129 FERC ¶ 61,267
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Suedeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Cleco Power LLC and
Acadia Power Partners, LLC

Docket No. ER10-104-000

ORDER GRANTING AUTHORIZATION
TO MAKE AFFILIATE SALES

(Issued December 23, 2009)

1. In this order, we grant Cleco Power LLC's (Cleco) and Acadia Power Partners, LLC's (Acadia) (collectively, the Parties) application under section 205 of the Federal Power Act (FPA)[1] for Commission authorization for Acadia to make market-based rate power sales to its affiliate, Cleco, pursuant to an interim power purchase agreement (the Bridge Toll). By this order, we find that the Bridge Toll, as described below and for the interim period described herein, satisfies the Commission's concerns regarding affiliate abuse. Accordingly, we will authorize this affiliate sale effective January 1, 2010, as requested, and ending no later than December 31, 2010.

I. Background

2. On October 23, 2009, the Parties submitted an application seeking Commission authorization for affiliate power sales at market-based rates pursuant to the Bridge Toll between Acadia, a market-regulated power sales entity, and Cleco, its franchised public utility affiliate.

3. According to the Parties, Cleco is a franchised public utility company serving captive customers in Louisiana, which has been granted market-based rate authorization by the Commission.[2] They add that Cleco is a wholly-owned direct subsidiary of Cleco Corporation.

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[1] 16 U.S.C. § 824d (2000).

[2] *Cleco Power, LLC*, Docket No. ER01-1099-000 (March 28, 2001) (unpublished letter order). *See also Acadia Power Partners, LLC*, 113 FERC ¶ 61,073 (2005).

4. The Parties represent that Acadia is 50 percent owned by Acadia Power Holdings LLC, which in turn is wholly-owned by Cleco Midstream Resources LLC, a wholly-owned direct subsidiary of Cleco Corporation. Acadia also has been granted market-based rate authorization by the Commission.[3]

5. The Parties explain that the Bridge Toll has been negotiated as a component of a proposed transaction in which Cleco will acquire Power Block One, a 580 megawatt (MW) gas-fired, combined-cycle generating unit, from Acadia.[4] The Parties assert that the Bridge Toll is proposed as an interim, and critically necessary, power supply resource in the event that Cleco's acquisition of Power Block One does not receive the requisite regulatory approvals, and that the transaction does not close, by December 31, 2009. The Parties assert that the Bridge Toll will assure the availability of Power Block One's capacity and energy to Cleco, which the Parties explain is needed in order to reliably serve Cleco's native load customers beginning in 2010.

6. The Parties state that Cleco's proposed acquisition of Power Block One resulted from Cleco's 2007 Integrated Resource Plan (2007 Resource Plan). The Parties add that according to the 2007 Resource Plan, Cleco will need approximately 300 MW of additional capacity starting in 2010 and up to 600 MW of additional capacity over the 10-year timeframe beginning in January 2010. The Parties represent that, based on the capacity projections established in the 2007 Resource Plan, Cleco decided to conduct in 2007 a Long-Term Request for Proposals (2007 Long-Term RFP).

7. In that RFP, Cleco requested competitive bids for power supply resources for a delivery term beginning January 1, 2010. The Parties state that the 2007 Long-Term RFP was designed specifically to comply with the Louisiana Public Service Commission's (Louisiana Commission) competitive solicitation requirements[5] as well as with the

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[3] *Acadia Power Partners, LLC*, Docket No. ER09-1406-000 (May 28, 2002) (unpublished letter order). *See also Acadia Power Partners, LLC*, 113 FERC ¶ 61,073 (2005).

[4] We note that the Parties have submitted to the Commission a joint application under section 203 of the FPA for authorization of the Power Block One acquisition transaction in Docket No. EC10-22-000. The Parties further state that Cleco has submitted an application with the Louisiana Commission seeking approval of the Power Block One transaction. Parties' Oct. 23, 2009 Application at p. 5.

[5] The Parties list these requirements as: (i) selecting an Independent Monitor; (ii) establishing procedures to preserve the confidential status of bidder data; (iii) establishing a request for proposals (RFP) code of conduct to protect against preferential treatment of affiliate and self-build proposals; (iv) detailing the bid schedule;

(continued…)

Commission's competitive solicitation guidelines related to asset acquisitions detailed in *Ameren Energy Generating Co.*, 108 FERC ¶ 61,081 (2004) (*Ameren)*. Specifically, the Parties note that in *Ameren*, the Commission applied the standards from *Boston Edison Co. Re: Edgar Electric Energy Co.*, 55 FERC ¶ 61,382 (1991) (*Edgar)*, to asset sales between affiliates and provided additional guidance regarding how it planned to evaluate the sufficiency of RFP procedures under *Edgar* in the future.[6]

8. The Parties represent that the Long-Term RFP process was open and fair, and that the design, implementation, and administration of it was overseen by the Independent Monitor and conducted in close consultation with the Louisiana Commission's staff. Further, the Parties state that the capacity resources sought by Cleco Power were clearly defined in the 2007 Long-Term RFP document, and that the RFP did not favor any of Cleco's market-regulated affiliates. Finally, the Parties explain that Cleco's evaluation of the 2007 Long-Term RFP bids was overseen by the Independent Monitor and conducted in close consultation with the Louisiana Commission's staff. They add that these bid evaluations were conducted pursuant to evaluation criteria that were explicitly and comprehensively specified. The Parties state that Power Block One was selected as the lowest reasonable cost proposal in the 2007 Long-Term RFP. Further, the Parties assert that the Bridge Toll, as an integral component of the Power Block One acquisition, satisfies the *Edgar* standard.[7]

II. The Parties' Filing

9. The Parties state that the Bridge Toll is a 580 MW tolling arrangement with Acadia to provide capacity and energy to Cleco for one year or less in the event that the Power Block One acquisition-transaction does not close by December 31, 2009. The energy delivered pursuant to the Bridge Toll would be supplied from Power Block One. The Parties represent that Cleco will be responsible for purchasing and scheduling the natural gas used to supply Power Block One. Thus, the Parties assert that there will be no fuel adders, fuel taxes or start-up fuel charges under the Bridge Toll. They note,

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(v) detailing the bid evaluation process and bidder instructions; and (vi) seeking input on the RFP design from market participants and the Louisiana Commission staff through technical conferences.

[6] The Parties noted that the Commission uses the following principles to evaluate whether an RFP process meets the *Edgar* criteria: transparency, product definition, evaluation, and oversight. Parties' Oct. 23, 2009 Application at 15.

[7] *Id.* at p. 15-16.

however, that Cleco will incur natural gas transportation charges and will use start-up fuel. Finally, the Parties state that the Bridge Toll would terminate, without penalty, upon Cleco's acquisition of Power Block One.

10. The Parties assert that although the Bridge Toll itself did not result from a competitive solicitation process, it was an essential element of the acquisition of Power Block One, which was the result of a competitive solicitation process. The Parties explain that it was impractical for Cleco to conduct an RFP for the service provided by the Bridge Toll, and note that *Edgar* contemplates alternative means of demonstrating a lack of affiliate abuse through benchmark evidence that shows the prices, terms, and conditions of sales made by nonaffiliated sellers.

11. The Parties reference two 2009 power purchase agreements that they argue constitute benchmark evidence (Benchmark PPAs). These two power purchase agreements are: (1) a power purchase agreement between NRG Power Marketing LLC as seller and Cleco as purchaser, dated March 16, 2009 (NRG Power PPA); and (2) a power purchase agreement between Acadia as seller and Cleco as purchaser, dated July 31, 2008 (Acadia Power PPA). They assert that the capacity charges and energy pricing offered in the proposed Bridge Toll is comparable to these Benchmark PPAs.

12. The Parties contend that the Bridge Toll fully satisfies the requirements established in *Edgar*[8] because the Benchmark PPAs are for similar services, are in the same relevant geographic market, and are, for all practical purposes, contemporaneous.[9] The Parties state that although the Benchmark PPAs provide for intra-year 2009 power sales and the Bridge Toll provides for 2010 power sales, Cleco entered the market for the NRG Power PPA at the same time Cleco would have issued an RFP for the Bridge Toll capacity.[10] The delivery term of the NRG Power PPA was April 1, 2009 through October 31, 2009 and the delivery term of the Acadia Power PPA was March 1, 2009 through September 30, 2009. Given the close proximity of the delivery terms, the Parties submit that the Benchmark PPAs satisfy the requirement under *Edgar* that they be

[8] *Edgar,* 55 FERC ¶ 61,382 at 62,168-69.

[9] Parties' Oct. 23, 2009 Application at p. 24 (stating that in *Edgar*, the Commission said it would assess the credibility of benchmark evidence based upon whether the benchmark sales are contemporaneous with the subject transaction and whether they are for similar services).

[10] According to the Parties, Cleco's RFPs for short-term power supplies for the next year, including the NRG Power PPA, have historically been issued in January or February of the preceding year, with one exception. *Id.* at p. 25.

contemporaneous.[11] The Parties also point out that the Benchmark PPAs resulted from Cleco's short-term RFPs that complied with all relevant Louisiana Commission and, as applicable, Commission competitive solicitation guidelines.[12]

13. The Parties acknowledge that the Acadia Power PPA is an affiliate transaction, but argue that "as the winner of an [Louisiana Commission]-approved RFP process and subsequently authorized by this Commission, . . . its pricing and terms are credible benchmark evidence of market pricing."[13]

14. The Parties also note that the Louisiana Commission authorized the Bridge Toll by granting Cleco's requested certificate of public convenience and necessity, with Louisiana Commission staff testifying that the Benchmark PPAs are reflective of Cleco's current market for short-term power.[14]

15. Further, the Parties represent that the Bridge Toll has lower capacity pricing, a lower heat rate, and lower variable O&M costs than the NRG Power PPA.[15] They add that on a total cost basis, the Bridge Toll provides a significant economic benefit to Cleco's customers relative to the NRG Power PPA[16] and include a supporting analysis that uses two scenarios to demonstrate this.

16. Finally, the Parties state that the Bridge Toll is necessary to meet Cleco's native load and reserve requirements during 2010.[17] The Parties explain that Cleco has recently acquired 170 MW of load with the addition of Valley Electric Membership Corporation as an all-requirement customer, and that Cleco's existing long-term 500 MW PPA with

[11] *Id.*

[12] The Acadia Power PPA, which involved an affiliate transaction, was accepted by the Commission in *Cleco Power LLC*, Docket No. ER09-477-000 (Jan. 16, 2009) (unpublished letter order). The NRG Power PPA did not involve an affiliate transaction and was not submitted for Commission approval.

[13] Parties' Oct. 23, 2009 Application at p. 24.

[14] *Id.* at p. 26 (quoting *id.* at Exh. B, Direct Testimony of Philip Hayet on behalf of the staff of the Louisiana Commission at p. 17).

[15] *Id.* at p. 26-27.

[16] *Id.* at p. 27.

[17] *Id.* at p. 11-12.

BE Louisiana LLC expires on December 31, 2009. While Cleco is nearing completion of construction of a 600 MW solid fuel generating unit that is scheduled to enter commercial operation in November or December 2009, the Parties argue that if this unit experiences less than full utilization at the time it enters commercial operation in 2009 or into 2010, power from Power Block One under the Bridge Toll likely would be necessary to meet Cleco's demand requirements and reserve margins through 2010.

III. Notice and Intervention

17. Notice of the Parties' filing was published in the *Federal Register*, 74 Fed. Reg. 56601 (2009), with interventions and protests due on or before November 16, 2009. The Louisiana Commission filed a notice of intervention and comments in support of the Parties' request.

IV. Louisiana Commission Comments

18. The Louisiana Commission urges this Commission to authorize the Bridge Toll, fully supporting the application. The Louisiana Commission notes that it approved the requested certification of the agreement. It adds that "[t]he selection process was monitored by an Independent Monitor, the resource was selected in accordance with Louisiana Commission rules and there was no affiliate preference or abuse."[18] The Louisiana Commission states that a consultant was retained to assist the Louisiana Commission staff in its review of Cleco's application for approval of the Bridge Toll. The Louisiana Commission notes that in its order, it found that the "'pricing and terms of the Bridge Toll are reasonable and representative of current market conditions.'"[19]

19. The Louisiana Commission's order also found that there were adequate safeguards in place to protect against affiliate abuse and consequently waived its "lower of cost or market" affiliate rules for this particular transaction. According to the Louisiana Commission, approval of the Bridge Toll is necessary for the protection of Cleco's customers and is an integral part of the proposed acquisition by Cleco of Power Block One unit. The Louisiana Commission adds that the Power Block One acquisition was evaluated under the Louisiana Commission Market Based Mechanisms Order governing Long-Term RFPs, and a request for approval of this acquisition is currently pending before the Louisiana Commission.[20]

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[18] Louisiana Commission comments at p. 1.

[19] *Id.* at p. 2 (quoting Order No. U-31123 (Louisiana Commission 10/14/09)).

[20] *Id.* at p. 3.

V. Procedural Matters

20. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the notice of intervention of the Louisiana Commission serves to make it a party to this proceeding.

VI. Discussion

21. Under the Commission's regulations, no wholesale sale of electric energy may be made between a franchised public utility with captive customers and a market-regulated power sales affiliate without first receiving Commission authorization for the transaction under section 205 of the FPA.[21] The Commission traditionally places limits on wholesale power sales by wholesale generators and marketers to affiliated franchised public utilities with captive customers out of concern for affiliate abuse.[22] In cases where affiliates are entering into 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.[23]

22. In *Edgar*, the Commission explained that there are three approaches to demonstrate that a buyer has chosen the lowest cost supplier and thus that it has not unduly preferred an affiliate.[24] First, the utility may submit evidence of direct head-to-head competition between affiliated and non-affiliated suppliers either in a formal solicitation or in an informal negotiation process.[25]

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[21] 18 C.F.R. § 35.39(b) (2009). *See 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 467, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs.¶ 31,268, *order on reh'g*, 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).

[22] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 492; Order No. 707, FERC Stats. & Regs. ¶ 31,264 at P 4-7.

[23] *Edgar*, 55 FERC ¶ 61,382 at 62,167.

[24] In Order No. 697, the Commission stated that it will continue its approach for determining the types of affiliate transactions that are permissible and the criteria that should be used to make those decisions, including evaluation of the *Edgar* criteria. Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 540.

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

23. Second, the utility may present evidence of the prices that non-affiliated buyers were willing to pay for similar services from that project. The Commission states that this second type of evidence is credible only to the extent that the nonaffiliated buyers are in the relevant market as the purchaser and are not subject to market power by the seller or its affiliates.[26]

24. Finally, the utility may provide "benchmark" evidence of the prices, terms and conditions of sales by non-affiliated sellers. This can include purchases made by the utility itself or by other buyers in the relevant market. The Commission states that two major considerations with respect to the credibility of benchmark evidence are whether the benchmark sales are contemporaneous and whether they are for similar services when compared to the original transaction.[27]

25. The Louisiana Commission urges the Commission to approve the Parties' request. The Louisiana Commission points to its order approving the Bridge Toll, in which the Bridge Toll was evaluated against the Benchmark PPAs. As noted above, the Louisiana Commission found that there was no affiliate preference or abuse in the transaction and the "pricing and terms of the Bridge Toll are reasonable and representative of current market conditions."[28]

26. The Commission finds the NRG Power PPA satisfies the third showing under *Edgar*.[29] The NRG Power PPA provides evidence of prices that a non-affiliated seller was willing to sell for similar services in the relevant market. NRG Power Marketing LLC, as the non-affiliated seller, is in the same relevant market as Acadia, the seller under the proposed PPA in the instant filing. The Bridge Toll also has comparable terms

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[26] *Id.* at 62,168-69.

[27] *Id.* at 62,169.

[28] Louisiana Commission comments at p. 2.

[29] While the second Benchmark PPA, the Acadia Power PPA, does not demonstrate the prices, terms and conditions of sales by non-affiliated sellers, the Commission notes the Parties' analysis. The Parties put forth that the Bridge Toll has comparable capacity pricing, a lower heat rate, a lower start cost, but higher variable operation and maintenance (O&M) costs. Further, they represent that on a total cost basis, the Bridge Toll provides a significant economic benefit to Cleco's customers relative to the Acadia Power PPA.

and conditions, and is close terms of timing and in duration to the NRG Power PPA.[30] The Parties assert that Cleco entered the market for the NRG Power PPA at the same time Cleco would have issued an RFP for the Bridge Toll capacity.

27. Moreover, the Bridge Toll will assure the availability of Power Block One's capacity and energy to Cleco, which the Parties assert Cleco will need in order to reliably serve its native load customers beginning in 2010 due to the addition of Valley Electric Membership Corporation as an all-requirement customer and expiration of an existing long-term PPA with BE Louisiana LLC.

28. The Commission finds that the submitted evidence and representations of the Parties are sufficient to provide reasonable assurance that no abuse of the affiliate relationship was involved in the Bridge Toll. Thus, we authorize the sale of electric capacity and energy between Cleco and Acadia pursuant to the Bridge Toll, effective January 1, 2010, and ending no later than December 31, 2010, as requested.

29. This order satisfies the requirement that Cleco and Acadia first receive Commission authorization, pursuant to section 205 of the FPA, before engaging in power sales at market-based rates with an affiliate for the instant affiliate sales. However, Cleco and Acadia 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.

30. We direct Cleco to inform the Commission within 30 days of the date on which the Bridge Toll expires as a result of the closing of the acquisition of Power Block One.

31. Finally, we will direct Acadia 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 waiver granted herein and include a citation to this order.[31]

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[30] The duration of the NRG Power PPA is seven months; the duration of the Bridge Toll is up to one year, although the Parties represent that the Bridge Toll will likely be in effect for significantly less than one year.

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

The Commission orders:

(A) The application for authorization for Acadia to make sales of energy and capacity to its affiliate, Cleco, pursuant to the Bridge Toll, is granted, effective January 1, 2010, as discussed in the body of this order.

(B) Acadia 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.

(C) Cleco is hereby directed to inform the Commission within 30 days of the date on which the Bridge Toll expires as a result of the closing of the acquisition of Power Block One.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.