

January 9, 2006 (3:40pm)

**UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION**

**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)	

**REQUEST FOR CLARIFICATION
BY AMERICAN MUNICIPAL POWER-OHIO, INC., AND
THE CITY OF CLEVELAND, OHIO**

Pursuant to 10 C.F.R. §2.1325, American Municipal Power-Ohio, Inc. ("AMP-Ohio"), and the City of Cleveland, Ohio ("Cleveland"), respectfully request that the Nuclear Regulatory Commission (the "Commission" or the "NRC") clarify, in connection with its consideration of the pending Petitions for Leave to Intervene of AMP-Ohio and Cleveland, filed with the Commission on August 24, 2005, provisions of the "Order Approving Transfer of Licenses and Conforming Amendments," issued on November 15, 2005¹ (as corrected on December 16, 2005), relating to antitrust conditions contained in the operating licenses for the nuclear facilities referenced above. In these orders, the Office of Nuclear Reactor Regulation approved the transfer of operating licenses for the Davis-Besse Nuclear Power Station Unit No. 1 and the Perry Nuclear Power Plant Unit No. 1 to FirstEnergy Nuclear Generation Corporation ("FENGenCo"), a subsidiary of FirstEnergy Corporation ("FirstEnergy") that is solely engaged

¹ AMP-Ohio and Cleveland note at the outset that counsel to Cleveland and AMP-Ohio, nor Cleveland and AMP-Ohio, were served with a copy of the November 15th Order and learned that the order had been issued only after FirstEnergy's counsel in a parallel proceeding before the Federal Energy Regulatory Commission moved to lodge the order with that agency. Cleveland remains concerned that its counsel may not have been kept apprised by the Commission Staff of other developments in these proceedings.

in nuclear generation. Although the Office of Nuclear Reactor Regulation conceded in its orders that FENGenCo is not an integrated utility and is apparently unable to comply with certain of the antitrust conditions included in the operating licenses for these facilities, the proposed license transfers were nevertheless authorized by the NRC Staff.

The Commission should clarify that transferring the operating licenses to a non-integrated utility essentially does, contrary to the Staff's conclusion, amount to a substantive change in the antitrust licensing conditions by rendering some of them moot. The Commission should also, as AMP-Ohio and Cleveland contended in their Petitions for Leave to Intervene, require a commitment from FirstEnergy that it and its subsidiaries and affiliates will continue to comply with the antitrust conditions following the transfer of the operating licenses and nuclear assets to FENGenCo.

Based on its determination that FENGenCo, as a non-vertically integrated utility, is incapable of performing transmission and distribution activities required by the antitrust conditions, the NRC Staff Order should have imposed the condition sought by AMP-Ohio and Cleveland in their initial petitions in this proceeding—namely, that FirstEnergy commit that it and its various affiliates and subsidiaries engaged in the transmission and distribution of energy will continue to be bound by the antitrust conditions following the transfer of the operating licenses. The Safety Evaluation performed by the Office of Nuclear Reactor Regulation² appended to the Staff Orders concludes that “FENGenCo is not an integrated utility with transmission and distribution facilities and therefore would not appear to be able to perform certain actions specified by the antitrust conditions, such as wheeling, strictly on its own. . . .” See Safety Evaluation at 10. This conclusion is entirely consistent with the contentions made

² It is not altogether clear why the antitrust conditions would be addressed in a safety evaluation.

by AMP-Ohio and Cleveland in their initial petitions for intervention in this proceeding and is not controverted by FirstEnergy.

Rather than requiring FirstEnergy and its subsidiaries and affiliates to commit to comply with those provisions of the antitrust conditions that FENGenCo is, by itself, incapable of complying with, however, the Staff Order instead determines that “[t]he applications are not proposing any changes to the substantive requirements set forth in the antitrust conditions . . . [g]iven that the proposed conforming amendments only seek to reflect that FENGenCo will become the holder of the licenses . . . the NRC staff finds the proposed amendments to the existing antitrust conditions acceptable.” *Id.* The Staff Order makes no attempt to link its premise—that, post-transfer, some license conditions will become moot—with its conclusion that FirstEnergy’s proposal is acceptable.

As AMP-Ohio and Cleveland have previously contended, the issue of which entity is bound by the antitrust conditions *is* a substantive issue. If FENGenCo, as the licensee, is incapable of performing some or all of the actions required by the conditions (as the NRC Staff found), and no FirstEnergy entity that is capable of performing those actions is obligated to do so, then the conditions will have been effectively suspended without the Commission having determined that suspension of the antitrust conditions is appropriate. *See, e.g., Ohio Edison (Perry Nuclear Power Plant Unit No. 1) et al.*, 36 N.R.C. 47, 1992 NRC LEXIS 26 at *24-26 (1992); *aff’d* 36 N.R.C. 269, 1992 NRC LEXIS 52 (1992). FirstEnergy has previously attempted unsuccessfully to eliminate the antitrust conditions as to Davis-Besse and Perry. *Id.* Unless the Commission imposes the modest requirement AMP-Ohio and Cleveland seek, which requires no alteration to the terms of the licenses themselves (but is easily accomplished in an order by this Commission), FirstEnergy will have achieved, albeit indirectly through this

license transfer proceeding, the elimination of the antitrust conditions as to certain of its operating companies where it previously failed to have the conditions formally suspended.

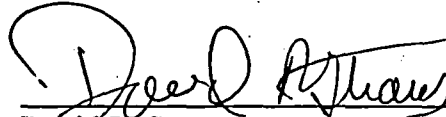
AMP-Ohio and Cleveland acknowledge the Commission's policy against conducting fully-fledged antitrust investigations in the context of license transfer proceedings (*see, e.g., Kansas Gas & Electric Co. (Wolf Creek Generating Station Unit 1)*, 49 N.R.C. 441, 1999 NRC LEXIS 85 (1999)) and is not, by virtue of its arguments in these proceedings, suggesting that the Commission do so here. Rather, AMP-Ohio and Cleveland essentially request that the Commission maintain the status quo with respect to the licenses that contain antitrust conditions by assuring AMP-Ohio and Cleveland that some FirstEnergy entity will comply with the conditions if FENGenCo, alone, cannot. AMP-Ohio and Cleveland reiterate that they are not requesting that the Commission require certain FirstEnergy operating companies to continue to be licensees, continue to be bound by other provisions of the operating licenses after the licenses have been transferred to FENGenCo, or comply with any new or different obligations.

It has never been the objective of AMP-Ohio or Cleveland to prevent or impede the transfer of the nuclear assets themselves or their operating licenses, except to the extent that existing antitrust protections (that are, in AMP-Ohio and Cleveland's view, critical to the prevention of anticompetitive conduct by FirstEnergy and its related companies) will be effectively nullified if the condition on the license transfer that Cleveland requested in their Petitions for Intervention is not imposed. AMP-Ohio and Cleveland understand that initial steps in the transfer of the nuclear assets to FENGenCo have already occurred. AMP-Ohio and Cleveland are merely requesting that the viability of the conditions be preserved as to FirstEnergy and its various subsidiaries and affiliates and, through this request for clarification,

are urging the Commission to act on their pending Petitions for Intervention and, in connection with those petitions, clarify the status of the antitrust conditions with respect to FirstEnergy and its subsidiaries and affiliates other than FENGenCo.³

WHEREFORE, for the foregoing reasons, AMP-Ohio and Cleveland respectfully request that the Commission (i) grant their Petitions 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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³ As this Commission is aware, AMP-Ohio and Cleveland have also argued before the Federal Energy Regulatory Commission that it should not approve the transfer of the nuclear assets unless FirstEnergy commits that the antitrust conditions will continue to apply to itself and its entire family of companies. The FERC has declined to rule on AMP-Ohio and Cleveland's request, on the basis that the NRC is the appropriate agency before which to pursue this issue. See "Order Authorizing Disposition and Acquisition of Jurisdictional Facilities," *FirstEnergy Corp.*, FERC Docket No. EC05-84-000, 112 FERC ¶ 61,243, at P 24 (2005). The FERC's approval of the nuclear asset transfer and its deferral to this Commission with respect to the applicability of the antitrust conditions is pending on rehearing. See "Order Granting Rehearing for Further Consideration," *FirstEnergy Corp.*, FERC Docket No. EC05-84-001 (November 2, 2005).

CERTIFICATE OF SERVICE

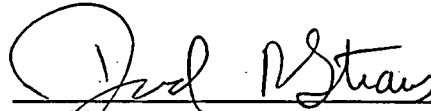
I hereby certify that I have on this 9th day of January, 2006, served a copy of the foregoing document via electronic mail and first class mail on the persons designated on the official service list maintained by the Commission in the proceedings referenced above, addressed as follows:

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