,018 at P 201.

⁶ May 25 Order, 111 FERC ¶ 61,239 at P 33.

⁷ See April 14 Order, 107 FERC ¶ 61,018 at P 201, 207-09.

⁸ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005).

the Commission denied a late motion to intervene filed by Lafayette Utilities System (LUS)⁹ and LEPA on June 10, 2005.¹⁰ LEPA and LUS filed a timely request for rehearing or clarification of the June 15 Order.

11. The Cleco Companies and Acadia filed timely requests for rehearing of the May 25 Order.

June 24, 2005 Compliance Filing

12. The Cleco Companies' June 24, 2005 compliance filing includes simultaneous transmission import capability studies performed for the LEPA and Lafayette control areas, but no data and work papers supporting the studies.

13. The Cleco Companies state that, since the values provided in the compliance filing differ from the values provided in their updated market power analysis that was acted on by the Commission in the May 25 Order, they included in their compliance filing an update of the pivotal supplier analysis and the market share analysis. The Cleco Companies state that the updated import study results do not change the conclusions of the market power analysis relied on in the Commission's May 25 Order and that they lack the ability to exercise market power in the first-tier markets. They state that they are shown not to be a pivotal supplier in their first-tier markets and are also shown to pass the market share screens in those markets for all seasons. They request that the Commission accept this compliance filing and determine that the Cleco Companies satisfy the generation market standard with respect to the Lafayette and LEPA control areas.

14. The Cleco Companies' June 24, 2005 compliance filing also included revisions to the market-based rate tariffs of Cleco Power, Cleco Evangeline and Perryville Energy to incorporate the market-based rate change in status reporting requirement.

July 25, 2005 Compliance Filing

15. The Cleco Companies submitted a DPT analysis and related analyses in their July 25, 2005 compliance filing. They state that the compliance filing demonstrates

⁹ LUS was already an intervenor in the dockets in which the Commission issued its May 25 Order. LUS operates the Lafayette control area.

¹⁰ On June 15, 2005, the Cleco Companies filed an answer opposing the motion to intervene.

that they lack generation market power in the relevant geographic market during the relevant time periods.¹¹

Notice and Responsive Pleadings

16. Notice of the Cleco Companies' refund effective date in the section 206 proceeding was published in the *Federal Register*, 70 Fed. Reg. 39,598 (2005). On June 6, 2005, Plum Point Energy Associates, LLC (Plum Point) filed a motion to intervene in the section 206 proceeding.

17. Notice of the Cleco Companies' June 24 compliance filing was published in the *Federal Register*, 70 Fed. Reg. 39,246 (2005), with comments, interventions, and protests due on or before July 15, 2005. LEPA and LUS filed a timely motion to intervene. LEPA and LUS state that the import studies submitted with the compliance filing support the conclusion that the Cleco Companies possess market power in the LEPA and Lafayette control areas. They submit that the import studies reflect a lack of available transmission capacity into those control areas during the winter season and limited available transmission capacity in the other seasons.

18. Notice of the Cleco Companies' July 25 compliance filing was published in the *Federal Register*, 70 Fed. Reg. 46,161 (2005), with comments, interventions, and protests due on or before August 15, 2005. LEPA and LUS filed a timely motion to intervene. LEPA and LUS state that it is not clear that Cleco and Entergy transmission is strong enough to support delivery of competitive generation to the Lafayette or LEPA control areas, and that the Commission should not rely upon unsupported assertions by Cleco or others that such alternative supplies can be delivered. LEPA and LUS maintain that the Commission has held that a lack of adequate transmission to permit competitors to bring their supplies to market should be considered as part of the Commission's examination of generation market power, and that such evidence should be considered here.

19. On August 30, 2005, the Cleco Companies filed an answer opposing the August 15, 2005 motion to intervene. The Cleco Companies agree that LEPA and LUS lack standing to intervene in the section 206 proceeding. The Cleco Companies state that LEPA's and LUS's generalizations about transmission constraints due to inadequate regional transmission capacity are outside the scope of the section 206 proceeding.

¹¹ The Cleco Companies state that they reserve their right, if the Commission revokes any of their market-based rate authority, to file cost-based rates other than default cost-based rates to be effective prospectively as of the refund date established in the May 25 Order or to file a mitigation proposal with prospective effect.

Discussion

Procedural Matters

20. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Notwithstanding the Cleco Companies' opposition to LEPA's and LUS's intervention, we will grant their intervention. We are satisfied that LEPA and LUS have expressed an interest in the outcome of this proceeding that no other party represents and that their participation is in the public interest.

Analysis

June 24, 2005 Compliance Filing

21. The Cleco Companies' revised tariff sheets incorporating the change in status reporting requirement are hereby accepted for filing.

22. However, the June 24, 2005 compliance filing does not comply with the Commission's directive in the May 25 Order. In the May 25 Order, the Commission stated that it was "unable to find here that the Cleco Companies satisfy the Commission's generation market power standard for market-based rate authority in the Lafayette and LEPA control areas without a compliance filing" consisting of a "simultaneous transmission import capability study, including data and work papers supporting the study, consistent with the requirements set forth in Appendix E of the April 14 Order, for the LEPA and Lafayette control areas."¹² Although the Cleco Companies did file simultaneous transmission import capability studies for these control areas, they did not include the supporting documents as required in the May 25 Order. Accordingly, the Commission is again unable to determine whether the results of the Cleco Companies' simultaneous transmission import capability studies are valid for these two control areas (*i.e.*, no work papers have been filed for examination by the Commission).

23. The Cleco Companies' failure to comply with the May 25 Order provides the basis for the Commission to institute a proceeding pursuant to section 206 of the FPA to establish a refund effective date to protect customers and to determine whether the Cleco Companies may continue to charge market-based rates in the LEPA and Lafayette control areas. This order establishes a refund effective date in order to put in place the necessary procedural framework to promptly impose an effective remedy, in case the Commission determines that such a remedy is required. Our decision to establish a refund effective date does not constitute a determination that refunds will

¹² May 25 Order at P 36-37.

be ordered. The Commission's decision to institute the instant section 206 proceeding does not constitute a definitive finding by the Commission that the Cleco Companies have market power in the LEPA and Lafayette control areas.

24. In cases where, as here, the Commission institutes a section 206 proceeding on its own motion, section 206(b), as amended by section 1285 of the Energy Policy Act of 2005,¹³ requires that the Commission establish a refund effective date that is no earlier than the date of publication of notice of the initiation of the Commission's proceeding in the *Federal Register*, but no later than five months subsequent to that date. In order to give maximum protection to customers, and consistent with Commission precedent,¹⁴ the Commission will set the refund effective date at the earliest date allowed. This date will be the date on which notice of the initiation of the proceeding in Docket No. EL06-4-000 is published in the *Federal Register*.

25. In addition, section 206, as amended, requires that, if no final decision has been rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, the Commission must provide its estimate as to when it reasonably expects to make such a decision. Given the facts and circumstances of this case, we will provide in this order our estimate as to when we reasonably expect to make such decision. Given the times for filing identified in this order, and the nature and complexity of the matters to be resolved, the Commission estimates that it will be able to reach a final decision by April 28, 2006.

26. The Cleco Companies are directed to file, within 30 days of the date of this order, data and work papers to support their simultaneous transmission import capability studies for the LEPA and Lafayette control areas, consistent with the requirements set forth in Appendix E of the April 14 Order, and as directed in the May 25 Order.¹⁵ Upon filing the appropriate supporting documents, to the extent that the Cleco Companies find that the simultaneous transmission import capability amounts are different than those submitted with their June 24 compliance filing, we direct the Cleco Companies to include revised generation market power screens to reflect the correct import capability.

¹³ Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

¹⁴ *See, e.g., Canal Elec. Co.*, 46 FERC ¶ 61,153, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

¹⁵ Specifically, the information listed in Appendix A of this order is needed to support the results for the generation market power screens submitted for the first-tier control areas, LEPA and Lafayette.

July 25, 2005 Compliance Filing

Delivered Price Test

27. In the April 14 Order, we stated that an applicant's failure of one or more of the indicative screens establishes a rebuttable presumption of market power. If such an applicant chooses not to proceed directly to mitigation, it must present a more thorough analysis using the Commission's DPT.¹⁶ The DPT is used to analyze the effect on competition for transfers of jurisdictional facilities in section 203 proceedings,¹⁷ using the framework in Appendix A of the Merger Policy Statement and revised in Order No. 642.¹⁸ The DPT is well established; it has been used routinely by the Commission to analyze market power in the merger context for many years, and it has been affirmed by the courts.¹⁹

28. The DPT defines the relevant market by identifying potential suppliers based on market prices, input costs, and transmission availability, and calculates each supplier's economic capacity and available economic capacity for each season/load period.²⁰ The results of the DPT can be used for the pivotal supplier, market share and market concentration analyses. A detailed description of the mechanics of the DPT is provided in Appendix F of the April 14 Order, which refers to Appendix A of the Merger Policy Statement and Order No. 642 for a complete description of the DPT.

¹⁶ April 14 Order, 107 FERC ¶ 61,018 at P 105-12.

¹⁷ 16 U.S.C. § 824b (2000).

¹⁸ *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, 61 Fed. Reg. 68,595 (1996), FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 62 Fed. Reg. 33,341 (1997), 79 FERC ¶ 61,321 (1997) (Merger Policy Statement); *see also Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, 65 Fed. Reg. 70,984 (2000), FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 66 Fed. Reg. 16,121 (2001), 94 FERC ¶ 61,289 (2001).

¹⁹ *See, e.g., Wabash Valley Power Associates, Inc. v. FERC*, 268 F.3d 1105 (D.C. Cir. 2001).

²⁰ Super-peak, peak, and off-peak, for Winter, Shoulder and Summer periods and an additional highest super-peak for the Summer.

29. Using the economic capacity for each supplier, applicants must provide pivotal supplier, market share and market concentration analyses. Examining these three measures with the more robust output from the DPT will allow applicants to present a more complete view of the competitive conditions and their positions in the relevant markets.²¹

30. Under the DPT, to determine whether an applicant is a pivotal supplier in each of the season/load conditions, applicants should compare the load in the destination market to the amount of competing supply (the sum of the economic capacities of the competing suppliers). The applicant will be considered pivotal if the sum of the competing suppliers' economic capacity is less than the load level (plus a reserve requirement that is no higher than State and Regional Reliability Council operating requirements for reliability) for the relevant period. The analysis should also be performed using available economic capacity to account for applicants' and competing suppliers' native load commitments. In that case, native load in the relevant market would be subtracted from the load in each season/load period. The native load subtracted should be the average of the actual native load for each season/load condition.

31. Each supplier's market share is calculated based on economic capacity (the DPT's analog to installed capacity). The market shares for each season/load condition reflect the costs of the applicant's and competing suppliers' generation, thus giving a more complete picture of the applicant's ability to exercise market power in a given market. For example, in off-peak periods, the competitive price may be very low because the demand can be met using low-cost capacity. In that case, a high-cost peaking plant that would not be a viable competitor in the market would not be considered in the market share calculations, because it would not be counted as economic capacity in the DPT. Applicants must also present an analysis using available economic capacity (the DPT's analog to uncommitted capacity) and explain which measure more accurately captures conditions in the relevant market.

32. Under the DPT, applicants must also calculate the market concentration using the Herfindahl-Hirschman Index (HHI) based on market shares.²² HHIs are usually used to assess the effect on competition of a merger or other disposition or acquisition

²¹ April 14 Order, 107 FERC ¶ 61,018 at P 107-108.

²² The HHI is the sum of the squared market shares. For example, in a market with five equal size firms, each would have a 20 percent market share. For that market, $HHI = (20)^2 + (20)^2 + (20)^2 + (20)^2 + (20)^2 = 400 + 400 + 400 + 400 + 400 = 2,000$.

of facilities. However, as noted by the U.S. Department of Justice in the context of market-based pricing for oil pipelines, concentration measures can also be informative in assessing whether a supplier has market power in the relevant market.²³

33. A showing of an HHI less than 2,500 in the relevant market for all season/load conditions for applicants that have also shown that they are not pivotal and do not possess more than a 20 percent market share in any of the season/load conditions would constitute a showing of a lack of market power, absent compelling contrary evidence from intervenors. Concentration statistics indicate the likelihood of coordinated interaction in a market. All else being equal, the higher the HHI, the more firms can extract excess profits from the market. Likewise, a low HHI can indicate a lower likelihood of coordinated interaction among suppliers and could be used to support a claim of a lack of market power by an applicant that is pivotal or does have a 20 percent or greater market share in some or all season/load conditions. For example, an applicant with a market share greater than 20 percent could argue that it would be unlikely to possess market power in an unconcentrated market (HHI less than 1,000).²⁴

34. As with our initial screens, applicants and intervenors may present other evidence such as historical wholesale sales, which can be used to calculate market shares and market concentration and to refute or support the results of the DPT. We encouraged applicants to present the most complete possible analysis of competitive conditions in the market. We have used actual data in our analysis of mergers and other section 203 jurisdictional transactions to supplement or support the analysis of the effect of such transactions on competition. As we stated in Order No. 642:

If sales data indicate that certain participants actually have been able to reach the market in the past, it is appropriate to consider whether they are likely candidates to be included in the market in the future. It is for this reason that we will require a “trade data check” as part of the competitive analysis test.²⁵

²³ See Comments of the United States Department of Justice in response to Notice of Inquiry Regarding Market-Based Ratemaking for Oil Pipelines, Docket No. RM94-1-000 (January 18, 1994) (“The Department and the Commission staff have previously advocated an HHI threshold of 2,500, and it would be reasonable for the Commission to consider concentration in the relevant market below this level as sufficient to create a rebuttable presumption that a pipeline does not possess market power.”).

²⁴ April 14 Order, 107 FERC ¶ 61,018 at P 111.

²⁵ Order No. 642 at n. 41.

Cleco's Delivered Price Test

35. The Cleco Companies' DPT analysis for the Cleco Power home control area indicates that the results for the pivotal supplier, market share and market concentration analyses under the available economic capacity measure are below the thresholds set forth in the April 14 Order for all ten season/load periods under study.²⁶ The Cleco Companies' market share is below 20 percent (it is zero in seven of the ten season/load periods studied, but summer 1 period has a market share of 3.1 percent, winter 1 period has a market share of 13.6 percent and shoulder 1 period has a market share of 7.2 percent), the HHIs are all below 2,500 (ranging from 1,562 to 2,154), and they are not a pivotal supplier in any season or load period.

36. When the economic capacity measure is used, the Cleco Companies' market shares and the HHIs are higher than the results for available economic capacity (which is not unexpected for a traditional utility in its own control area), and indicates that they exceed the thresholds set forth in the April 14 Order for the following: all season/load periods using the market share measure; one season/load period using the market concentration measure; and for all season/load periods using the pivotal supplier measure. The HHIs are below 2,500 in all but one period. Specifically, the HHI slightly exceeds 2,500 (2,516) only in the summer extreme peak.

37. The Cleco Companies argue that the Commission should discount the results using the economic capacity measure for three reasons. First, since other suppliers have sufficient economic capacity to meet all of the wholesale loads, any attempt by the Cleco Companies to exercise market power would be met by competitors. Second, the market concentration test shows that the Cleco control area market is not concentrated, as measured by the HHI. In only one season does the HHI exceed the Commission's threshold of 2,500, and then only by 16 points. Finally, the Cleco Companies argue that the economic capacity measure does not account for the Cleco Companies' legal obligation to serve native load in their control area. The Cleco Companies state that when this legal requirement is factored in, the Cleco Companies are shown not to possess generation market power.

38. LEPA and LUS state in their motion to intervene that the Cleco and Entergy transmission grids are not strong enough to support delivery of competitive generation to the Lafayette or LEPA control areas, and the Commission should not rely upon unsupported assertions by Cleco or others that simply assume such alternative supplies can be delivered.

²⁶ April 14 Order, 107 FERC ¶ 61,018 at P 111.

39. In their answer, the Cleco Companies state that the Commission's section 206 proceeding is limited to the Cleco Power control area, not the Lafayette or LEPA control areas.

Commission Determination

40. After weighing all of the relevant factors, the Commission concludes that, on balance, based on the Cleco Companies' DPT analysis for its home control area, the Cleco Companies have rebutted the presumption of generation market power and satisfy the Commission's generation market power standard for the grant of market-based rate authority.²⁷ As noted above, as submitted, the results of the Cleco Companies' DPT analysis for the Cleco Power home control area vary depending on whether the economic capacity or available economic capacity measure is used to perform the analysis. As the Commission has stated, the DPT does not function like the initial screens – *i.e.*, failure of either the economic capacity or available economic capacity analyses does not result in an automatic failure of the test as a whole. In particular, neither measure is definitive; the Commission weighs the results of both the economic capacity and the available economic capacity analyses and considers the arguments of the parties.²⁸

41. The Commission has recognized that not all generation capacity is available all of the time to compete in wholesale markets and that some accounting for native load requirements is warranted.²⁹ In the DPT analysis, available economic capacity accounts for native load requirements. The Cleco Companies' DPT results using the available economic capacity measure indicate that they lack market power in their control area.

42. While available economic capacity reflects native load obligations in the case of assessing the potential for market power in generation, the Commission has noted that a clear distinction between generation serving native load and generation competing for wholesale load is not so easily made.³⁰ The Commission therefore also considers economic capacity in assessing generation market power. The HHIs using the economic capacity measure are below the 2,500 threshold for all but one season/load period.

²⁷ April 14 Order, 107 FERC ¶ 61,018 at P 111.

²⁸ July 8 Order, 108 FERC ¶ 61,026 at P 26.

²⁹ April 14 Order, 107 FERC ¶ 61,018 at P 67.

³⁰ *Id.*

43. In addition, the Cleco Companies' DPT indicates that the market shares using the available economic capacity measure are substantially below 20 percent (in all but two seasons, market shares are below 3.2 percent), the HHIs using the available economic capacity measure are all below 2,500 (the highest being 2191 in summer peak and off-peak), and the Cleco Companies are not pivotal using the available economic capacity measure in any season. Moreover, our analysis indicates that these results are robust even when available economic capacity is increased. For example, our review shows that a 20 percent increase in the Cleco Companies' available economic capacity in all seasons/load periods still yields market shares below 20 percent in all seasons/load periods. At the same time, the Cleco Companies remain non-pivotal suppliers, and the market concentration as measured by the HHIs remains below 2,500.

44. In addition, the intervenors do not present a compelling case for a finding of market power in generation in the Cleco Power home control area. LEPA and LUS argue that the Cleco and Entergy transmission grids are not strong enough to support delivery of competitive generation to the Lafayette or LEPA control areas. These pleadings do not present evidence of the nature or extent of transmission constraints or their effect on the DPT. Thus, they do not present an adequate basis to call into question the Cleco Companies' DPT results.

45. As described above, the Cleco Companies' DPT results using available economic capacity are uniformly and substantially below the thresholds at which market power is indicated. Moreover, those results are robust at lower demand and import levels, and the HHIs associated with the economic capacity measure do not clearly support a finding of market power in generation. Accordingly, after weighing all of the relevant factors, the Commission concludes that, on balance, based on the Cleco Companies' DPT analysis, the Cleco Companies have rebutted the presumption of market power and satisfy the Commission's generation market power standard for the grant of market-based rate authority in the Cleco Power home control area.

Docket No. EL05-113-000

46. The Commission terminates Docket Nos. EL05-113-000 and EL05-113-001. That proceeding was established to investigate generation market power issues in the Cleco Power home control areas. Based on the above findings, the Commission finds that there is no further need for the proceeding in this docket.

Reporting Requirements

47. In Order No. 664, the Commission stated that it intends to no longer grant waivers of the full requirements of Part 45 in its orders granting market-based rate authority. Rather, persons seeking to hold interlocking positions will be required

henceforth to comply with the full requirements of Part 45.³¹ With respect to an individual who currently is authorized to hold interlocking positions, that individual will not need to refile under the full requirements of Part 45 to continue to hold such interlocking positions (unless and until that individual assumes different or additional interlocking positions).³² Thus, consistent with Order No. 664, any of the Cleco Companies who previously sought and were granted waiver of the full requirements of Part 45 will be required henceforth to comply with the full requirements of Part 45.

Requests for Rehearing and Clarification of the May 25 Order

48. The Cleco Companies request rehearing of the May 25 Order, arguing that: (1) all of the output of the Evangeline-owned and Acadia-owned facilities should be assigned to the purchasers of their output and none should be assigned to the Cleco Companies because the Cleco Companies do not have control of these facilities; (2) neither Evangeline nor Acadia should be treated as part of the section 206 proceeding; (3) the market-based rates of Evangeline and Acadia should not be subject to refund; and (4) no market power remedies should be imposed on Evangeline or Acadia in the section 206 proceeding.

49. Additionally, the Cleco Companies request that the Commission clarify that the cost-based rates that may be adopted in the section 206 proceeding would not be applicable to existing contracts, but to new contracts only. They request that the Commission clarify its definition of “grandfathered contracts” in the context of the Commission’s statement that it will impose “prospective” cost-based rates only. Further, they request that the Commission clarify the effects, if any, of amendments or renewals to existing contracts in “interrupting the market-based rates for such existing contracts.”³³

50. Acadia’s request for rehearing, like the Cleco Companies’ request, concerns Acadia’s inclusion in the section 206 proceeding. Specifically, Acadia seeks a determination that it should not be treated as a “Cleco Company” for purposes of the section 206 proceeding. Acadia states that all of the output of the Acadia generation facility is controlled by Calpine Energy Services, L.P. (Calpine Energy). It states that the Commission, in the July 8 Order, affirmed that, when assessing whether a public utility has generation market power, the Commission will consider whether the public

³¹ *Commission Authorization to Hold Interlocking Positions*, Order No. 664, 70 Fed. Reg. 17,219 (Apr. 5, 2005), 112 FERC ¶ 61,298, at P 34 (2005) (discussing part 45, 18 C.F.R. Part 45 (2005)).

³² *Id.* P 36.

³³ Cleco Companies’ Rehearing Request at 5.

utility controls the capacity from a generation facility even if it does not own the facility. Acadia further states that in Order No. 652, the Commission reiterated that “ownership” does not necessarily denote “control.”

51. Acadia also requests that the Commission clarify that it does not need to re-file the Market Behavior Rules.

Commission Determination

52. We dismiss the Cleco Companies’ and Acadia’s request for rehearing with respect to the inclusion of Evangeline and Acadia in the section 206 proceeding and the request for clarification regarding the applicability of any cost-based rates adopted in the section 206 proceeding to existing contracts. As an initial matter, we note that the Cleco Companies included the Evangeline and Acadia capacity as their own when they submitted their updated market power analysis. Nevertheless, in light of the Commission’s finding that the Cleco Companies satisfy the Commission’s generation market power standard for the grant of market-based rate authority in the Cleco Power home control area and because we are terminating the 206 proceeding related to that control area in this order, it is no longer necessary to address these issues on rehearing.

53. We grant Acadia’s request that the Commission clarify that it does not need to re-file the Market Behavior Rules.

Request for Rehearing and Clarification of the June 15 Order

54. LEPA and LUS request rehearing or clarification of the June 15 Order with respect to two issues: (1) the date Cleco’s next market power analysis must be filed; and (2) the intervention status of LEPA and LUS in this proceeding.

55. In the May 25 Order, the Commission acted on the Cleco Companies’ December 22, 2004 update to their June 17, 2002 market power analysis. On rehearing, LEPA and LUS argue that the Commission erred in accepting the Cleco Companies’ December 2004 update in lieu of a filing that would have been due June 17, 2005, three years after the June 17, 2002 filing.

56. Also in LEPA’s and LUS’s request for rehearing and clarification of the June 15 Order, they state that it is unclear whether the Commission intended to deny LEPA and LUS party status in Docket No. EL05-113-000, the section 206 investigation. They therefore seek clarification that the Commission did not intend the June 15 Order to serve as a denial of their motion to intervene in the EL docket.

Commission Determination

57. With respect to the due date of the Cleco Companies' next market power analysis, we deny LEPA's and LUS's request for rehearing. It would be unduly burdensome and unnecessary to require the Cleco Companies to file another market power analysis only six months after they updated their market power analysis in December 2004, and because we are herein finding that, based on the Cleco Companies' DPT, they satisfy our generation market power concerns for the Cleco Power home control area. Further, we are instituting a section 206 proceeding to investigate the Cleco Companies' market power in the LEPA and Lafayette control areas.

58. Regarding the late intervention, we note that the caption of dockets listed in LEPA's and LUS's June 10 late motion to intervene did not include Docket No. EL05-113-000, the docket in which the Commission instituted a section 206 proceeding. On this basis, when the Commission denied LEPA's late motion to intervene, the Commission did not intend to deny intervention status for LEPA or LUS in the section 206 proceeding. We clarify here that the Commission will accept LEPA and LUS as intervenors in the section 206 proceeding.³⁴

The Commission orders:

(A) The Cleco Companies' updated market power analysis is accepted, as discussed in the body of the order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by section 402(a) of the Department of Energy Organization Act and by the FPA, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R., Chapter I), the Commission hereby institutes a proceeding in Docket No. EL06-4-000 concerning the justness and reasonableness of the Cleco Companies' market-based rates in the LEPA and Lafayette first-tier control areas, as discussed in the body of this order.

(C) The Cleco Companies are directed to file data to support their simultaneous transmission import capability studies, within 30 days of the date of this order, as discussed in the body of this order.

³⁴ We note that on June 15, 2005, the Cleco Companies submitted an answer opposing the intervention. Notwithstanding the Cleco Companies' opposition to LEPA's and LUS's intervention, we find that good cause exists to allow LEPA's and LUS's intervention for purposes of the section 206 proceeding.

(D) The revised tariff sheets incorporating the change in status reporting requirement adopted in Order No. 652 are hereby accepted for filing.

(E) The section 206 proceeding in Docket No. EL05-113-000 is terminated, as discussed in the body of this order.

(F) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of the proceeding under section 206 of the FPA in Docket No. EL06-4-000.

(G) The refund effective date established pursuant to section 206(b) of the FPA will be the date of publication in the *Federal Register* of the notice discussed in Ordering Paragraph (F) above.

(H) The requests for rehearing are dismissed, granted in part and denied in part, as discussed in the body of the order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

Appendix A

- a) the stability transfer limits in effect for the applicable historical seasons and as applied to OASIS-posted transfer capabilities;
- b) the voltage transfer limits in effect for the applicable historical seasons and as applied to OASIS-posted transfer capabilities;
- c) the MW value and date of the historic seasonal peak demand in each of the four seasons studied in the simulation;
- d) the work papers and other documentation for historic seasonal peak demands utilized in the simulation;
- e) the historical long-term network and firm reservations controlled by applicant and its affiliates utilized in the power flow cases submitted for each of the four seasonal peaks;
- f) the work papers and other documentation for the historical long-term network and firm reservations controlled by applicant and its affiliates utilized in the power flow cases submitted for each of the four seasonal peaks;
- g) the historical short-term network and firm reservations controlled by applicant and its affiliates utilized in the power flow cases submitted for each of the four seasonal peaks;
- h) the work papers and other documentation for historical short-term network and firm reservations controlled by applicant and its affiliates utilized in the power flow cases submitted for each of the four seasonal peaks;
- i) the historical unit dispatch used to serve native load or firm commitments during the study period;
- j) the work papers and other documentation supporting the historical unit dispatch used to serve native load or firm commitments utilized in the seasonal power flow cases;
- k) the historical/actual operating limitations required by internal constraints imposed in real-time upon both affiliated and non-affiliated generation resources during the historical seasonal peak periods;
- l) the work papers and other documentation supporting historical operating limitations imposed upon both affiliated and non-affiliated generation during the historical seasonal peak periods;
- m) all historical contingency scenarios used to manage OASIS-available transfer capability in assessing internal/external transmission availability (in .con format if possible or text-readable format);
- n) the work papers and other documentation supporting all historical contingency scenarios used to manage OASIS-available transfer capability in assessing internal/external transmission availability;
- o) all historical monitored facilities used to manage OASIS-available transfer capability in assessing internal/external transmission availability (in .mon format if possible or text-readable format);

- p) the work papers and other documentation supporting all historical monitored facilities used to manage OASIS-available transfer capability in assessing internal/external transmission availability;
- q) the TRM and CBM active for each seasonal peak, with all supporting work papers and documentation, and an explanation of how these margins were applied in the study;
- r) the transmission line deratings used to model reliability margins on the transmission system that were not available to non-affiliated generation resources, together with all work papers and supporting documentation.
- s) the methodology used for calculating simultaneous import capability and methodologies used in managing transmission availability for OASIS posting. This would include a description of the pro-rata scaling of generation or load in order to simulate control area to control area transfers. Appendix E states, "In addition, the applicant shall scale up available generation in the exporting (aggregated first tier areas) and scale down the study area resources according to the same methods used historically in assessing available transmission for non-affiliate resources. Therefore, this calculation represents an estimate of the total import capability available to remote resources". Paragraph 84 of the April 14th Order states, "The "contingency" model should use the same assumptions used historically by the transmission provider in approximating its control area import capability (see Appendix E)".
- t) Text-readable power flow, contingency, monitored facility, super area, and transaction files. (example file types: .raw, .sup, .mon, .con, .tra, and .trn). The response to this question may be filed under the protection of Critical Energy Infrastructure Information, 18 CFR § 388.113(c)(1) (2000).
- u) Simultaneous import capability base cases for each of the four seasonal/historical peaks in text-readable (PSSE or .raw) format.