132 FERC ¶ 61,118
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller, and
John R. Norris

BE Louisiana, LLC	Docket Nos.	ER07-1358-015
		EL10-73-000
Cedar Brakes I, L.L.C.		ER00-2885-029
Cedar Brakes II, L.L.C.		ER01-2765-028
J.P. Morgan Commodities Canada Corporation		ER09-1141-008
J.P. Morgan Ventures Energy Corporation		ER05-1232-025
Utility Contract Funding, L.L.C.		ER02-2102-028

ORDER ON NOTICE OF CHANGE IN STATUS, INSTITUTING SECTION 206 PROCEEDING AND ESTABLISHING REFUND EFFECTIVE DATE

(Issued August 11, 2010)

1. On March 4, 2010, as amended on April 16, 2010, BE Louisiana, LLC (BE Louisiana), Cedar Brakes I, L.L.C., Cedar Brakes II, L.L.C., J.P. Morgan Commodities Canada Corporation, J.P. Morgan Ventures Energy Corporation (J.P. Morgan Ventures), and Utility Contract Funding, L.L.C. (collectively, the J.P. Morgan Sellers) filed a notice of change in status. As discussed below, the Commission's analysis indicates that the J.P. Morgan Sellers fail the wholesale market share screen in the Cleco Corporation, Inc. (Cleco) balancing authority area. Such failure establishes a rebuttable presumption of horizontal market power and provides the basis for instituting a proceeding pursuant to section 206 of the Federal Power Act (FPA)[1] to determine whether the J.P. Morgan Sellers' market-based rate authority in the Cleco balancing authority area remains just and reasonable. Although the J.P. Morgan Sellers also submitted a delivered price test (DPT) analysis, we find that they have failed to rebut the presumption of horizontal market power. Accordingly, we direct the J.P. Morgan Sellers, within 60 days of the date of issuance of this order, (1) to show cause as to why the Commission should not revoke their market-based rate authority in the Cleco balancing authority area; (2) file a

[1] 16 U.S.C. § 824e (2006).

mitigation proposal tailored to their particular circumstances that would eliminate their ability to exercise market power; or (3) inform the Commission that they will adopt the default mitigation set forth in the Commission's regulations.[2]

I. Background

2. BE Louisiana is located in the Southwest Power Pool (SPP) region in the Cleco balancing authority area. BE Louisiana controls 758 megawatts (MW) of generating capacity at the Evangeline generating facility pursuant to a tolling agreement with Cleco Evangeline, LLC. The J.P. Morgan Sellers state that they do not own or control any other generation within the Cleco balancing authority area or in any first-tier balancing authority area.

3. On March 4, 2010, the J.P. Morgan Sellers filed a notice of change in status (March 4 Filing) pursuant to the requirements in Order No. 652[3] and the requirement promulgated in section 35.42 of the Commission's regulations adopted in Order No. 697.[4] In the March 4 Filing, the J.P. Morgan Sellers notified the Commission of the December 31, 2009 expiration of a long-term sales agreement between BE Louisiana LLC and Cleco Power LLC (Cleco Power) under which BE Louisiana sold Cleco Power 450 MW from the Evangeline generating facility. The J.P. Morgan Sellers submitted a horizontal market power analysis indicating that they are not pivotal, but that they fail the Commission's market share analysis as a result of the termination of the agreement. Nevertheless, they maintained that they continue to lack market power within the Cleco balancing authority area and committed to make such a demonstration in the near future. They also stated that they only became aware of the fact that the termination of the agreement resulted in failure of the Commission's market share analysis, thereby necessitating a change-in-status notification, on March 1, 2010, and sought waiver of the

[2] 18 C.F.R. § 35.38 (2010).

[3] *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005).

[4] *Id; Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, *clarified*, 121 FERC ¶ 61,260 (2007) (Clarification Order), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055 (2008), *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 No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010).

Commission's requirement that a notice be filed within 30 days after a change in status occurs.[5]

4. The J.P. Morgan Sellers amended their filing on April 16, 2010 (April 16 Filing). As part of their April 16 Filing, the J.P. Morgan Sellers submit an analysis of the impact of the Simultaneous Import Limit (SIL) into the Cleco balancing authority on the results of their market share analysis. Specifically, they submit revised indicative screens and a DPT using the following potential SIL values or SIL proxies: the SIL values calculated by Cleco in connection with its triennial update (Cleco-calculated SIL values),[6] the SIL values that the Commission previously adopted for the Cleco balancing authority area (Southeast SIL Order values),[7] or a SIL proxy based on the seasonal average Available Transfer Capability (ATC) from the Entergy Electric Services (Entergy) balancing authority area into the Cleco balancing authority area.[8]

II. Notices and Responsive Pleadings

5. Notice of the J.P. Morgan Sellers' March 4 Filing was published in the *Federal Register* with interventions or protests due on or before March 25, 2010.[9] None was filed.

6. Notice of the J.P. Morgan Sellers' April 16 Filing was published in the *Federal Register* with interventions or protests due on or before May 7, 2010.[10] None was filed.

III. Discussion

A. Market-Based Rate Authorization

7. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, horizontal and vertical market

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[5] March 4 Filing, Transmittal Letter at 2-3.

[6] Cleco submitted its updated market power analysis on September 4, 2009. *Cleco Power LLC*, Updated Market Power Analysis Filing, Docket No. ER01-1099-013 (Sept. 4, 2009). On May 20, 2010, the Commission accepted the SIL values calculated by Cleco in connection with its triennial update. *AEP Service Co.*, 131 FERC ¶ 61,146 (2010) (May 20 Order).

[7] *Carolina Power & Light Co.*, 128 FERC ¶ 61,039 (2009).

[8] April 16 Filing, Transmittal Letter at 3-4, Attachment A at 3-4.

[9] 75 Fed. Reg. 12,534 (2010).

[10] 75 Fed. Reg. 23,755 (2010).

power.[11] As discussed below, the Commission concludes that the J.P. Morgan Sellers have failed to rebut the presumption of horizontal market power that is established by their failure of the market share indicative screen, and thus may not satisfy the Commission's standards for market-based rate authority.

1. Horizontal Market Power

a. Indicative Screens

8. The Commission adopted two indicative screens for assessing horizontal market power, the pivotal supplier screen and the wholesale market share screen.[12] An applicant that fails one or more of the indicative screens is provided with several procedural options including the right to challenge the market power presumption by submitting a DPT analysis, or, alternatively, sellers may accept the presumption of market power and adopt some form of cost-based mitigation.[13]

9. In their March 4 Filing, the J.P. Morgan Sellers prepared the pivotal supplier and wholesale market share screens for the Cleco balancing authority area, consistent with Order No. 697.[14] The screens submitted in the March 4 Filing indicate that they pass the pivotal supplier screen. However, the screens indicate that they fail the wholesale market share screen in the Cleco balancing authority area with market shares of 21.3 percent in the spring and 28.9 percent in the summer.

10. Similarly, the indicative screens submitted in the April 16 Filing indicate that the J.P. Morgan Sellers pass the pivotal supplier screen in the Cleco balancing authority area; but the results of their market share screen depend on which SIL value is used. The J.P Morgan Sellers explain that, when the Cleco-calculated SIL values are used, they fail the market share analysis during the summer with a market share of 23.1 percent. They state that, on the other hand, when the Southeast SIL Order values are used, the J.P. Morgan Sellers fail the market share analysis during the fall with a market share of 21.2 percent. They explain that when the seasonal average ATC from the Entergy balancing authority area is used as a proxy for the SIL, the J.P. Morgan Sellers pass the market share screen in all time periods.

11. The J.P. Morgan Sellers note that in both of the seasons where they fail the market share analysis using the Cleco-calculated SIL values and the Southeast SIL Order values,

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[11] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 62, 399, 408, 440.

[12] *Id.* P 62.

[13] *Id.* P 63.

[14] *Id.* P 231-232.

the SIL value is zero. They assert that the results of the screens are inextricably linked with the determination of the SIL; yet, there is no way to reconcile these data sets. They contend, therefore, that it is difficult to conclude that the J.P. Morgan Sellers really fail the market share screen in the summer, fall, both, or neither.[15] The J.P. Morgan Sellers also argue that reliance on the ATC data as a proxy for the SIL is warranted in this case because both the Cleco-calculated and Southeast SIL Order values are based on a historical period before the expiration of the long-term sales agreement, whereas the ATC proxy is forward-looking and reflects a period after the expiration of the agreement.

12. Thus, the J.P. Morgan Sellers argue that, on balance, the results of their indicative screens demonstrate that they pass the indicative screens in the Cleco balancing authority area. Given the variability of the results of the indicative screens, however, they also submitted a DPT using the three SIL assumptions used in the indicative screens.

Commission Determination

13. We find that the indicative screen using the Cleco-calculated SIL values represents the correct analysis. In the Clarification Order, the Commission stated that entities that do not own transmission should rely on "the same vintage data used in the triennial review filed by the transmission owners in their region within the past year."[16] On May 20, 2010, the Commission accepted the Cleco-calculated SIL values for the December 2006 to November 2007 period.[17] We find that reliance on the screens using the Southeast SIL Order values or the ATC proxy from the Entergy balancing authority area would be inappropriate. The Southeast SIL Order values were for the December 2005-November 2006 period; thus, they are out-of-date. Likewise, the ATC proxy from the Entergy balancing authority area is based on the June 2010-May 2011 period and is not an acceptable proxy for the SIL value. We note that we require the use of historical data for both of the horizontal market power indicative screens and the DPT analysis in evaluating whether a seller may possess market power.[18]

14. Consequently, based on their indicative screens using the Cleco-calculated SIL values, the J.P. Morgan Sellers fail the wholesale market share screen in the Cleco balancing authority area. As noted above, sellers that fail either indicative screen are

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[15] April 16 Filing, Appendix A at 4.

[16] Clarification Order, 121 FERC ¶ 61,260 at P 12.d.

[17] May 20 Order, 131 FERC ¶ 61,146.

[18] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 298; Clarification Order, 121 FERC ¶ 61,260 at P 12; Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 128.

provided with several procedural options, including the right to challenge the presumption of market power by submitting a DPT analysis.

15. Accordingly, we turn to the DPT analysis submitted by the J.P. Morgan Sellers. For the reasons stated above, we are basing our analysis of the DPT prepared using the Cleco-calculated SIL values.

b. <u>Delivered Price Test</u>

16. As the Commission has previously explained, the DPT identifies potential suppliers based on market prices, input costs, and transmission availability, and calculates each supplier's economic capacity and available economic capacity[19] for each season/load period.[20] Under the DPT, applicants must also calculate market concentration using the Hirschman-Herfindahl Index (HHI).[21] An HHI of less than 2,500 in the relevant market for all season/load periods, in combination with a demonstration that the applicants are not pivotal and do not possess more than a 20 percent market share in any of the season/load periods would constitute a showing of a lack of market power, absent compelling contrary evidence from intervenors. A detailed description of the mechanics of the DPT is provided in Order No. 697.[22]

17. As with our initial screens, applicants and intervenors may present evidence such as historical wholesale sales data, which can be used to calculate market shares and market concentration and to refute or support the results of the DPT. In Order No. 697, the Commission encouraged applicants to present the most complete analysis of competitive conditions in the market as the data allows.[23]

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[19] Economic capacity" is the total generation capacity of a potential supplier that can compete in the destination market, given its costs and transmission availability. "Available economic capacity" is derived by subtracting each potential supplier's native load obligation from its total capacity and adjusting transmission availability accordingly. *See* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 96 n.78.

[20] Super-peak, peak, and off-peak, for winter, shoulder, and summer periods and an additional highest super-peak for the summer.

[21] 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 = $(20)^2 + (20)^2 + (20)^2 + (20)^2 + (20)^2 = 400 + 400 + 400 + 400 + 400 = 2{,}000$.

[22] FERC Stats. & Regs. ¶ 31,252 at P 104-117.

[23] *Id.* P 111.

18. The J.P. Morgan Sellers' DPT analysis for the Cleco balancing authority area indicates that, when the available economic capacity measure is used, they fail the market share analysis in six season/load periods with market shares of 47.8 percent in the summer super-peak one load period, 43.5 percent in the summer super-peak two load period, 55.6 percent in the summer peak load period, 29 percent in the winter super-peak load period, 28.3 percent in the shoulder super-peak load period, and 27 percent in the shoulder peak load period. Additionally, the J.P. Morgan Sellers fail the pivotal supplier test in the summer off-peak load period and fail the HHI test with HHI values over 5,000 during the summer super-peak one, summer super-peak two, and summer peak load periods.

19. When the economic capacity measure is used, the J.P. Morgan Sellers fail the market share analysis in the summer peak load period with a market share of 24.1 percent. Also, they fail the pivotal supplier analysis in the summer off-peak load period[24] and fail the market concentration analysis with HHIs in excess of 2,500 in all periods except for the shoulder off-peak and winter off-peak periods.[25]

20. In spite of multiple failures, the J.P. Morgan Sellers argue that they cannot exercise market power because there has been limited market demand within the Cleco balancing authority area and nearby markets. The J.P. Morgan Sellers state that since January 1, 2010, when the long-term sales contract with Cleco Power expired, the Evangeline facility has only been brought online during a 10-day period (January 5-15). The J.P. Morgan Sellers further state that the facility has not operated since that time, as the unit has been unable to cover its marginal costs.

21. The J.P. Morgan Sellers maintain that they are almost wholly reliant upon incumbent utilities, especially Cleco Power, to purchase the Evangeline facility's output. They assert that, to the extent Cleco Power, Entergy, or another nearby purchaser does not seek additional supplies, the Evangeline facility is not likely to be economic and is not likely to operate. They further argue that they cannot exercise market power because the Evangeline facility, as a combined cycle plant in the SPP, tends to be economic to operate mostly during peak periods. They note that all sales from the Evangeline facility

[24] Despite their failure of the pivotal supplier analysis using both economic capacity and available economic capacity, the J.P. Morgan Sellers maintain that they are not pivotal during the summer off-peak period because the marginal cost of the Evangeline facility is higher than the market price during the time period and, thus, their failure of the screen results from a general lack of economic capacity or available economic capacity in the market. April 16 Filing, Appendix A at 5 n.8.

[25] The failing HHI values range from just above 2,500 up to a high of 9,981 for the summer off-peak load period.

that have been made in the Cleco balancing authority area since they acquired the tolling agreement in November 2007 have been made to Cleco Power itself. They argue that there will likely be less demand for the output of the Evangeline facility in the future because Cleco Power has opened and been operating a 660 MW generating facility in the Cleco balancing authority area, Rodemacher 3, since February 2010.

22. Lastly, the J.P. Morgan Sellers further argue that they have little incentive to withhold the output of the facility because they do not own or control any generation in any balancing authority areas first-tier to the Cleco balancing authority area.

Commission Determination

23. After weighing all of the relevant evidence, the Commission finds that, based on the J.P. Morgan Sellers' DPT analysis in the Cleco balancing authority area, they have failed to rebut the presumption of horizontal market power and thus that they may not satisfy the Commission's horizontal market power standard for the grant of market-based rate authority.[26]

24. The Commission has noted that 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. 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.[27]

25. 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.[28] In the DPT analysis, available economic capacity accounts

[26] As a condition of retaining market-based rate authority, a seller must report any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority no later than 30 days after the change in status occurs. 18 C.F.R. § 35.42 (2010). Here, the J.P. Morgan Sellers should have submitted their change in status filing no later than 30 days after the expiration of the long-term sales agreement between BE Louisiana and Cleco Power on December 31, 2009, but they failed to submit it until March 4, 2010. We remind the J.P. Morgan sellers that they must submit required filings on a timely basis, or face possible sanctions by the Commission.

[27] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 13, 112 (stating that the Commission will weigh both the available economic capacity measure and the economic capacity measure).

[28] *See, e.g.*, *Sierra Pac. Power Co.*, 126 FERC ¶ 61,283, at P 21 (2009).

for native load requirements. Using the available economic capacity measure, the J.P. Morgan Sellers' market share exceeds 20 percent in six out of ten season/load periods. Most notably, their market shares during the summer peak, super-peak 1, and super-peak 2 periods are 55.6 percent, 47.8 percent, and 43.5 percent, respectively. During these same three season/load periods, they fail the market concentration analysis with HHIs in excess of 5,000. In addition, they fail the pivotal supplier screen in the summer off-peak period.

26. While available economic capacity reflects native load obligations when assessing the potential for horizontal market power, a clear distinction between generation serving native load and generation competing for wholesale load is not easily made. The Commission therefore also considers economic capacity in assessing horizontal market power.[29] Using the economic capacity measure, the J.P. Morgan Sellers' DPT indicates that their HHIs exceed 2,500 in eight out of ten season/load periods, their market share exceeds 20 percent in the summer peak period, and they are pivotal in the summer off-peak period.

27. Thus, the J.P. Morgan Sellers' DPT results indicate that they exceed the thresholds established by the Commission during various season/load periods using both the available economic capacity measure and the economic capacity measure. While the J.P. Morgan Sellers offer various arguments as to why they lack horizontal market power in the Cleco balancing authority area despite the admittedly "mixed" results of their DPT,[30] we find their arguments unpersuasive.

28. First, while the J.P. Morgan Sellers argue that they do not have the incentive to exercise market power, the Commission has previously stated that its analysis in the market-based rate context focuses on the ability to exercise market power, not the incentive to do so.[31]

29. Second, the J.P. Morgan Sellers' reliance on the argument that the Evangeline Plant is not likely to be economic to run, especially now that the Rodemacher Plant has come online, is misplaced. We note that the DPT analysis submitted by the J.P. Morgan affiliates has already been adjusted to reflect the additional capacity of the Rodemacher

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[29] *Id.* P 22.

[30] April 16 Filing, Appendix A at 7.

[31] *See Westar Energy, Inc.*, 123 FERC ¶ 61,123, at P 22 (2008) (rejecting the argument that the Commission's market power analysis for market-based rate authority is concerned with the ability *and* incentive to exercise market power); *See also Empire District Electric Co.*, 123 FERC ¶ 61,084, at P 17 (2008).

Plant.[32] Notwithstanding that adjustment, the J.P. Morgan Sellers fail the pivotal supplier, market share, and market concentration analyses in various periods, as detailed above. Their speculative arguments about existing and future economic conditions in the Cleco balancing authority and nearby markets cannot overcome the fact that their DPT indicates that they have horizontal market power.

30. Third, even if we were to accept the J.P. Morgan Sellers' argument that they are not pivotal despite the results of the DPT, it would not change the fact that their failures of the market share and market concentration analyses using the available economic capacity and economic capacity measures suggest that they have horizontal market power in the Cleco balancing authority area.

31. In summary, after weighing all of the relevant evidence, the Commission concludes that, based on their DPT analysis, the J.P. Morgan Sellers have horizontal market power in the Cleco balancing authority area. Therefore, we will institute a proceeding in Docket No. EL10-73-000, pursuant to section 206 of the FPA, to determine whether the J.P. Morgan Sellers' market-based rate authority for the Cleco balancing authority area remains just and reasonable. Under the section 206 proceeding established herein, the J.P. Morgan Sellers' must show cause, within 60 days of the date of issuance of this order, as to why the Commission should not revoke its authority to sell power at market-based rates in the Cleco balancing authority area. In this regard, the J.P. Morgan Sellers may present alternative evidence such as historical sales and transmission data to rebut the Commission's finding that they have horizontal market power in the Cleco balancing authority.[33] In the alternative, the J.P. Morgan Sellers may (1) file a mitigation proposal tailored to their particular circumstances that would eliminate their ability to exercise market power; or (2) inform the Commission that they will adopt the Commission's default cost-based rates or propose other cost-based rates and submit cost support for such rates.[34]

32. In cases where, as here, the Commission institutes a section 206 investigation on its own motion, the Commission is required to establish a refund effective date that is no earlier than publication of notice of the Commission's initiation of its investigation in the *Federal Register*, and no later than five months subsequent to that date. In order to give maximum protection to customers, and consistent with our precedent,[35] we will establish

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[32] April 16 Filing, Appendix A at 8, 12.

[33] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 117.

[34] *Id.* P 604, 620, 648, 659; 18 C.F.R. § 35.38.

[35] *See, e.g, Canal Electric Company*, 46 FERC ¶ 61,153, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

a refund effective date at the earliest date allowed. This date will be the date on which notice of our investigation in this proceeding is published in the *Federal Register*.

33. In addition, section 206 requires that, if no final decision has been rendered by the earlier of the refund effective date or the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it failed to do so and shall state its best estimate as to when it reasonably expects to make such a decision. We expect that we should be able to render a decision within five months of the date that the J.P. Morgan Sellers submit the filing ordered below, or March 31, 2011.

The Commission orders:

(A) 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 Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), the Commission hereby institutes a proceeding in Docket No. EL10-73-000 concerning the justness and reasonableness of the J.P. Morgan Sellers' market-based rates, as discussed in the body of this order.

(B) 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. EL10-73-000.

(C) The refund effective date in Docket No. EL10-73-000, established pursuant to section 206(b) of the FPA, shall be the date of publication in the *Federal Register* of the notice discussed in Ordering Paragraph (B) above.

(D) For the Cleco balancing authority area, the J.P. Morgan Sellers are directed, within 60 days from the date of the issuance of this order, to (1) show cause as to why the Commission should not revoke their authority to sell power at market-based rates in the Cleco balancing authority area; (2) file a mitigation proposal tailored to their particular circumstances that would eliminate their ability to exercise market power; or (3) inform the Commission that they will adopt the Commission's default cost-based rates or propose other cost-based rates and submit cost support for such rates.

By the Commission. Commissioner LaFleur is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.