

UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

August 22, 2005 (4:55pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

FirstEnergy Nuclear Operating Company)	Docket Nos. 50-334
Beaver Valley Power Station Unit)	50-346
Nos. 1 and 2; Davis-Besse Nuclear)	50-412
Power Station Unit No. 1; Perry)	50-440
Nuclear Power Plant Unit No. 1)	

PETITION FOR LEAVE TO INTERVENE OF
THE CITY OF CLEVELAND, OHIO

Pursuant to Rule 2.309 of the Rules of Practice for Domestic Licensing Proceedings of the Nuclear Regulatory Commission (the "Commission" or the "NRC"), 10 C.F.R. §2.309 (2005), and the Commission's Notices of Filing issued on August 2, 2005 (the "Notices of Filing")¹, the City of Cleveland, Ohio ("Cleveland"), hereby moves to intervene in the above-captioned proceedings concerning the filing by FirstEnergy Nuclear Operating Company ("FENOC"), on behalf of the Pennsylvania Power Company ("Penn Power"), Ohio Edison Company ("Ohio Edison"), the Toledo Edison Company ("Toledo Edison"), and the Cleveland Electric Illuminating Company ("CEI")

¹ FirstEnergy Nuclear Operating Co., Beaver Valley Power Station Unit Nos. 1 and 2, 70 Fed. Reg. 44,390 (N.R.C. August 2, 2005) (Notice of Consideration of Approval of Transfer of Facility Operating Licenses); FirstEnergy Nuclear Operating Co., Davis-Besse Nuclear Power Station Unit No. 1, 70 Fed. Reg. 44,391 (N.R.C. August 2, 2005) (Notice of Consideration of Approval of Transfer of Facility Operating Licenses); FirstEnergy Nuclear Operating Co., Beaver Valley Power Station Unit Nos. 1 and 2, 70 Fed. Reg. 44,392 (N.R.C. August 2, 2005) (Notice of Consideration of Approval of Transfer of Facility Operating Licenses); FirstEnergy Nuclear Operation Co., Perry Nuclear Power Plant Unit No. 1, 70 Fed. Reg. 44,393 (N.R.C. August 2, 2005) (Notice of Consideration of Approval of Transfer of Facility Operating Licenses); FirstEnergy Nuclear Operation Co., Perry Nuclear Power Plant, 70 Fed. Reg. 44,393 (N.R.C. August 2, 2005) (Notice of Consideration of Approval of Transfer of Facility Operating Licenses).

(collectively, the “Operating Companies”) and FirstEnergy Nuclear Generation Corporation (“FENGenCo”) of the following applications:

(i) “Application for Order Consenting to Transfer of Licenses and Approving Conforming License Amendments,” on May 18, 2005, as supplemented by letter dated July 15, 2005, requesting the Commission’s authorization to transfer Penn Power’s ownership interests in Units 1 and 2 of the Beaver Valley Power Station (“Beaver Valley”) and Unit 1 of the Perry Nuclear Generating Station (“Perry”) to FENGenCo and approval of conforming administrative amendments to Facility Operating License Nos. DPR-66 and NPF-73 (Beaver Valley) and License No. NPF-58 (Perry); and

(ii) “Application for Order Consenting to Transfer of Licenses and Approving Conforming License Amendments,” on June 1, 2005, as supplemented by letter dated July 15, 2005, requesting the Commission’s authorization to transfer the respective ownership interests of Ohio Edison, Toledo Edison, CEI, and OES Nuclear, Inc., in Beaver Valley, Perry, and Unit 1 of the Davis-Besse Nuclear Power Station (“Davis-Besse,” and together with Perry and Beaver Valley, the “Nuclear Assets”) to FENGenCo and approval of conforming administrative amendments to the License Nos. DPR-66 and NPF-73 (Beaver Valley), NPF-58 (Perry), and NPF-3 (Davis-Besse).

As discussed below, the licenses for both Perry and Davis-Besse contain antitrust conditions that were imposed upon vertically-integrated companies, the breadth and effect of which will be significantly affected by the proposed amendments to License Nos. NPF-58 and NPF-3. Specifically, FENOC proposes to amend the antitrust licensing provisions “such that FENGenCo would be subject to the conditions, and would be responsible for any actions of FENOC that contravene the antitrust conditions.” *See*

FENOC, Davis-Besse Nuclear Power Station, 70 Fed. Reg. at 44,392; *see also* FENOC, Perry Nuclear Power Plant, 70 Fed. Reg. at 44,393 and FENOC, Perry Nuclear Power Plant, 70 Fed. Reg. at 44,394. If the proposed amendments are accepted by the Commission, the Operating Companies will no longer be licensees and would not be responsible for or subject to the antitrust conditions. *Id.* The conditions would become the responsibility of FENGenCo, a newly-formed subsidiary of FirstEnergy Solutions Corporation, itself a subsidiary of FirstEnergy Corporation (“FirstEnergy”), the parent of the Operating Companies. FENGenCo will be exclusively engaged in nuclear generation. As a nuclear generator, FENGenCo is simply incapable of ensuring that antitrust conditions will be complied with by the Operating Companies or other FirstEnergy subsidiaries that exist now or may be created in the future. Through parallel proceedings before the Federal Energy Regulatory Commission (“FERC”), it has become apparent that FirstEnergy is cognizant of this “gap” in the applicability of the antitrust conditions and is seeking to capitalize on this opportunity to relieve the Operating Companies of the obligations imposed by the conditions.

Cleveland requests that the Commission reject the attempt by FirstEnergy to nullify the antitrust licensing conditions by reconfiguring its corporate structure and transferring the licenses to FENGenCo. FENGenCo is clearly unable to comply with the conditions, which pertain to generation (both nuclear and non-nuclear), transmission, and distribution services. For this reason, Cleveland respectfully urges the Commission to condition its authorization to transfer the licenses on a commitment by FirstEnergy to preserve the *status quo* by honoring the conditions through each of the Operating Companies and its other subsidiaries.

I. COMMUNICATIONS

Communications regarding this matter should be addressed to the following persons, who should also be designated for service on the Commission's official list:²

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II. DESCRIPTION OF CLEVELAND'S INTERESTS

Cleveland owns and operates Cleveland Public Power ("CPP"), a municipal electric system that is interconnected at three locations with the transmission system

² Cleveland requests, to the extent necessary, that the Commission waive the requirements of 10 C.F.R. §2.304(e) (2005) to permit all of the persons named above to be included on the Commission's official service list for these proceedings.

operated by FirstEnergy subsidiary American Transmission Systems, Inc. ("ATSI"). CPP provides retail electric service to customers within and outside the corporate boundaries of Cleveland. CPP is the largest municipal electric system in Ohio, serving approximately 80,000 customers and having a peak load in excess of 300 MW.

In order to serve its load, CPP is an active participant in the markets for short, intermediate, and long-term power and energy. It presently purchases power from various utilities. In addition, CPP owns and operates 48 MW of combustion turbine generating capacity and has installed 11 MW of diesel-powered generators. It purchases transmission service from several providers, but all of the power it purchases is delivered to the City over ATSI transmission lines pursuant to the Midwest ISO Tariff. Therefore, any changes to the antitrust conditions could potentially affect Cleveland.

III. PETITION TO INTERVENE

FENOC's request for transfer of the licenses to FENGenCo is the latest example of the corporate reorganization and unbundling of FirstEnergy, from a few vertically-integrated companies to a much larger group of single-function companies. Pursuant to this proposed reorganization, FirstEnergy's nuclear generation assets will be held by FENGenCo, a subsidiary created exclusively for that purpose. FirstEnergy, on behalf of itself, the Operating Companies, and FENGenCo, has also filed an application at the FERC seeking approval by that agency to transfer the respective ownership interests of the Operating Companies in the Nuclear Assets to FENGenCo. *See* Joint Application of FirstEnergy Corp., on behalf of Cleveland Electric Illuminating Co., Ohio Edison Co.,

Toledo Edison Co., and the Pennsylvania Power Co., FERC Docket No. EC05-84-000 (May 19, 2005). According to its applications pending here, transfer of the licenses to FENGenCo is a necessary precondition to the transfer of ownership of the Nuclear Assets. *See* Application (May 18, 2005), Enclosure No. 1 at 5-6; Application (June 1, 2005), Enclosure No. 1 at 8.

Through its applications to transfer licenses currently held by each of the Operating Companies to FENGenCo, FENOC is proposing to amend the licenses to reflect that FENGenCo will be responsible for compliance with the antitrust conditions. *See* Application (May 18, 2005), Enclosure 1, Exhibit A, Attachment 3; Application (June 1, 2005), Enclosure 1, Exhibit A, Attachments 3 and 4. Under the proposed scenario, the antitrust conditions will remain in place following the transfer of the licenses to FENGenCo, although the Operating Companies will no longer be obligated to comply with the them. Having failed previously to remove the conditions, FirstEnergy now seeks to escape their reach.

The antitrust conditions essentially require, among other things, that the licensees permit interconnection to the FirstEnergy transmission system upon reasonable terms and conditions, provide certain wheeling access rights over FirstEnergy transmission facilities, and not attach certain conditions to the sale of electricity or bulk power services. Because Cleveland is interconnected only with FirstEnergy and relies upon transmission service through ATSI, Cleveland opposes the proposed transfer of the licenses to FENGenCo unless it is made absolutely clear that the antitrust conditions remain in place and enforceable as to FirstEnergy and its subsidiaries, regardless of which FirstEnergy subsidiary holds the licenses and owns the Nuclear Assets.

The antitrust conditions provide municipal utilities such as Cleveland, a transmission customer and competitor of the Operating Companies and of CEI in particular, with important rights relating to generation, transmission, and distribution services. Cleveland actively participated in the antitrust investigation by the NRC that resulted in the imposition of the conditions. The antitrust conditions were imposed, in part, to remedy anti-competitive conduct by CEI against Cleveland, and the conditions continue to serve as a safeguard for Cleveland against further anti-competitive conduct by the Operating Companies. Cleveland has a direct interest in any proposed modifications to the conditions that are authorized as a result of this proceeding. No other party can adequately represent Cleveland's interests. Moreover, participation in this proceeding by Cleveland is consistent with the public interest. Cleveland therefore requests that the Commission grant its petition for leave to intervene.

IV. CONTENTIONS OF CLEVELAND

As a member of American Municipal Power-Ohio, Inc. ("AMP-Ohio"), Cleveland will not repeat the comments of AMP-Ohio but incorporates them herein by reference. It suffices here to state that, as AMP-Ohio has demonstrated, FirstEnergy's previous attempts to rid itself of the license conditions in an overt manner have not succeeded, and it now seeks to accomplish much the same result by seeking to limit the applicability of the conditions to a subsidiary that does nothing other than to generate electricity at nuclear plants.

It is also appropriate here to recognize that Cleveland's position *vis-à-vis* the license conditions is somewhat different from that of AMP-Ohio and its other members (as AMP-Ohio itself explains).

As did AMP-Ohio, Cleveland raised objections to the 1997 merger between Ohio Edison and Centerior that created FirstEnergy, and both AMP-Ohio and Cleveland ultimately withdrew their oppositions as part of separately negotiated, and very different, settlement agreements. The settlement agreement among Cleveland, FirstEnergy and the FirstEnergy operating companies stated that the antitrust licensing conditions "shall continue to apply to all dealings between the FirstEnergy Operating Companies and CPP irrespective of the agreements or tariffs pursuant to which such dealings shall occur. . . ." Agreement Among Centerior Energy Corporation, the Cleveland Electric Illuminating Company, Toledo Edison Company, Ohio Edison Company, FirstEnergy Corporation, and the City of Cleveland, Ohio (June 11, 1997) at page 21, paragraph 20. FirstEnergy also agreed that it "shall not seek to modify the operative terms and conditions" of the antitrust license conditions in the same manner as it had tried, unsuccessfully, several years previously at this Commission. *Id.*

In June of this year, in commenting upon the May application of FirstEnergy for FERC approval of the transaction at issue here, Cleveland expressed concern that FirstEnergy's prior commitments might not encompass all of the license conditions, because the settlement agreement was limited to the "Operating Companies." Motion for Leave to Intervene and Comments of the City of Cleveland, Ohio, FERC Docket No. EC05-84-000 (June 8, 2005) at 6-7. In response, FirstEnergy stated that the commitments regarding the licensing conditions made by FirstEnergy "will continue to

apply to the FirstEnergy affiliates that have acquired or will acquire ownership of the generation and transmission assets formerly owned by the FirstEnergy Operating Companies.” Response of FirstEnergy Corp. to Motion for Leave to Intervene and Comments of American Municipal Power-Ohio, Inc. and the City of Cleveland, FERC Docket No. EC05-84-000 (June 21, 2005) at 6. FirstEnergy added that its commitment includes ATSI and FENGenCo, although FirstEnergy did not expressly renew its commitment with respect to the Operating Companies. *Id.*

It may appear that, between the settlement agreement and its further commitments recently made to FERC, FirstEnergy has effectively obligated itself to abide by the antitrust conditions with respect to Cleveland (although not with respect to AMP-Ohio or its other members). However, its steadfast refusal to state affirmatively that all subsidiaries will comply with the license conditions leaves open the possibility that, either by virtue of its most recent activity or pursuant to some further reconfiguration of its corporate structure, it will seek to maneuver its way around one or more of them.

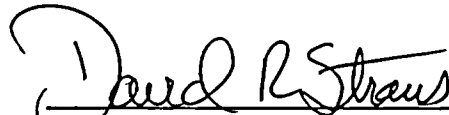
FirstEnergy should not be permitted to reshuffle its corporate deck and thereby avoid full compliance with conditions imposed by this Commission. The most straightforward and effective way to assure that the conditions are complied with as intended is to require as a condition of approval that FirstEnergy make the necessary commitment. That is, FirstEnergy’s applications should be approved only if it commits that all of its subsidiaries will be bound by the license conditions. Such a commitment cannot possibly harm FirstEnergy. However, its refusal, thus far, to make that

commitment shows that a failure by the Commission to require it could well lead to harm to those who were intended to benefit from the conditions.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, Cleveland respectfully requests that the Commission (i) grant its petition for leave to intervene in the above-referenced proceedings and (ii) condition its approval of the transfer of the licenses to FENGenCo to require a commitment by FirstEnergy that the antitrust license conditions remain applicable to FirstEnergy and all of its subsidiaries and affiliates, regardless of the corporate structure of the FirstEnergy companies.

Respectfully submitted,



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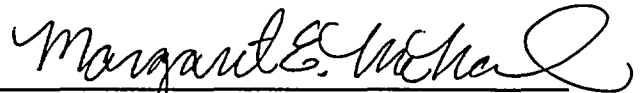
CERTIFICATE OF SERVICE

I hereby certify that I have on this 22nd day of August, 2005, caused a copy of the foregoing document to be sent by electronic and first-class, United States mail to the following parties designated for service in the proceedings referenced above:

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