

December 28, 2006

Gary R. Leidich
President and Chief Nuclear Officer
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Mail Stop A-GO-19
76 South Main Street
Akron, OH 44308

SUBJECT: ORDER APPROVING APPLICATION REGARDING PROPOSED CORPORATE
RESTRUCTURING FOR PERRY NUCLEAR POWER PLANT, UNIT NO. 1 (TAC
NO. MD2185)

Dear Mr. Leidich:

The Nuclear Regulatory Commission (NRC) staff has completed its review of the application dated June 6, 2006, as supplemented by letters dated June 9 and August 15, 2006, requesting approval of the indirect transfer of control of the facility operating license for Perry Nuclear Power Plant, Unit No. 1, to the extent held by FirstEnergy Nuclear Generation Corp. (FENGenCo), that would result from the proposed corporate restructuring under which FirstEnergy Solutions Corp. would become the direct parent of FENGenCo. The enclosed Order approves the proposed indirect license transfer pursuant to Section 50.80 of Title 10 of the *Code of Federal Regulations*, subject to the condition described therein.

Enclosure 2 contains the NRC staff's safety evaluation (SE) related to the preceding action. The SE is available for public inspection in the NRC's Public Document Room and accessible electronically from the Agencywide Documents Access and Management System's Electronic Reading Room.

The Order has been forwarded to the Office of the *Federal Register* for publication.

Sincerely,

/RA/

Thomas J. Wengert, Project Manager
Plant Licensing Branch III-2
Division of Operating Reactor Licensing
Office of Nuclear Reactor Regulation

Docket No. 50-440

Enclosures:

1. Order Approving Proposed Corporate Restructuring
2. Indirect License Transfer SE

cc w/encls: See next page

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)	
)	
FIRSTENERGY NUCLEAR OPERATING COMPANY)	
)	
FIRSTENERGY NUCLEAR GENERATION CORP.)	
)	
(Perry Nuclear Power Plant, Unit No. 1))	Docket No. 50-440
)	
)	License No. NPF-58

ORDER APPROVING APPLICATION REGARDING PROPOSED
CORPORATE RESTRUCTURING

I.

FirstEnergy Nuclear Operating Company (FENOC) and FirstEnergy Nuclear Generation Corp. (FENGenCo), along with the Ohio Edison Company, are the holders of Facility Operating License NPF-58, which authorizes the possession, use, and operation of Perry Nuclear Power Plant, Unit No. 1 (Perry). The facility is located in Lake County, Ohio.

II.

By letter dated June 6, 2006, as supplemented by letters dated June 9 and August 15, 2006, FENOC, the licensed operator of Perry, acting on behalf of FENGenCo and FirstEnergy Solutions Corp. (FE Solutions), submitted an application to the U.S. Nuclear Regulatory Commission (NRC or Commission) requesting, pursuant to Section 50.80 of Title 10 of the *Code of Federal Regulations* (10 CFR), approval of the indirect transfer of control of FENGenCo's license to own 87.42 percent of Perry. FE Solutions and FENGenCo are both currently wholly owned direct subsidiaries of FirstEnergy Corp. (FirstEnergy). This action is

being sought as a result of a planned corporate restructuring which would make FENGenCo: 1) a wholly owned direct subsidiary of FE Solutions; and 2) a wholly owned second-tier subsidiary of FirstEnergy. The Ohio Edison Company, which holds a leased interest in Perry and is licensed to possess such interest, is not involved in the planned corporate restructuring. The proposed corporate restructuring involves no changes to the facility license. Accordingly, no license amendments are requested in the application.

A "Notice of Consideration of Approval of Application Regarding Proposed Corporate Restructuring, and Opportunity for a Hearing," was published in the *Federal Register* on July 12, 2006 (71 FR 39370-39371). No comments or hearing requests were received.

Under 10 CFR 50.80, no license, or any right thereunder, shall be transferred, directly or indirectly, through transfer of control of the license, unless the Commission shall give its consent in writing. Upon review of the information in the application submitted by FENOC and other information before the Commission, the NRC staff has determined that the subject corporate restructuring will not affect the qualifications of FENGenCo to hold the license to the same extent now held by FENGenCo, and that the indirect transfer of the license as held by FENGenCo effected by the corporate restructuring is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto, subject to the condition discussed herein.

The findings set forth above are supported by a safety evaluation dated December 28, 2006.

III.

Accordingly, pursuant to Sections 161b, 161i, and 184 of the Atomic Energy Act of 1954, as amended (the Act), 42 USC §§ 2201(b), 2201(i), and 2234; and 10 CFR 50.80, IT IS HEREBY ORDERED that the application regarding the proposed corporate restructuring and indirect license transfer is approved, subject to the following condition:

Should the proposed corporate restructuring not be completed by December 28, 2007, this Order shall become null and void, provided, however, upon written application and good cause shown, such date may be extended by order.

This Order is effective upon issuance.

For further details with respect to this Order, see the application dated June 6, 2006, as supplemented by letters dated June 9 and August 15, 2006, and the safety evaluation dated December 28, 2006, which are available for public inspection in the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area 01 F21, 11555 Rockville Pike (first floor), Rockville, Maryland, and accessible electronically from the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, <http://www.nrc.gov/reading-rm/adams.html>. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at 1-800-397-4209, 301-415-4737, or by e-mail to pdr@nrc.gov.

Dated at Rockville, Maryland, this 28th day of December 2006.

FOR THE NUCLEAR REGULATORY COMMISSION

/RA/

John W. Lubinski, Acting Director
Division of Operating Reactor Licensing
Office of Nuclear Reactor Regulation

SAFETY EVALUATION BY THE OFFICE OF NUCLEAR REACTOR REGULATION
RELATED TO INDIRECT TRANSFER OF FACILITY OPERATING LICENSES
OF FIRSTENERGY NUCLEAR GENERATION CORP.
BEAVER VALLEY POWER STATION, UNITS 1 AND 2
DAVIS-BESSE NUCLEAR POWER STATION, UNIT NO. 1
PERRY NUCLEAR POWER PLANT, UNIT NO. 1
DOCKET NOS. 50-334, 50-412, 50-346, AND 50-440

1.0 INTRODUCTION

By application dated June 6, 2006 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML061670079), FirstEnergy Nuclear Operating Company (FENOC, the applicant), acting on behalf of FirstEnergy Nuclear Generation Corp. (FENGenCo) and FE Solutions Corp. (FE Solutions), requested that the NRC, pursuant to Title 10 of the *Code of Federal Regulations* (10 CFR) Section 50.80, "Transfer of licenses", consent to the indirect license transfers that would be effected by a proposed corporate restructuring described below resulting in the transfer of control of FENGenCo to FE Solutions. The application was supplemented by letters dated June 9, 2006, and August 15, 2006. Notices of the June 6, 2006, application for Beaver Valley Power Station (BVPS) Unit 1 and 2, Davis-Besse Nuclear Power Station (Davis-Besse), Unit 1, and Perry Nuclear Power Plant (Perry), Unit 1 were published in the *Federal Register* on July 12, 2006 (71 FR 39371-39372, 71 FR 39370 and 71 FR 39370-39371, respectively). The June 9 and August 15, 2006, supplements to the June 6, 2006, application did not expand the scope of the application beyond that noticed in the *Federal Register*.

Previously, FENOC had submitted two applications to the U.S. Nuclear Regulatory Commission (NRC, the Commission) requesting the direct transfer of the licenses with respect to the proposed transfer of all the ownership interests (all non-leasehold interests) in four nuclear power reactor units held by certain subsidiaries of FirstEnergy Corp. (FirstEnergy) to FENGenCo, a new nuclear generation subsidiary of FirstEnergy. FENOC is the licensed operator for the four reactor units.

In the first application dated May 18, 2005 (ADAMS Accession No. ML051450431), as supplemented by letters dated July 15 (ADAMS Accession No. ML052070592) and October 31, 2005 (ADAMS Accession No. ML053120323), FENOC, acting on behalf of FENGenCo and Pennsylvania Power Company (Penn Power), requested that the NRC approve the direct license transfers associated with the transfer of Penn Power's 65-percent undivided ownership interest in, BVPS Unit 1, 13.74-percent undivided ownership interest in BVPS, Unit 2, and 5.24-percent undivided ownership interest in, Perry, Unit 1 to FENGenCo.

In the second application dated June 1, 2005 (ADAMS Accession No. ML051570371), also supplemented by the above letters dated July 15 and October 31, 2005, FENOC, acting on behalf of FENGenCo, Ohio Edison Company (Ohio Edison), OES Nuclear, Inc. (OES Nuclear), the Cleveland Electric Illuminating Company (Cleveland Electric), and the Toledo Edison Company (Toledo Edison), (as a group, Ohio Edison, OES Nuclear, Cleveland Electric, and Toledo Edison were referred to as the Ohio Companies), requested that the NRC approve the following direct license transfers associated with transfer of the ownership interests of the Ohio Companies in BVPS 1, BVPS 2, Perry, and Davis-Besse to FENGenCo:

- Ohio Edison's 35-percent undivided ownership interest in BVPS 1 and 20.22-percent undivided ownership interest in BVPS 2;
- OES Nuclear's 17.42-percent undivided ownership interest in Perry;
- Cleveland Electric's 24.47-percent undivided ownership interest in BVPS 2, 44.85-percent undivided ownership interest in Perry, and 51.38-percent undivided ownership interest in Davis-Besse; and
- Toledo Edison's 1.65-percent undivided ownership interest in BVPS 2, 19.91-percent undivided ownership interest in Perry, and 48.62-percent undivided ownership interest in Davis-Besse.

No transfers or other changes were requested with respect to Ohio Edison's license to possess its 21.66-percent leased interest in BVPS 2 and 12.58-percent leased interest in Perry, nor with respect to Toledo Edison's license to possess its 18.26-percent leased interest in BVPS 2. Ohio Edison and Toledo Edison remained responsible for their respective obligations under the licenses for these leased interests.

The NRC issued an Order on November 15, 2005 (ADAMS Accession No. ML052790510), approving the direct transfers of the licenses. Subsequent to the issuance of the Order, the NRC staff determined that corrections were needed to the cover letter, Order, and conforming amendments for BVPS 2 and Perry, and the non-proprietary and proprietary safety evaluations (SEs). Therefore, the NRC issued a corrected Order on December 16, 2005 (ADAMS Accession No. ML053460182). The corrected Order superceded the November 15, 2005, Order. As a result of these direct transfers, FENGenCo now holds the following undivided ownership interests: 100 percent of BVPS 1, 60.08 percent of BVPS 2, 100 percent of Davis-Besse, and 87.42 percent of Perry.

On May 30, 2006 (ADAMS Accession No. ML061590403), FENOC submitted revised financial information associated with the NRC's December 16, 2005, Order approving the transfer of the licenses as described above to FENGenCo. The May 30, 2006, letter stated that FENOC had identified "two errors of substance" that affected the financial projections submitted as part of the 2005 direct license transfer applications (2005 applications). First, there was a numerical transposition error in the debt-to-equity ratio. Second, the submittals to the NRC did not comport with an associated submittal to the Federal Energy Regulatory Commission (FERC) regarding FERC Account 411 dealing with a FERC-approved rate structure. Both of these errors resulted in lower 5-year revenue projections than those included in the original 2005 applications to the NRC.

The May 30, 2006, letter stated that FENOC believes that the NRC staff's finding of adequate financial qualifications for FENGenCo, as described in the NRC SE supporting the December 16, 2005 Order (the 2005 SE), remains valid because FENGenCo is projected to continue to earn revenues in excess of its operating and maintenance expenses during each of the 5 years of the 2006 through 2010 projection period. The letter further stated that the \$400 million support agreement from FirstEnergy, described in the original 2005 applications, is unaffected by the revised financial projections.

The NRC staff reviewed the May 30, 2006, revised financial data submitted by FENOC in relation to the data in the 2005 SE. The NRC staff concluded that the changes in the financial data from 2005 to the May 2006 projections did not have a material impact on the conclusions of the 2005 SE (see the NRC staff's supplement to the 2005 SE, ADAMS Accession No. ML062080170, dated December 11, 2006; Supplemental SE).

In the June 6, 2006 application for indirect transfer under consideration here, FENOC incorrectly noted that FENGenCo's ownership interest in BVPS 2 was 60.8 percent, which was corrected by the June 9, 2006, letter (ADAMS Accession No. ML061650288), to 60.08 percent.

Subsequently, in the letter to the NRC dated August 15, 2006 (ADAMS Accession No. ML062340523), FENOC stated:

The May 30, 2006 submittal indicated in a footnote to the financial statements that certain accretion costs were being recovered through the Power Supply Agreement (PSA) [with FE Solutions, the proposed intermediate parent of FENGenCo], and therefore, included in the Operating Revenue projections based upon an anticipated application to the Federal Energy Regulatory Commission (FERC). FE [FirstEnergy] is requesting an adjustment in the FERC-approved rates to include FERC Account 411 (net of FERC Account 419) in the rates. Recent pre-application discussions with FERC have confirmed the anticipated inclusion of FERC Account 411 (net of FERC Account 419). However, FERC has recommended that certain non-cash amounts associated with the asset retirement costs be excluded from the rate base input. Consequently, the FENGenCo five-year pro forma income statements were impacted. The revised pro forma income statements resulted in a less than 10% reduction in the yearly net income [from the levels projected in the May 30, 2006 submittal]. . .

According to the August 15, 2006, letter, FENOC believes that the above-described changes to the FENGenCo financial projections are not significant. In the Supplemental SE discussed above, with respect to the August 15, 2006, information, the NRC staff concluded that the changes in the financial data from the 2005 applications to the August 15, 2006, projections did not have a material impact on the conclusions of the 2005 SE.

2.0 BACKGROUND

FE Solutions and FENGenCo are both currently wholly-owned direct subsidiaries of FirstEnergy, a utility holding company based in Akron, Ohio. FE Solutions is the FirstEnergy affiliate responsible for the purchase and sale of electricity in competitive markets. The

proposed corporate restructuring would make FENGenCo a wholly-owned direct subsidiary of FE Solutions and a wholly-owned second-tier subsidiary of FirstEnergy.

The June 6, 2006, application states that the proposed corporate restructuring would consolidate all of FirstEnergy's merchant generation subsidiaries into a single intermediate holding company, FE Solutions, and would involve no changes to any of the facility licenses. The application also states that the proposed corporate restructuring would be a continuation of the reorganization that began with the direct transfers described above.

3.0 REGULATORY EVALUATION

FENOC requested the approval of the indirect transfer of the licenses of FENGenCo, pursuant to 10 CFR 50.80. Section 50.80(a) states, "No license for a production or utilization facility, or any right thereunder, shall be transferred, assigned, or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of the license to any person, unless the Commission shall give its consent in writing."

In addition, the requirements of 10 CFR 50.80(b) and (c) apply. Section 50.80(b) states that an applicant for a license transfer shall include as much of the information described in 10 CFR 50.33, "Contents of applications; general information" and 10 CFR 50.34, "Contents of applications; technical information" of this part "with respect to the identity and technical and financial qualifications of the proposed transferee as would be required by those sections if the application were for an initial license . . ." Section 50.80(c) states that "the Commission will approve the application for the transfer of a license, if the Commission determines: (1) that the proposed transferee is qualified to be the holder of the license; and (2) that transfer of the license is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto." For indirect license transfers, the Commission has held with regard to the first finding above that an application shall be approved if the subject underlying transaction (here the corporate restructuring) will not affect the qualifications of the licensee to hold the license.

4.0 QUALIFICATIONS

4.1 Financial Qualifications

In the SE supporting the December 16, 2005, NRC Order, the NRC staff concluded that the applicant provided sufficient information for newly-formed entities, and demonstrated reasonable assurance of adequate financial qualifications for FENGenCo, as a non-electric utility pursuant to 10 CFR 50.33(f), and that FENGenCo was financially qualified to hold the respective licenses. The NRC staff concluded in the December 11, 2006, Supplemental SE that the revised financial information submitted on May 30 and August 15, 2006, did not have a material impact on the conclusions of the 2005 SE.

The June 6, 2006, application states that there will be no change to FENGenCo's financial qualifications as a result of the proposed establishment of FE Solutions as an intermediate parent company. FENGenCo's current arrangements for the sale of energy from its interests in BVPS 1 and BVPS 2, Davis-Besse, and Perry will not be affected by the proposed corporate restructuring. In particular, the application states that FENGenCo has entered into a Power Supply Agreement with FE Solutions (which was described in the financial qualifications

information provided to support the December 16, 2005, Order) that provides substantial revenue that is more than adequate to recover its maintenance, operating, and capital costs for the transferred assets as anticipated in the 2005 applications. Also, FirstEnergy's \$400 million financial support agreement with FENGenCo (described in the NRC staff's December 2005 SE) will remain in place unaffected by the proposed indirect transfers.

The NRC staff has determined, based on the foregoing, that the findings of the December 16, 2005, Order and the December 11, 2006 Supplemental SE regarding financial qualifications will not be affected, and concludes that the proposed corporate restructuring of FENGenCo's parent organization will not affect the financial qualifications of FENGenCo.

4.2 Decommissioning Funding Assurance

The application represents that FENGenCo's decommissioning funding assurance program approved by the December 16, 2005, Order will be unchanged notwithstanding the corporate restructuring. The application states that all of the 2005 trust fund contributions referenced in the June 1, 2005, application were made, and the \$80 million parent company guarantee for decommissioning funding assurance from FirstEnergy to FENGenCo referenced in the May 18, 2005, application will remain unchanged following the corporate restructuring¹. Therefore, the NRC staff concludes that the proposed corporate restructuring will not affect the decommissioning funding arrangements by FENGenCo for the subject plants.

4.3 Antitrust Review and Existing Antitrust Conditions

The Atomic Energy Act of 1954, as amended, does not require or authorize antitrust reviews of post-operating license transfer applications. *Kansas Gas and Electric Co., et al.* (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441 (1999). The applications submitted by FENOC postdate the issuance of the operating licenses for the four reactor units, and therefore no antitrust review is required or authorized. The existing antitrust conditions in the Perry and Davis-Besse licenses, which were the subject of the conforming amendments approved by the December 16, 2005, Order, will not be changed by the proposed restructuring since there are no proposed license amendments.

¹ The June 6, 2006 application also states that "FirstEnergy will continue to make all future required contributions," referring to the \$80 million of funds for decommissioning that FENGenCo expects to receive from Penn Power and/or other affiliates of FirstEnergy within the next 5 years, as described in the May 18, 2005, application for direct transfers of licenses. While the receipt of these funds by FENGenCo may allow FENGenCo to reduce the amount of the parent company guarantee in the future, such contributions by Penn Power and other FirstEnergy affiliates were not part of the basis for the NRC staff's conclusions in the December 16, 2005 Order, and accordingly are not specifically material to the finding of this safety evaluation.

4.4 Foreign Ownership, Control, or Domination

The June 6, 2006, application gives the names of the directors and the principal officers of FE Solutions and states that all are U.S. citizens. FE Solutions is an Ohio corporation doing business in Ohio. The application further states that the information presented in the foreign ownership and control section of the 2005 applications has not changed, and, as such, FirstEnergy, FE Solutions, and FENGenCo are not owned, controlled or dominated by an alien, a foreign corporation, or a foreign government. The application contains no information to suggest that the corporate restructuring will change this status. Accordingly, the NRC staff does not know or have reason to believe that FENGenCo will be owned, controlled, or dominated by foreign interests following the proposed corporate restructuring.

4.5 Nuclear Insurance and Indemnity

The June 6, 2006, application represents that the proposed indirect transfer of control will not affect the existing Price-Anderson indemnity agreement for BVPS 1, BVPS 2, Davis-Besse, or Perry, and will not affect the current required nuclear property damage insurance pursuant to 10 CFR 50.54(w) and nuclear energy liability insurance pursuant to Section 170 of the Price-Anderson Act and 10 CFR Part 140, "Financial Protection Requirements and Indemnity Agreements." Therefore, the NRC concludes that the proposed restructuring does not raise any problematic nuclear insurance and indemnity issues.

4.6 Technical Qualifications

According to the June 6, 2006, application, the proposed corporate restructuring does not involve any change to FENOC's role as the licensed operator of BVPS 1, BVPS 2, Davis-Besse, and Perry, and will not result in any changes to FENOC's technical qualifications or any changes to the conduct of operations at BVPS 1, BVPS 2, Davis-Besse, or Perry. Thus, the NRC staff has concluded that it need not make any findings with respect to technical qualifications, other than that there will be no effect on FENOC's technical qualifications, since there is no proposed change in operating authority or change in the current operator's qualifications to operate BVPS 1, BVPS 2, Davis-Besse, and Perry.

5.0 ENVIRONMENTAL CONSIDERATION

The subject application is for approval of indirect license transfers. Accordingly, the actions involved meet the eligibility criteria for categorical exclusion set forth in 10 CFR 51.22(c)(21). Pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared in connection with approval of the application.

6.0 CONCLUSION

In view of the foregoing, the NRC staff finds that proposed corporate restructuring as described herein will not affect the qualifications of FENGenCo as holder of the licenses for BVPS 1, BVPS 2, Davis-Besse, and Perry, and that the indirect transfer of licenses, to the extent effected by the restructuring, is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto.

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Date: December 28, 2006

Perry Nuclear Power Plant, Unit 1

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