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UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION



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|-------------------------------------|---|-----------------------|
| In the Matter of |) | |
| |) | |
| The Toledo Edison Company |) | |
| The Cleveland Electric Illuminating |) | |
| Company |) | NRC Dkt. No. 50-346A |
| (Davis-Besse Nuclear Power Station, |) | |
| Unit 1) |) | |
| | | |
| The Cleveland Electric Illuminating |) | |
| Company, et al. |) | NRC Dkt. Nos. 50-440A |
| (Perry Nuclear Power Plant, |) | 50-441A |
| Units 1 & 2) |) | |

CONDITIONAL REQUEST
OF CITY OF CLEVELAND, OHIO
FOR HEARING OF ORDER OF MAY 13, 1980.

The NRC's order of May 13, 1980, provides that "any person who has an interest affected by the order" "may . . . request a hearing with respect to all or any part of" the order.

The order of May 13, 1980, directed The Cleveland Electric Illuminating Company (CEI) to file within 10 days of the date of the Order "modification amendments to the transmission service schedule tariff ordered by the FERC Initial Decision" which "CEI has not appealed to FERC or which were not raised in the FERC proceeding" in accordance with Appendix A to the NRC order of May 13, 1980, and in conformity with the applicable filing requirements of the Federal Energy Regulatory Commission.

The Order of May 13, 1980, was issued by the NRC without awareness of the fact that the FERC's final decision, Opinion No.

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84, had already been issued eight days earlier, on May 5, 1980. This fact is evident from the order which states: "Further action may be required at a later date depending on the final decision of the FERC." CEI filed no application for rehearing of Opinion No. 84 which is a prerequisite to court review under the Federal Power Act. Opinion No. 84 is, therefore, a final, nonreviewable order and is binding upon CEI.

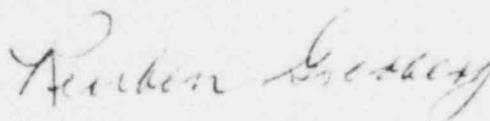
The NRC Order directed modifications which are inconsistent with FERC's Opinion No. 84. On June 10, 1980, CEI filed a revised transmission service tariff in purported compliance with FERC's Opinion No. 84. In that revised tariff CEI adopted some provisions of the NRC order of May 13, 1980 and did not adopt other provisions. On June 12, 1980, CEI filed the same revised tariff with NRC that CEI has filed with FERC. CEI requested that an order issue confirming CEI's compliance with the order of May 13, 1980 "and indicating that the matter is now closed in light of the enclosed Transmission Service Tariff which is currently on file with FERC."

FERC has issued a Notice of the filing made by CEI providing that protests may be filed on or before July 11, 1980. Attached hereto as an Appendix to this conditional request for hearing is the City of Cleveland's protest in which the differences between the transmission tariff as prescribed by FERC in Opinion No. 84 and the tariff as filed by CEI in purported compliance with Opinion No. 84 are discussed. The differences between the provisions of the May 13 order of the NRC and of Opinion No. 84 are also discussed.

As will be seen in reading the City of Cleveland's Protest, there is no reason why the May 13, 1980 order should not be modified to be consistent with the FERC tariff since such consistency involves no violation of the license condition respecting transmission services. NRC's Order of May 13, 1980 recognized that with the issuance of FERC's final decision, further action may be required by the NRC to modify its order to reflect FERC's final decision.

If the order of May 13, 1980 should be modified to bring it into consistency with the tariff prescribed by FERC there will be no occasion for a hearing. If, however, the order be not so modified, the City of Cleveland requests a hearing as required by Section 189(a) of the Atomic Energy Act [42 USC §2239(a)].

Respectfully submitted,



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July 9, 1980

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

The Cleveland Electric Illuminating Company) Docket No. ER78-194

PROTEST OF CITY OF CLEVELAND, OHIO
AGAINST TRANSMISSION SERVICE TARIFF
SUBMITTED BY
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY
IN PURPORTED COMPLIANCE WITH
COMMISSION OPINION NO. 84

Ordering Paragraph (C) of the Commission's Opinion No. 84 required CEI within 45 days from the date of issuance of the Opinion to "file appropriate revisions to its Electric Tariff as required by the initial decision and this Opinion, such revisions to be subject to the approval of the Commission."

The City of Cleveland, Ohio (City), an intervenor in the above-entitled proceeding, files this Protest against The Cleveland Electric Illuminating Company's (CEI) FERC Electric Tariff, Original Volume No. 1, applicable to transmission service to be provided by CEI, which CEI alleges it has modified to conform to Commission Opinion No. 84 and has tendered as in compliance with that Opinion.

PRELIMINARY STATEMENT OF THE CITY OF CLEVELAND

Although this document is designated as a "Protest" against the modified transmission service tariff filed by CEI, City does not protest all differences discussed herein between the modified tariff tendered by CEI and the tariff prescribed by Opinion No. 84. Some of the differences appear to be typographical in nature. Obviously, City does not protest such differences. City brings them to the attention of the Commission so that the typographical errors or omissions can be corrected.^{1/} City's protest is limited to a few differences.

^{1/} City's counsel, on June 18, 1980, by telephone informed CEI's counsel of these typographical errors and omissions and suggested that CEI might wish to file corrected, substitute sheets to eliminate the need for City to address them in its (Footnote 1 continued on next page.)

THE DIFFERENCES IDENTIFIED AND DISCUSSED

The Opening Paragraph
Of "Service Provided"

In Opinion No. 84, the Commission did not adopt City's contention that the transmission service tariff should make available transmission service to entities with the statutory right or privilege to generate and/or distribute electric energy in addition to municipalities and rural electric cooperatives. The Commission, therefore, adopted the opening paragraph of "Service Provided" as prescribed in the Initial Decision. As prescribed in the Initial Decision, the opening paragraph of "Service Provided" is as follows (Initial Decision, Appendix A, p. 1):

"The service provided hereunder (Transmission Service) shall be the transmission of electric power between delivery (interconnection) points of The Cleveland Electric Illuminating Company (CEI) to, from, between, or among any rural electric cooperatives or municipalities located within the Combined CAPCO (Central Area Power Coordination Group) Company Territories (CCCT) (Customer). The service will be 60 Hertz, alternating current and three phase."

CEI took no exception to the Initial Decision's prescription of the opening paragraph of "Service Provided" quoted immediately above. In fact, the provision as prescribed by the Initial Decision and adopted by Opinion No. 84 was essentially the provision proposed by CEI when it originally tendered its transmission service tariff on January 28, 1978. This can be seen, readily, by reference to page 1 of Appendix A of the Initial Decision since the Presiding Administrative Law Judge (ALJ) set forth the tariff provisions as tendered by CEI and showed changes by underlining language added by the Initial Decision and showed deletions in the provisions as tendered by CEI by striking through CEI's language. As the Initial Decision points out the ALJ's changes were made to assure that CEI is obligated to provide two-way transmission service "to, from, between, or among rural electric cooperatives or municipalities" (Initial Decision, pp. 7-8). The ALJ noted that "CEI agrees that the transmission tariff was intended to be available in all directions across CEI's transmission system" (Initial Decision, p. 7).

(Footnote 1 continued from page 1.)

Protest. At the same time, City's counsel suggested that it would also be helpful in evaluating the differences and commenting on them if CEI would file an explanation of the differences between the tariff as tendered and as prescribed in Opinion No. 84. At this point in time, these suggestions of City's counsel have not been adopted. The comments in this Protest on the differences are made without the benefit of explanations for them by CEI.

In its purported compliance tariff filing, CEI has not included the opening paragraph of "Service Provided" as prescribed by the Commission in Opinion No. 84. Instead, CEI has substituted the following:

"A. Service Provided

The Cleveland Electric Illuminating Company (CEI) shall engage in wheeling^{1/} for and at the request of other entities^{2/} in the CCCT^{3/}:

- (a) of power from delivery points of CEI to the entity(ies); and,
- (b) of power generated by or available to such entity as a result of its ownership or entitlements^{4/} in generating facilities to delivery points of CEI designated by the other entity.

The service will be 60 Hertz, alternating current and three phase, (hereinafter referred to as 'Transmission Service').

1/ 'Wheeling' refers to the 'transfer' by direct transmission or displacement of electric power from one utility to another over the facilities of an intermediate utility. Otter Tail Power Co. vs. United States, 410 U.S. 366, 368 (1973).

2/ 'Entity' means any electric generating and/or distribution system or municipality or cooperative with a statutory right or privilege to engage in either of these functions, (hereinafter sometimes referred to as 'Customer').

3/ CCCT is an acronym for the combined CAPCO (Central Area Power Coordination Group) Company territories.

4/ 'Entitlement' includes but is not limited to power made available to an entity pursuant to an exchange agreement."

CEI's substitute provision is not the provision prescribed by Opinion No. 84 either in language or substance. The language differences are obvious. Substantively, while CEI would agree, as the ALJ pointed out, that transmission service "to, from, between, or among" the entities is intended, the absence of these words creates the same possibility of dispute that the ALJ undertook to eliminate and to which CEI took no exception. Opinion No. 84 adopted the ALJ's findings and there is no excuse for CEI's failure to comply with Opinion No. 84 in this respect.

Also, the substitute provision employed by CEI includes transmission service to all entities, although the Commission, in Opinion No. 84, declined to include entities other than municipalities or rural electric cooperatives, with the understanding that if another type of entity requested service and CEI was not prepared to provide a like service on reasonable terms and rates, the Commission would address that refusal. (Opinion No. 84, p. 2). City is not objecting to the transmission service tariff applying to entities other than municipalities and rural electric cooperatives. That was City's objective to which the Commission declined to accede in Opinion No. 84. City is only pointing out that in this respect what CEI has proposed does not comply with what the Commission ordered.

Although CEI has not explained why it substituted the paragraph quoted above for the paragraph prescribed by Opinion No. 84, City assumes that CEI prefers^{2/}, for reasons that are not identified by CEI, to follow the order of the Nuclear Regulatory Commission (NRC) issued May 13, 1980. That NRC order, issued without an awareness of the issuance of Opinion No. 84 on May 5, 1980^{3/}, set forth the paragraph employed by CEI in its purported compliance filing.

The NRC's order of May 13, 1980 cannot serve as an excuse to CEI for its failure to file a compliance tariff conforming with the requirements of Opinion No. 84. The language employed by the NRC order tracks the form of language of the transmission condition imposed by the NRC's decision in issuing licenses and construction permits to CEI and its co-applicants for the Davis-Besse and Perry nuclear units (5 NRC 133; 5 NRC 265), but in preparing a tariff consistent with this license condition, the tariff provision need not adopt the language of the license condition in haec verba so long as the provision employed complies with the license condition's requirements. Thus, when CEI originally tendered its tariff, which it advised the Commission was being tendered to comply with the license condition (Opinion No. 84, p. 1), CEI employed the language prescribed by Opinion No. 84, with the exception, of course, of the Commission's modification to remove any doubt that two-way transmission was intended, as CEI agreed was its intention.

^{2/} As will appear herein, CEI has not followed other requirements of the NRC order and instead followed what Opinion No. 84 prescribed. E.g., deletion of the "sole discretion" and "sole judgment" language in Section A, paragraphs 2 and 3, ordered by Opinion No. 84 (page 3), but not required to be deleted "at this time" by the NRC order of May 13, 1980.

^{3/} The NRC order of May 13, 1980 stated that the directives contained therein "at this time" relate to matters CEI "has not appealed to FERC or which were not raised in the FERC proceeding." "Further action," the NRC order states, "may be required at a later date depending on the final decision of the FERC."

Moreover, it was CEI's position before the ALJ and before the Commission on exceptions that the Commission "may neither review tariff compliance with a license condition established pursuant to the Atomic Energy Act nor modify the tariff to correct noncompliance because enforcement responsibility rests exclusively with the NRC."

Furthermore, the decision of the Licensing Board, affirmed with minor modifications not here relevant by the Appeals Board of the NRC, and adopted by the NRC as its decision, provided that (5 NRC 259):

"The above conditions are to be implemented in a manner consistent with the provisions of the Federal Power Act and all rates, charges or practices in connection therewith are to be subject to the approval of regulatory agencies having jurisdiction over them."

The Commission's power to prescribe the tariff provisions it prescribed in Opinion No. 84 is not open to dispute as a matter of law, and City observes that CEI filed no application for rehearing of Opinion No. 84.

The NRC order of May 13, 1980, provides that any person who has an interest affected by that order may within a specified time request a hearing with respect to all or any part of the order at which hearing the issue would be (NRC order, p. 4):

"Whether CEI should file the amendment to the transmission service schedule as prescribed in this Order."

The Department of Justice has already filed a motion with the NRC requesting modification of the order to conform to the requirements of the Commission's prescribed tariff or, in the alternative, to conduct a hearing on the May 13 order. The motion of the Department of Justice asserts that the May 13 order is inconsistent with and weakens the antitrust relief contained in the license conditions related to transmission services and is inconsistent with the decision of the ALJ and of this Commission in Opinion No. 84.

The time for requesting a hearing (July 9, 1980) has not expired and before it does, City intends also to request that a hearing of the May 13, 1980 order be held in the event the NRC order is not harmonized with the Commission Opinion No. 84.

In light of the fact that the NRC order was issued without awareness of the issuance of this Commission's final decision, as shown above, and the statement in the May 13 order that this Commission's final decision may require modification of the May 13 order, City anticipates that the NRC will modify its order.

In any case, whatever the NRC may do about its order, and notwithstanding the present status of the May 13 order, Opinion No. 84 represents the exercise by the Commission of its lawful authority under the Federal Power Act and CEI must obey the requirements of Opinion No. 84 in making its tariff compliance filing.

The Second Paragraph
of "Service Provided"

The second paragraph of "Service Provided" as prescribed by the Commission also appears on page 1 of Appendix A to the Initial Decision.

In that paragraph CEI has made a number of changes as follows:

(a) Wherever the word "transmit" appears CEI has substituted the word "wheel." CEI has not explained the reason for the change. It represents a change in the word CEI itself used in preparing and submitting the transmission service tariff to the Commission in January 1978. City surmises that the change was made because the NRC order of May 13, 1980 uses "wheel" instead of "transmit" in its version of the second paragraph of "Service Provided." City is of the view that there is no change of substance involved but believes that in this tariff which refers to the service as "Transmission Service" in both the tariff as prescribed by the Commission and in CEI's compliance tariff, the better choice is "transmit" in lieu of "wheel." CEI did not except to use of "transmit" having used that word itself in its original submission of the tariff.

(b) CEI has deleted the words "to Customer" which appear at the end of the second sentence in the second paragraph. Here again CEI has not explained this deletion. City can only surmise that these words were deleted from the tariff prescribed by the Commission because the same sentence appears in the May 13 NRC order without "to Customer." No other explanation appears tenable since these words were CEI's words which it used in the original submission of the transmission tariff. No one ever objected to CEI's use of the words. City is of the view that the words should be retained. Instead of leaving in doubt to whom delivery is to be made, the words "to Customer" make it definite and certain. The more definite and certain a tariff provision, the better.

(c) In addition to omitting the words "to Customer," CEI inserted a footnote at the end of the sentence. The footnote states:

"A determination by CEI with respect to the availability of Transmission Service, the capacity of its bulk transmission facilities and related facilities, and the extent that such Transmission Service

imposes a burden on its system, will not preclude any party requesting such service from petitioning the FERC (or NRC) with respect to CEI's nuclear license for a review of the merits of CEI's determination."

This footnote was not authorized either by the ALJ's Initial Decision or the Commission's Opinion No. 84. The footnote was included in the NRC's order of May 13, 1980 in connection with the NRC's retention of the "sole discretion" language. Obviously, the NRC felt that with the retention of the "sole discretion" language, entities requesting transmission service and denied it by CEI should be on notice that they have recourse to the Commission or the NRC.^{4/} Inclusion of the footnote in connection with the second paragraph of "Service Provided" tends to introduce confusion and weaken the provision. The footnote is not in compliance with Opinion No. 84, is not necessary, and should not be allowed.

(d) The second paragraph of "Service Provided" as prescribed by the Commission includes the following sentence:

"Nothing herein shall be construed as requiring CEI to enlarge its facilities to transmit such power."

This sentence is also retained by the NRC in its order of May 13, 1980.

The sentence has been omitted by CEI in its filing. As in other instances where there is a variance between CEI's compliance tariff and Opinion No. 84, City can only surmise CEI's reason therefor. In this instance, City believes that CEI concluded that retention of the sentence is inconsistent with the provisions of the tariff that were ordered included by Opinion No. 84. They require CEI to include in its planning of transmission capacity the disclosed requirements of its transmission service customers. (Opinion No. 84, pp. 4-5). Hence, CEI omitted the sentence. City agrees that the sentence should be omitted since its retention is inconsistent with the tariff provisions ordered by the Commission and would generate unnecessary disputes if the sentence were now retained. City recommends that this deletion be approved by the Commission.

^{4/} CEI has apparently chosen to follow or not to follow the NRC order of May 13, 1980, apparently, as CEI believes its best interests dictate.

The Third Paragraph
of "Service Provided"

The Commission in Opinion No. 84 (pp. 3-4) required CEI to include in the transmission service tariff the curtailment of service provision included in the NRC license condition. CEI has included the provision. Without the curtailment provision, which requires CEI to reduce its transmission capacity allocations to CAPCO members at least 5% before CEI may reduce wheeling services to other entities, the third paragraph of "Service Provided" stated that CEI shall provide transmission service within the limits of the capacity of its bulk transmission facilities without undue interference with service to interconnected systems "including other members of the CAPCO group." In order to conform the third paragraph of "Service Provided" to the inclusion of the curtailment provision, CEI substituted "except as stated below" for "including." The revision made by CEI is appropriate and City recommends it be allowed.

With respect to the curtailment provision which appears as the first full paragraph on First Revised Sheet No. 4 of the compliance tariff, City suggests that the word "capacity" should be inserted in the fourth line of the paragraph between "transmission" and "allocations."

The Fifth Paragraph
of "Service Provided"

Following the fourth paragraph of "Service Provided," which appears on page 2 of Appendix A of the Initial Decision, CEI has inserted a fifth paragraph required by Opinion No. 84 (pp. 4-5). There is a typographical error in the fifth paragraph which should be corrected. The word "or" should be "of".

Paragraph F, Losses

As proposed by CEI and adopted by the ALJ and the Commission (See Appendix A, p. 5 of Initial Decision), the losses are stated at 2% and CEI agrees to deliver 98% of the power "(adjusted to the nearest whole MW)" each hour to Customer's delivery point. In the compliance tariff, CEI has changed the losses to 1%, the 98% to 99%, and has deleted the parenthetical phrase quoted above.

Apparently, CEI has determined that the losses are 1% and accordingly has revised the paragraph. City does not object thereto and recommends that the change be allowed.

City does not know why the parenthetical phrase has been eliminated. City believes the omission of the phrase may be detrimental to City. In the absence of an explanation by CEI, City objects to the deletion of the phrase.

Paragraph J, Customers
and CEI's Responsibilities

CEI has omitted "at all times in a safe operating condition, will operate their respective lines" from the portion of the first paragraph appearing on page 7 of Appendix A of the Initial Decision. City is confident that the omission is an inadvertent error in typing. These words are necessary and should be restored.

In the second paragraph of this section, appearing on page 7 of Appendix A, there is a typographical error which has not been corrected in the compliance tariff. "Of" in the fourth line of the paragraph should be "or".

Paragraph K, Metering

CEI has added "unless otherwise agreed" at the end of the first sentence of the first paragraph of this section. City does not know why it was added, but City does not object to the addition.

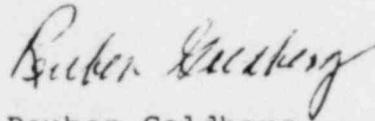
Exhibit A, Point of Receipt and Service Specifications
and
Exhibit B, Delivery Point and Service Specifications

Exhibits A and B appear, respectively, on pages 2 and 3 of Appendix B to the Initial Decision. As proposed by CEI and prescribed by the Commission, the Service Agreement is described in the "Witness Whereof" clauses as "Service Agreement for Provision of Transmission Service." CEI has changed the description in Exhibits A and B to "Service Agreement for Provision of Transmission Service to Municipalities and Rural Electric Cooperatives." The change should be disallowed. The restrictive description CEI now seeks to employ was not proposed by CEI when its original tariff was restricted to municipalities and rural electric cooperatives. The restrictive description is clearly inconsistent with CEI's proposal to make the tariff available to entities in addition to municipalities and rural electric cooperatives. See Compliance Tariff, First Revised Sheet No. 2. The restrictive description is also inappropriate in light of the Commission's intent that other entities shall be entitled to service if such an entity seeks transmission service. Opinion No. 84, p. 2.

CONCLUSION

For each and all of the reasons set forth in this Protest, the compliance tariff should be required to be revised in accordance with this Protest.

Respectfully submitted,



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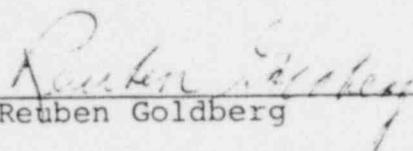
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Units 1 & 2))

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of "Conditional Request Of City Of Cleveland, Ohio For Hearing Of Order Of May 13, 1980" upon each person designated on the official service list.

Dated at Washington, D.C., this 9th day of July, 1980.



Reuben Goldberg