139 FERC ¶ 61,084
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Cleco Power LLC
Cleco Evangeline LLC

Docket No. ER12-1116-000

ORDER GRANTING AUTHORIZATION TO MAKE AFFILIATE SALES

(Issued April 30, 2012)

1. In this order, we grant Cleco Evangeline LLC's (Cleco Evangeline) request to make power sales to its affiliate Cleco Power LLC (Cleco Power) pursuant to a competitive solicitation that we find satisfies the Commission's concerns regarding the potential for affiliate abuse.

I. Background

2. On February 16, 2012, as amended on March 19, 2012, Cleco Evangeline and Cleco Power (collectively, the Cleco Companies) requested authority for Cleco Evangeline to make sales to its affiliate Cleco Power as the result of Cleco Evangeline's selection as a winning bidder in a competitive solicitation issued in 2011 (2011 RFP).

3. The Cleco Companies state that Cleco Power is an investor-owned public utility that generates, purchases, transmits, distributes and sells electricity in Louisiana and has been granted market-based rate authorization by the Commission.[1] They add that Cleco Power is a wholly-owned direct subsidiary of Cleco Corporation and provides sale-for-resale electric service and supplies retail electric service to customers in Louisiana.

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[1] *Cleco Power, LLC*, Docket No. ER01-1099-000 (Mar. 28, 2001) (delegated letter order).

4. The Cleco Companies further state that Cleco Evangeline generates and sells electricity at wholesale, and has been granted market-based rate authorization by the Commission.[2] They represent that Cleco Evangeline is wholly-owned by Cleco Midstream Resources LLC, which in turn, is a direct, wholly-owned subsidiary of Cleco Corporation. Additionally, the Cleco Companies state that Cleco Evangeline is the sole owner of the Coughlin Power Station, a 775 megawatt (MW) gas-fired generation facility in Louisiana located in the Cleco Power balancing authority area. The Cleco Companies represent that, until January 1, 2012, the Coughlin Power Station's generating units were controlled by J.P. Morgan Ventures Energy Corporation under a long-term tolling agreement.

5. The Cleco Companies state that Cleco Power issued the 2011 RFP to obtain capacity and energy beginning May 1, 2012, for a delivery term of three or five years, to ensure resource availability and ensure reliability when serving its native load in the May 1, 2012 to April 30, 2015 timeframe while complying with the requirements of the United States Environmental Protection Agency's (EPA) Cross-State Air Pollution Rule (Air Pollution Rule).[3]

6. The Cleco Companies state that on October 21, 2011, Cleco Power issued the 2011 RFP, requesting up to 750 MW of capacity and energy for a delivery term of three or five years, beginning May 1, 2012. The Cleco Companies further state that a number of companies submitted proposals to supply capacity and energy to Cleco Power, including a bid by Cleco Evangeline to supply capacity and energy from the Coughlin Power Station.

7. The Cleco Companies maintain that, on the basis of objective evaluation criteria that were identified in the competitive solicitation, Cleco Power determined that Cleco Evangeline's proposal was the lowest reasonable cost resource in the 2011 RFP process to supply approximately 750 MW of capacity and energy under a three year power purchase agreement that begins on May 1, 2012 (the Evangeline PPA).

[2] *Cleco Evangeline, LLC*, 88 FERC ¶ 61,005 (1999).

[3] The Cleco Companies state that the 2011 RFP was based upon Cleco Power's projection that it would exceed its seasonal NOx allowance allotment under the Air Pollution Rule, and would be able to overcome the shortfall by contracting for up to approximately 750 MW of capacity and energy, in addition to installing certain environmental emissions controls. The Cleco Companies state that on December 30, 2011 the U.S. Court of Appeals for the District of Columbia Circuit stayed the Air Pollution Rule, which the Cleco Companies speculate may cause EPA to postpone the initial compliance date for the Air Pollution Rule to January 1 and May 1 of 2013.

8. The Cleco Companies represent that the 2011 RFP satisfies the competitive solicitation process requirements established by the Commission for affiliate power sales in *Edgar*[4] as well as the four guidelines outlined by the Commission in *Allegheny* (i.e., Transparency, Definition, Evaluation, and Oversight).[5]

9. The Cleco Companies note that the Evangeline PPA was submitted to the Louisiana Public Service Commission (Louisiana Commission) for certification as serving the public convenience and necessity in accordance with Louisiana Commission requirements for a comprehensive RFP process as a prerequisite to acquiring power supplies from an affiliate.[6] The Cleco Companies also state that in accordance with Louisiana Commission requirements, Cleco Power retained an Independent Monitor to oversee the 2011 RFP and implement the required safeguards that Cleco Power instituted to prevent affiliate preference.[7] Specifically, the Cleco Companies state that the design and administration of the 2011 RFP, the evaluation of the bids received in response to the

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[4] *Boston Edison Co. Re: Edgar Electric Energy Co.*, 55 FERC ¶ 61,382 (1991) (*Edgar*).

[5] *Allegheny Energy Supply Co., LLC*, 108 FERC ¶ 61,082 (2004) (*Allegheny*).

[6] The Cleco Companies note that the Louisiana Commission Staff, Cleco Power and the intervenors in the Louisiana Commission proceeding for the Evangeline PPA completed and executed an unopposed settlement agreement on March 16, 2012 authorizing Cleco Power to enter into the proposed Evangeline PPA and to flow-though, in its jurisdictional rates, the charges that it pays Cleco Evangeline under the Evangeline PPA. The settlement agreement states that "[t]he 2011 RFP was conducted in a fair and transparent manner, and the Evangeline PPA was properly selected by Cleco Power as the lowest reasonable cost and most reasonably reliable resource." March 16, 2012 settlement agreement at 3. The settlement agreement states that Cleco Power agrees to forego recovery from retail rates the Louisiana Commission-jurisdictional capacity costs associated with 250 MW of the Evangeline PPA for the first contract year, and that the remaining 480 MW of capacity costs of the Evangeline PPA are eligible for recovery during the first year, but 86.9 percent of the capacity costs associated with half of those 480 MW (240 MW) are subject to deferral.

[7] The Cleco Companies state that Energy Associates was retained by Cleco Power in consultation with Louisiana Commission Staff to act as the Independent Monitor for the 2011 RFP.

2011 RFP, and the negotiation of the Evangeline PPA were overseen and monitored by the Independent Monitor.[8]

10. The Cleco Companies state that the Louisiana Commission Staff was kept informed of the progress of the 2011 RFP and prior to notification of bidders, Cleco Power and the Independent Monitor reviewed Cleco Power's bid evaluation methodology and its proposed resource selection and supporting analytics with the Louisiana Commission Staff. The Cleco Companies state that the Louisiana Commission and the Independent Monitor were involved throughout the process to ensure that the bid evaluation and bid selection process was conducted on a rational, fair, and transparent basis.

11. The Cleco Companies subsequently notified this Commission that the Louisiana Commission authorized the Evangeline PPA and approved Cleco Power's application for a certificate of public convenience and necessity for the Evangeline PPA.[9] The Cleco Companies request that the Commission authorize Cleco Evangeline to make sales of energy and capacity to its affiliate Cleco Power pursuant to the Evangeline PPA, effective May 1, 2012.

II. Notice and Responsive Pleadings

12. Notice of the Cleco Companies' filing was published in the *Federal Register*, 77 Fed. Reg. 12,226 (2012), with motions to intervene and protests due on or before March 8, 2012. None was filed.

13. On March 9, 2012, the Director of the Division of Electric Power Regulation—West issued a letter under delegated authority directing the Cleco Companies to clarify certain aspects of their filing and to submit additional information.[10] The Cleco Companies submitted their response to the Deficiency Letter on March 19, 2012 (March 19 Response).

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[8] Cleco clarified that the negotiations related to non-price terms were, in large measure, operational in nature, such as provisions relating to credit support requirements and possible installation of automated generation control at the Coughlin Power Station. The Cleco Companies March 19, 2012 Response to request for additional information at 1-2.

[9] The Cleco Companies March 30, 2012 Informational Filing.

[10] *Cleco Power, LLC*, Docket No. ER12-1116-000 (Mar. 9, 2012) (delegated letter order).

14. Notice of the Cleco Companies' March 19 Response was published in the *Federal Register*, 77 Fed. Reg. 19,660 (2012), with interventions and comments due on or before April 9, 2012. None was filed.

III. **Discussion**

A. **Analysis**

1. **Affiliate Abuse Analysis**

15. At issue here is whether the Cleco Companies' filing satisfies the Commission's concerns regarding the potential for affiliate abuse. In *Edgar*, the Commission stated that, in cases where affiliates are entering into market-based rate sales agreements, it is essential that ratepayers be protected and that transactions be above suspicion in order to ensure that the market is not distorted. Under *Edgar*, the Commission has approved affiliate sales resulting from competitive bidding processes after the Commission has determined that, based on the evidence, the proposed sale was a result of direct head-to-head competition between affiliated and competing unaffiliated suppliers.[11]

16. When an entity presents evidence seeking to satisfy the *Edgar* criteria, the Commission has required assurance that: (1) a competitive solicitation process was designed and implemented without undue preference for an affiliate; (2) the analysis of bids did not favor affiliates, particularly with respect to non-price factors; and (3) the affiliate was selected based on some reasonable combination of price and non-price factors.[12]

17. In *Allegheny*, the Commission provided guidance as to how it will evaluate whether a competitive solicitation process satisfies the *Edgar* criteria.[13] As the

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[11] *See Edgar*, 55 FERC ¶ 61,382 at 62,167-69. *See also Connecticut Light & Power Co.*, 90 FERC ¶ 61,195, at 61,633-34 (2000); *Aquila Energy Marketing Corp.*, 87 FERC ¶ 61,217, at 61,857-58 (1999); *MEP Pleasant Hill, LLC*, 88 FERC ¶ 61,027, at 61,059-60 (1999).

[12] *Edgar*, 55 FERC ¶ 61,382 at 62,168.

[13] *Allegheny*, 108 FERC ¶ 61,082. *See also Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities,* Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 540, *clarified,* 121 FERC ¶ 61,260 (2007), *order on reh'g,* Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified,* 124 FERC ¶ 61,055, *order on reh'g,* Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g,* Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g,* Order

(continued…)

Commission stated in *Allegheny*, the underlying principle when evaluating a competitive solicitation process under the *Edgar* criteria is that no affiliate should receive undue preference during any stage of the process. The Commission stated that the following four guidelines will help the Commission determine if a competitive solicitation process satisfies that underlying principle: (1) Transparency: the competitive solicitation process should be open and fair; (2) Definition: the product or products sought through the competitive solicitation should be precisely defined; (3) Evaluation: evaluation criteria should be standardized and applied equally to all bids and bidders; and (4) Oversight: an independent third-party should design the solicitation, administer bidding, and evaluate bids prior to the company's selection. The *Edgar* criteria and *Allegheny* guidelines are designed to ensure that the transactions between affiliates do not unduly favor affiliates, and thereby protect captive customers from affiliate abuse.

18. As discussed below, the Commission concludes that the competitive solicitation described by the Cleco Companies satisfies the Commission's concerns regarding affiliate abuse and results in just and reasonable rates. Accordingly, the Commission will grant the Cleco Companies' request for authorization for Cleco Evangeline to make affiliate sales to Cleco Power pursuant to the 2011 RFP and resulting Evangeline PPA, effective May 1, 2012, as requested.

a. Transparency Principle

19. The Cleco Companies argue that the instant process was consistent with the Transparency guideline because the 2011 RFP was posted in draft form on Cleco Power's website and was provided via e-mail to prospective bidders identified as market participants that have expressed interest in Cleco Power's recent RFPs, have recently interacted with Cleco Power's Energy Operations Department, or were identified as participants in local electric power markets. In addition, information regarding the 2011 RFP was published in Platt's Megawatt Daily. Following issuance of the draft 2011 RFP, Cleco Power, Louisiana Commission Staff, and the Independent Monitor conducted a Technical and Bidders Conference. Comments from both Louisiana Commission Staff and potential bidders were incorporated into the 2011 RFP documents, after which the 2011 RFP was issued. The Cleco Companies state that the 2011 RFP was designed and implemented under the oversight of, and in collaboration with, the Independent Monitor. The Cleco Companies maintain that the Independent Monitor monitored all communications between Cleco Power and Cleco Evangeline throughout the RFP process and all questions regarding the 2011 RFP process or regarding specific bids were channeled through the Independent Monitor. The Cleco Companies maintain that the

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No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *aff'd sub nom. Montana Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011).

Independent Monitor ensured that no affiliate received preferential treatment and all potential bidders had equal access to relevant information.

20. Based on the Cleco Companies' representations, the Commission finds that the competitive solicitation was consistent with the Commission's Transparency guideline.

b. Definition Principle

21. The Cleco Companies argue that the 2011 RFP meets the Definition guideline because Cleco Power clearly stated and defined the products for which Cleco Power was soliciting proposals in the 2011 RFP. The Cleco Companies represent that in the 2011 RFP, Cleco Power requested up to 750 MW of capacity and energy for a delivery term of three or five years beginning May 1, 2012. More specifically, the RFP stated that "Cleco Power is seeking competitive bids for firm electric capacity and energy starting May 1, 2012" and encouraged bidders "to submit proposals for different amounts of capacity, provided that the minimum amount of capacity that a bidder may propose is 50 MW." The RFP also stated that "Cleco Power will consider purchase power proposals as well as tolling arrangements."[14] Finally, the Cleco Companies state that the products sought in the 2011 RFP were clearly defined in advance, and the 2011 RFP was posted in draft form on Cleco Power's website in advance of its issuance.

22. Based on these representations, the Commission finds that the competitive solicitation was consistent with the Commission's Definition guideline.

c. Evaluation Principle

23. The Cleco Companies argue that the instant process is consistent with the Evaluation guideline because the 2011 RFP document clearly identified the price and non-price factors under which bids will be evaluated. The RFP specifies that each proposal will be screened to ensure that it meets stated threshold requirements and that proposals that are submitted timely and meet the threshold requirements shall be considered conforming. Once initial screening is completed, the Independent Monitor will prepare a confidential summary of the proposals received; no information regarding the identity of bidders will be communicated. Appendix E to the RFP details the bid evaluation criteria, which include price and non-price factors. The Cleco Companies state that Cleco Power utilized an evaluation methodology that it has used consistently in the past and that is good industry practice. In addition, the Cleco Companies state that the evaluation methodology used in the 2011 RFP was subject to review by both the Independent Monitor and the Louisiana Commission and ensured that bidder identities

[14] Cleco Power October 21, 2011 RFP, § 2.1.

were masked during the evaluation process in order to prevent giving undue preference to affiliates.[15] The Cleco Companies further represent that Cleco Power and the Independent Monitor conferred with Louisiana Commission staff regarding the evaluation process after the selection but before the bidders were notified of the results in order to review Cleco Power's bid evaluation methodology to assure that the bid evaluation and bid selection process was conducted on a rational, fair, and transparent basis.

24. Based on these representations, the Commission finds that the competitive solicitation was consistent with the Commission's Evaluation guideline.

d. Oversight Principle

25. The Cleco Companies argue that the instant process satisfies the Oversight guideline. In support, the Cleco Companies state that the process used for the 2011 RFP complied with the requirements developed by the Louisiana Commission requiring a comprehensive request for proposals process as a prerequisite to acquiring power supplies from affiliates. The Cleco Companies note that the 2011 RFP was supervised by an Independent Monitor, who they state was retained in consultation with Louisiana Commission Staff, to ensure fairness and transparency, and the 2011 RFP was subject to review by the Louisiana Commission Staff. Additionally, the Independent Monitor provided a report of her findings to the Louisiana Commission. The Cleco Companies included that report and a copy of the Unopposed Settlement Agreement between Cleco Power and Louisiana Commission Staff as part of their March 19 Response. Finally, the Cleco Companies state that the Louisiana Commission approved the proposed transaction.[16]

26. Based on these representations, the Commission finds that the competitive solicitation was consistent with the Commission's Oversight guideline.

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[15] Appendix E to the 2011 RFP states that "Cleco Power shall, prior to the November 17, 2011 deadline specified for the submission of proposals, provide both the [Louisiana Commission] Staff and the [Independent Monitor] with the modeling protocols and the modeling assumptions that Cleco Power will utilize in its evaluation of proposals."

[16] The Cleco Companies March 30, 2012 Informational Filing at 1.

2. Other Issues

27. This order satisfies the requirement that Cleco Evangeline must first receive Commission authorization, pursuant to section 205 of the Federal Power Act (FPA), before engaging in power sales at market-based rates for the instant affiliate sales. We note that Cleco Evangeline must receive prior approval from the Commission under section 205 of the FPA for any other sales to affiliates with a franchised electric service territory and captive customers.

28. Finally, we will direct Cleco Evangeline to submit a compliance filing, within 30 days of the date of this order, revising the limitations and exemptions section of its market-based rate tariff to list the specific, limited waiver granted herein and include a citation to this order.[17]

The Commission orders:

(A) The Cleco Companies' request for authorization for Cleco Evangeline to make power sales to Cleco Power, pursuant to the 2011 RFP is granted, effective May 1, 2012, as discussed in the body of this order.

(B) Cleco Evangeline is hereby directed to submit a compliance filing, within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

[17] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at Appendix C; Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 385 n.517.