

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;  
Richard Glick and Bernard L. McNamee.

Bayou Cove Peaking Power, LLC  
Big Cajun I Peaking Power LLC  
Cottonwood Energy Company LP  
Louisiana Generating LLC  
Sterlington Power LLC  
NRG Cottonwood Tenant LLC  
NRG Power Marketing LLC  
Cleco Cajun LLC  
Cleco Corporate Holdings LLC  
Cleco Group LLC  
Cleco Partners L.P.

Docket No. EC18-63-001

ORDER ON CLARIFICATION

(Issued September 19, 2019)

1. On January 11, 2019, Entergy Services, LLC (Entergy) filed a limited request for rehearing or, in the alternative, clarification (Request) of the Commission's December 12, 2018 order authorizing a disposition of jurisdictional facilities.<sup>1</sup> For the reasons discussed below, we clarify the Commission's December Order.

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<sup>1</sup> *Bayou Cove Peaking Power, LLC*, 165 FERC ¶ 61,226 (2018) (December Order).

*(continued ...)*

## **I. Background**

2. In the December Order, the Commission authorized a transaction between the Cleco applicants<sup>2</sup> and the NRG applicants<sup>3</sup> in which: (1) Cleco Cajun LLC would acquire all of the membership interests of the South Central Project Companies' corporate parent, NRG South Central Generating LLC, thereby indirectly transferring control over certain generating facilities; (2) NRG Power Marketing LLC would transfer certain long-term, market-based rate requirements agreements with various municipalities to a wholly owned affiliate of Cleco Partners L.P.; (3) Cottonwood and Cottonwood Tenant would enter into a lease during which Cottonwood Tenant would have operational control of the Cottonwood generation facility; and (4) Cottonwood would transfer the reactive service rate schedule associated with that facility to Cottonwood Tenant (Transaction).

3. In evaluating whether the Transaction would have an adverse effect on competition, the Commission first examined the geographic markets relevant to the Transaction. The Commission explained that “[p]roperly defining and measuring each relevant [geographic] market is required to evaluate whether a transaction adversely affects competition.”<sup>4</sup> To determine whether an alternative geographic market is relevant, the Commission analyzes “whether there are frequently binding transmission constraints during historical seasonal peaks . . . and at other competitively significant times that prevent competing supply from reaching customers within the [proposed alternative geographic market].”<sup>5</sup> Such an examination involves “evidence of binding

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<sup>2</sup> The Cleco applicants include Cleco Cajun LLC, Cleco Corporate Holdings LLC, Cleco Group LLC, and Cleco Partners L.P. *Id.* at n.3.

<sup>3</sup> The NRG applicants include Bayou Cove Peaking Power, LLC (Bayou Cove), Cottonwood Energy Company LP (Cottonwood), Big Cajun I Peaking Power LLC (Big Cajun), Louisiana Generating LLC (Louisiana Generating), Sterlington Power LLC (Sterlington), NRG Cottonwood Tenant LLC (Cottonwood Tenant), and NRG Power Marketing LLC (NRG Power Marketing). Bayou Cove, Cottonwood, Big Cajun, Louisiana Generating, and Sterlington are collectively referred to as the South Central Project Companies. *Id.* at n.4.

<sup>4</sup> December Order, 165 FERC ¶ 61,226 at P 67 (citing U.S. Dep’t of Justice & Federal Trade Commission, “Horizontal Merger Guidelines” (Apr. 1992), revised (Apr. 1997)).

<sup>5</sup> *Id.* (citing *Exelon Corp.*, 138 FERC ¶ 61,167, at P 32 (2012) (*Exelon*) (citations omitted)).

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transmission constraints or price separation data”<sup>6</sup> and is completed on a case-by-case basis.<sup>7</sup>

4. In the December Order, the Commission examined whether the Sub-Regional Power Balance Constraint was frequently binding during historical seasonal peaks. As explained in the December Order, the Sub-Regional Power Balance Constraint, or the Regional Directional Transfer constraint, represents the total transmission capability between the Midcontinent Independent System Operator, Inc. (MISO) Midwest region (MISO Midwest) and MISO South.<sup>8</sup> The Commission noted that there are two components to the Sub-Regional Power Balance Constraint: (1) a physical interconnection that allows for 1,000 megawatt (MW) of firm capability for flows to and from MISO Midwest and MISO South (MISO Contract Path); and (2) the ability to reserve service on the transmission facilities of Southwest Power Pool, Inc. (SPP) for real-time energy transfers between MISO Midwest and MISO South in excess of the MISO Contract Path. The transfers on SPP’s and others’ transmission facilities are limited to 3,000 MW for MISO Midwest to MISO South flows, and to 2,500 MW for MISO South to MISO Midwest flows.<sup>9</sup> Based on the transmission constraint and price separation evidence in the record, in the December Order, the Commission found that the Sub-Regional Power Balance Constraint was frequently binding during historical seasonal peaks, such that MISO South should be a submarket for purposes of analyzing the Transaction’s effect on competition.<sup>10</sup>

5. Subsequent to filing its Request, Entergy Mississippi, LLC (Entergy Mississippi) and NRG Wholesale Generation LP submitted an application in Docket No. EC19-63-000

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<sup>6</sup> *Id.* (citing *NRG Energy Holdings, Inc.*, 146 FERC ¶ 61,196, at P 80 (2014); *Exelon*, 138 FERC ¶ 61,167 at P 32).

<sup>7</sup> *Id.* P 68 (citing *Inquiry Concerning the Commission’s Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044, at 30,118 (1996) (cross-referenced at 77 FERC ¶ 61,263) (Merger Policy Statement)).

<sup>8</sup> MISO South, as well as MISO Midwest, correspond to the terms First Planning Area and Second Planning Area, as defined in Sections 1.F and 1.S of the MISO Open Access Transmission, Energy, and Operating Reserves Markets Tariff. MISO, FERC Electric Tariff, Definitions, § 1.F (45.0.0); *see also id.*, § 1.S (49.0.0).

<sup>9</sup> December Order, 165 FERC ¶ 61,226 at P 40 n.23 (citing *Midcontinent Indep. Sys. Operator, Inc.*, 164 FERC ¶ 61,129, at P 5 & n.13 (2018)).

<sup>10</sup> For purposes of this order, “submarket” will be used instead of “alternative geographic market.”

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for the approval of Entergy Mississippi's purchase of the Choctaw Generating Station, which would be transferred to MISO South if that application is approved. Concurrently with this order, we are issuing an order approving the application and finding, based on new evidence presented by the applicants in Docket No. EC19-63-000, that MISO South no longer is a submarket.<sup>11</sup>

## **II. Request**

6. Entergy states that it is not seeking rehearing on any issues it raised in its protest of the Transaction. Entergy explains that the sole issue on which it seeks rehearing is the definition of the relevant geographic market.<sup>12</sup> Specifically Entergy argues that the Commission erred in concluding that there is a submarket, distinct from the MISO market as a whole, that consists solely of MISO South. Entergy asserts that the Commission's conclusion was based on an erroneous premise that the constraints at issue in the context of the Transaction are transmission constraints.<sup>13</sup> In addition, Entergy argues that the Commission's conclusion was based on a flawed analysis of transmission constraint and price separation data that ignored relevant evidence and relied on incongruous comparisons to other Commission cases.<sup>14</sup> In the alternative, Entergy asks that any decision on the validity of a MISO South submarket for purposes of this proceeding does not establish any presumption that the MISO South submarket will be valid in future cases and that, in future cases, the definition of the relevant geographic market and analysis of competitive effects will be based on the particular facts and circumstances presented.<sup>15</sup>

## **III. Discussion**

7. Entergy does not request that we reverse the Commission's authorization of the Transaction. Rather, as Entergy explains, its Request is limited to the issue of whether the Commission erred in concluding that there is a submarket that consists solely of MISO South. Therefore, Entergy's Request has no effect on the Commission's

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<sup>11</sup> *NRG Wholesale Generation LP*, 168 FERC ¶ 61,166 (2019).

<sup>12</sup> Request at 1 n.1.

<sup>13</sup> *Id.* at 4-13.

<sup>14</sup> *Id.* at 13-24.

<sup>15</sup> *Id.* at 26.

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authorization of the Transaction because the Commission found that the Transaction raised no competition concerns in the MISO South submarket.<sup>16</sup>

8. As the Commission explained in Order No. 697-A, “[w]here the Commission makes a specific finding that there is a submarket within [a regional transmission organization (RTO) or independent system operator (ISO)], that submarket becomes the default relevant geographic market for sellers located within the submarket for purposes of the market power analysis (both indicative screens and DPT).”<sup>17</sup> However, the definition of the relevant geographic market can change over time, so the Commission determines relevant geographic markets under FPA section 203 on a case-by-case basis based on the record in each case.<sup>18</sup> Consequently, the Commission established that, “[t]o the extent that the Commission finds that a submarket exists within an RTO/ISO, intervenors or sellers can provide evidence to the contrary; thus, a submarket, like other default geographic markets, is a rebuttable default geographic market.”<sup>19</sup> That is, the Commission may determine a submarket exists in one FPA section 203 proceeding, which becomes the default relevant geographic market for sellers located within the submarket for purposes of the market power analysis, but later find the submarket no longer exists in a different proceeding based on a different record.<sup>20</sup> We clarify that the

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<sup>16</sup> December Order, 165 FERC ¶ 61,226 at P 79 (“Based on the results of Applicants’ Delivered Price Tests for the MISO, MISO South, and WOTAB markets, we find that the Proposed Transaction is unlikely to have an adverse effect on competition.”). Thus, any ruling by the Commission on Entergy’s Request could have only a prospective effect on future transactions that raise the issue of whether MISO South should be considered a separate submarket.

<sup>17</sup> *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 119 FERC ¶ 61,295, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh’g*, Order No. 697-A, 123 FERC ¶ 61,055, at P 70, *clarified*, 124 FERC ¶ 61,055, *order on reh’g*, Order No. 697-B, 125 FERC ¶ 61,326 (2008), *order on reh’g*, Order No. 697-C, 127 FERC ¶ 61,284 (2009), *order on reh’g*, Order No. 697-D, 130 FERC ¶ 61,206 (2010), *aff’d sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied sub nom. Public Citizen, Inc. v. FERC*, 576 U.S. 934 (2012).

<sup>18</sup> See Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,118; *see also* Order No. 697-A, 123 FERC ¶ 61,055 at PP 71, 88.

<sup>19</sup> Order No. 697-A, 123 FERC ¶ 61,055 at P 71.

<sup>20</sup> See, e.g., *Atlas Power Finance, LLC*, 157 FERC ¶ 61,237, at P 48 (2016) (finding Connecticut and Southwest Connecticut are no longer submarkets in the ISO New England, Inc. energy market).

Commission will continue this practice of evaluating the definition of a relevant geographic market on a case-by-case basis. In fact, as noted above, concurrently with this order, we are issuing an order approving the application in Docket No. EC19-63-000 and finding, based on the evidence filed in that proceeding, that MISO South no longer is a submarket. Because we grant clarification, we need not address the arguments Entergy raises on rehearing.

The Commission orders:

The request for clarification is granted, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.