

RAS 11124

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 01/31/06

COMMISSIONERS

SERVED 01/31/06

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield
Gregory B. Jaczko
Peter B. Lyons

In the Matter of)
)
)
FIRSTENERGY NUCLEAR)
OPERATING COMPANY)
)
(Beaver Valley Power Station, Unit Nos. 1 and 2;)
Davis-Besse Power Station, Unit No. 1;)
Perry Nuclear Power Plant, Unit No. 1))
_____)

Docket Nos. 50-334-LT; 50-346-LT;
50-412-LT; & 50-440-LT

CLI-06-02

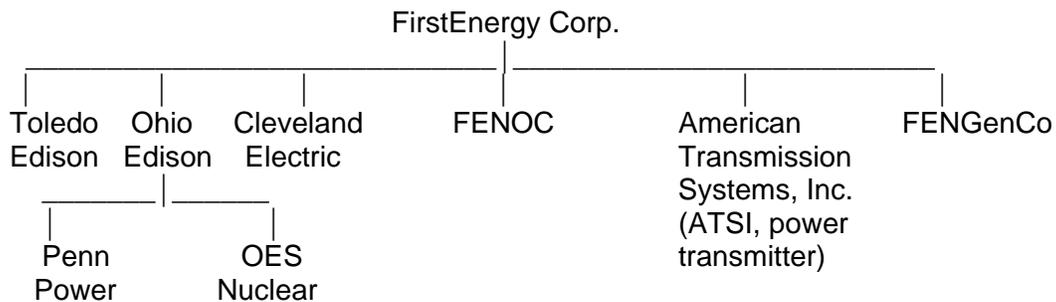
MEMORANDUM AND ORDER

FirstEnergy Corporation (FirstEnergy) is the parent of the owners and of the operator of the Perry, Davis-Besse and Beaver Valley nuclear facilities and is currently engaged in a corporate reorganization of its electric generation assets. To facilitate that reorganization, FirstEnergy's subsidiary FirstEnergy Nuclear Operating Company (FENOC) has filed two license transfer applications on behalf of another of FirstEnergy's subsidiaries -- FirstEnergy Nuclear Generation Corporation (FENGenCo) -- as well as the facilities' five current "operating companies" (also owned by FirstEnergy), viz., Ohio Edison Company (Ohio Edison), Pennsylvania Power Company (Penn Power), Toledo Edison Company (Toledo Edison), Cleveland Electric Illuminating Company (Cleveland Electric), and OES Nuclear, Inc. (OES

Nuclear).¹ Assuming the reorganization is completed as planned, FENGenCo will hold all of FirstEnergy's nuclear generation assets, with the exception of a partial leased interest in the Perry facility retained by Ohio Edison² and partial leased interests in Beaver Valley-2 retained by Ohio Edison and Toledo Edison.

American Municipal Power-Ohio, Inc. (AMP-Ohio) and the City of Cleveland, Ohio, (City of Cleveland) have petitioned to intervene but have not sought a hearing.³ The petitioners do not oppose the license transfers in their entirety, but they do request (as their primary form of relief) that we condition our approval of those transfers "on a commitment by FirstEnergy to preserve the *status quo* [of the licenses' antitrust conditions⁴] by honoring the conditions through

¹ See Applications for Order Consenting to Transfer of Licenses and Approving Conforming License Amendments, dated May 18 and June 1, 2005, as supplemented by letter from Gary R. Leidich, President and Chief Nuclear Officer, FENOC, to the Commission, dated July 15, 2005. The pleadings and applications indicate the following post-reorganization corporate interrelationship of these companies (as well as another company relevant to this proceeding):



² FENOC[’s] Answer to Petitions to Intervene by AMP-Ohio and Cleveland, dated Sept. 15, 2005, at 8 n.22, 11, 18, 22.

³ Petition for Leave to Intervene of American Municipal Power-Ohio, Inc., dated Aug. 22, 2005; Petition for Leave to Intervene of the City of Cleveland, Ohio, dated Aug. 22, 2005. The petitions are largely identical so, for brevity, we will generally cite to only AMP-Ohio’s petition.

⁴ “These conditions prohibit[] Licensees from making the sale of wholesale power or the coordination of services contingent upon agreements to allocate customers, forgo alternative power supplies, or refrain from participating in Commission antitrust proceedings. The conditions also require[] Licensees to connect their transmission lines with those of their competitors; wheel power for competitors; open up membership in [a regional power pool

(continued...)

each of the [o]perating [c]ompanies and [FirstEnergy's] other subsidiaries.”⁵ According to the petitioners, they could thereby enforce those conditions against FirstEnergy and its subsidiaries and affiliates, regardless of which (if any) of those entities were to continue holding operating licenses and owning nuclear generation assets.⁶

FENOC filed an Answer opposing the petitions to intervene. Neither petitioner filed a Reply Brief.⁷ As is usual in our license transfer cases, the NRC Staff is not a party.⁸

We find that the petitioners have failed to provide sufficient support for their claim of potential injury and that they consequently lack standing to intervene. We therefore deny their petitions and terminate this proceeding. Because the NRC Staff has already issued its own order approving the instant license transfers (subject, of course, to our rulings in this adjudication),⁹ FENOC requires no further license transfer authorization from this agency

⁴(...continued)

named Central Area Power Coordinating Group, or] CAPCO to competitors in the CAPCO territory; sell various types of power to competitors on the same terms offered to CAPCO members; share power reserves with interconnected facilities that generate their own power; and give competitors access to power generated by Licensees' nuclear plants.” *City of Cleveland v. NRC*, 68 F.3d 1361, 1364-65 (D.C. Cir. 1995), summarizing *Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), ALAB-560, 10 NRC 265, 296-99 (1979). See also 68 F.3d at 1368-69 (same). The original companies to whom the antitrust conditions were directed in 1979 were Ohio Edison, Penn Power, Toledo Edison, Cleveland Electric, and Duquesne Light Company (which transferred its interests in the subject plants well prior to this proceeding). See *Davis-Besse*, ALAB-560, 10 NRC at 273. At the time, FirstEnergy, FENOC, FENGenCo, and ATSI did not yet exist.

⁵ AMP-Ohio's Petition to Intervene at 3-4. See also *id.* at 15.

⁶ *Id.* at 7, 16. Alternatively, the petitioners ask the Commission to reject the proposed license transfers outright if the Commission cannot, for any reason, ensure that “the antitrust conditions remain viable as to FirstEnergy and all of its subsidiaries and affiliates.” *Id.* at 8.

⁷ 10 C.F.R. § 2.309(h)(2) (permitting Reply Briefs).

⁸ See 10 C.F.R. § 2.1316; *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 201 (2000).

⁹ The Staff's order approved conforming license amendments as proposed in the applications, under which entities that would no longer be licensees are deleted from the

(continued...)

regarding the FirstEnergy corporate family's reorganization.

A. The Proposed License Transfers

The relevant portions of the May 18th application (as supplemented) seek authorization to transfer Penn Power's ownership interest in the Beaver Valley and Perry facilities to FENGenCo, and also seek approval of conforming amendments to those facilities' operating licenses. The relevant portions of the June 1st application (as supplemented) seek authorization to transfer to FENGenCo the ownership interests of Ohio Edison, Toledo Edison, Cleveland Electric and OES Nuclear, Inc., in the Beaver Valley, Perry, and Davis-Besse facilities, and likewise seeks approval of conforming amendments to those facilities' operating licenses.

FENOC states in both of its applications that "[t]he existing antitrust conditions in the licenses will continue in effect."¹⁰ Under the license transfer applications, only FENGenCo, Ohio Edison and FENOC would be bound by the Perry operating license's antitrust conditions; only FENGenCo and FENOC would be bound by the antitrust conditions in the Davis-Besse operating license; and the Beaver Valley operating licenses would continue to contain no antitrust provisions.

FENOC requests the transfers because the State of Ohio has required FirstEnergy "to establish a structural separation between the competitive generation portion of [its] electric business and the regulated "wires" [*i.e.*, transmission] portion of this business."¹¹

⁹(...continued)
licenses. We note that the Staff's action in this regard is not inconsistent with our decision in *Kansas Gas and Elec. Co.* (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441 (1999), and in particular the suggestions therein regarding the appropriate fate or disposition of existing antitrust license conditions during a license transfer (see *id.* at 466).

¹⁰ May 18th Application at 15; June 1st Application at 19.

¹¹ June 1st Application at 8. Ohio's requirement applies not only to the Ohio subsidiaries but also to Penn Power, because it operates with Ohio Edison as a single system in both Pennsylvania and Ohio. See *Ohio Edison Co.*, 80 FERC P 61,039, at p. 61,094 (1997), 1997 WL 564505 (Federal Energy Regulatory Commission (FERC)), *reh'g denied*, 81 FERC P 61,109 (continued...)

B. Petitions to Intervene

To qualify for intervenor status, a petitioner must, among other things, demonstrate standing.¹² As part of that demonstration, we require a showing that the petitioner “has suffered [or will suffer] a distinct and palpable harm that constitutes injury-in-fact within the zone of interests arguably protected by the governing statute [and that this] injury can fairly be traced to the challenged action” (here, the approval of the license transfer).¹³

AMP-Ohio is an organization comprising 109 municipalities in Ohio, Pennsylvania, West Virginia, and Michigan -- all of which own or operate utility systems and some of which also operate electric generation and transmission facilities.¹⁴ AMP-Ohio claims that it and its members both purchase power from FirstEnergy¹⁵ and use the transmission services of FirstEnergy’s wholly-owned subsidiary, American Transmission Systems, Inc. (ATSI).¹⁶ Although FirstEnergy is only one of several companies with which AMP-Ohio and its members

¹¹(...continued)
(1997), 1997 WL 805924 (FERC), *reh’g denied*, 85 FERC P 61,203 (1998), 1998 WL 785782 (FERC) (“Ohio Edison operates and dispatches itself and Penn Power (jointly, Ohio Edison Companies) as a single system [which] ... provides retail electric service to ... customers in ... central and northeastern Ohio and western Pennsylvania”).

¹² 10 C.F.R. § 2.309(d).

¹³ *See, e.g., Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996).

¹⁴ AMP-Ohio’s Petition to Intervene at 4-5.

¹⁵ Because FirstEnergy is itself a holding company rather than an electric generation company, we assume that AMP-Ohio is referring here to its power purchase agreements with some of FirstEnergy’s subsidiary utilities.

¹⁶ *Id.* at 7. “Transmission services” is a concept central to our determination of standing in this proceeding; it refers to the transport of electricity on the wholesale market to local distribution companies. By contrast, the term “distribution” refers generally to the transport of electricity by local distribution companies to the end users of the electricity (*e.g.*, homes, shops, office buildings, factories). *See generally Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-452, 6 NRC 892, 973-74 and n.352 (1977).

have contracted for transmission services,¹⁷ AMP-Ohio asserts that ATSI delivers *all* the electricity purchased by those of its members located within FirstEnergy's control area.¹⁸

The City of Cleveland owns and operates Cleveland Public Power, a municipal electric distribution system that provides retail electric service in and around Cleveland. It claims that *all* the electric power it purchases is delivered over ATSI's transmission lines. For the same reasons as pressed by AMP-Ohio, the City of Cleveland asserts that changes in entities governed by the antitrust conditions could adversely affect it.¹⁹ The City of Cleveland also explains that the antitrust conditions provide municipal utilities such as Cleveland Public Power with significant rights regarding generation, transmission and distribution services, that those conditions were imposed on Cleveland Electric to remedy its past anti-competitive conduct against the City of Cleveland, and that they continue to protect against similar conduct by FirstEnergy's operating companies.²⁰

At bottom, AMP-Ohio and the City of Cleveland argue that they could suffer injury from an inability to seek enforcement of the NRC antitrust conditions against any or all of the operating companies if those companies were to violate any of those conditions. Both petitioners assert that FENOC's attempt to transfer all antitrust compliance responsibility from the operating companies to FENGenCo constitutes a substantial modification to the antitrust conditions' scope and effectiveness (though not to their literal terms) by "significantly undercut[ing] the vitality of those conditions for their beneficiaries ... that compete with and

¹⁷ Because FirstEnergy is not a transmission company, we assume that AMP-Ohio is referring here to ATSI, FirstEnergy's subsidiary transmission company.

¹⁸ AMP-Ohio's Petition to Intervene at 5. "[A] control area is a geographic area within which a single entity, such as FirstEnergy, balances generation and load in real time in order to maintain reliable operations." *Ohio Edison Co.*, 105 FERC P 61,372 at 62,655 n.3 (2003), 2003 WL 23011904 (FERC) (citation omitted).

¹⁹ City of Cleveland's Petition to Intervene at 4-5.

²⁰ *Id.* at 7.

receive transmission service from FirstEnergy.”²¹

More specifically, the petitioners argue that the antitrust conditions provide protection for small municipal electrical systems that both compete with FirstEnergy and its operating companies for generation and transmission services and are simultaneously dependent upon those same companies’ transmission systems in order to transport energy to the municipals’ systems for delivery to their customers.²² AMP-Ohio asserts that its members purchase transmission services from FirstEnergy (among other common carriers), and that all of the power those members purchase in FirstEnergy’s control area must ultimately be delivered by FirstEnergy subsidiary ATSI.²³ Similarly, the City of Cleveland asserts that all its power “is delivered ... over ATSI transmission lines pursuant to the Midwest ISO Tariff.”²⁴

The petitioners accuse FirstEnergy of attempting to undermine those protections *sub rosa* under the guise of a corporate restructuring. According to the petitioners, the effect of this restructuring would be that the antitrust conditions would remain in the licenses and would apply to FENGenCo, but that FENGenCo has no ability either to comply or to force other FirstEnergy companies to comply with those conditions. Conversely, the conditions would no longer be enforceable against the operating companies (*i.e.*, Ohio Edison, Toledo Edison, Cleveland Electric, and Penn Power) who *are* capable of complying, because they would no longer be NRC licensees. Thus, the petitioners reason, the antitrust conditions would be *de facto* unenforceable, and this unenforceability constitutes an injury for purposes of standing. The petitioners say that their fears in this regard are exacerbated by FENOC’s repeated refusal, at

²¹ AMP-Ohio’s Petition to Intervene at 7. See *also* City of Cleveland’s Petition to Intervene at 7 (incorporating AMP-Ohio’s arguments by reference).

²² AMP-Ohio’s Petition to Intervene at 8-9.

²³ *Id.* at 5.

²⁴ City of Cleveland’s Petition to Intervene at 5.

least in this proceeding, to provide assurances that all members of the FirstEnergy corporate family will be bound by the NRC licenses' antitrust conditions.²⁵

C. Analysis

We cannot accept the petitioners' characterization of the license transfers as precluding enforcement action against *all* FirstEnergy affiliates (each of whom is capable of complying with only certain provisions of the antitrust conditions, depending on the nature of the affiliate's business). As already noted, Ohio Edison will retain a partial interest in the Perry facility and will therefore remain subject to the antitrust conditions in that license. Also, FENGenCo would be subject to those same conditions and, as a generation entity, would be able to address requirements in the conditions concerning the sale or exchange of wholesale power, and the sale of maintenance power, emergency power, economy energy,²⁶ and coordination services.²⁷

Nor do we accept the petitioners' "potential injury" argument. Each petitioner claims that

²⁵ AMP-Ohio's Petition to Intervene at 9-12.

²⁶ License Conditions (1), (5), (6), (7), (10), and (11) for both Perry and Davis-Besse.

²⁷ License Conditions (1) and (11) for both Perry and Davis-Besse. "[T]he coordination services market is a market for the exchange of surplus electric power between utilities on a nonfirm basis and the joint and coordinated operation by utilities of their systems of generation and distribution, all with the purpose of achieving maximum efficiency and economies in their overall power supply operations." *Davis-Besse*, ALAB-560, 10 NRC at 301 (opinion of Mr. Sharfman). See also *Midland*, ALAB-452, 6 NRC at 902-03 (citations and footnotes omitted):

"Coordination" refers to the electric power utilities' practice of interchanging power and sharing responsibility for building new generating facilities to achieve economic benefits unattainable by an individual utility acting alone. The practice encompasses both "operational coordination," which is the unified control of generation and transmission facilities, and the sharing of one or more of reserve, emergency, maintenance, economy, dump, seasonal and time diversity power or energy, and "developmental coordination," which includes the cooperative planning of new facilities to allow their construction as joint ventures or on staggered time schedules.

As these definitions indicate, the vast majority of coordination services involve the supply of power rather than its transmission. In any event, coordination services for transmission are now handled by independent regional transmission organizations called ISOs rather than via the coordination services provisions of the 1979 antitrust conditions.

the unenforceability of the antitrust conditions will adversely affect its “important rights relating to generation, transmission, and distribution” services.²⁸ Yet neither petitioner explains how its distribution and generation rights would be adversely affected. As close as either petitioner comes is AMP-Ohio’s highly general comment that it and its members “compete with FirstEnergy and the Operating Companies for generation ... services”²⁹ – a statement too vague and general to show a real potential for injury sufficient for standing.³⁰

Therefore, the only remaining potential source of injury we need to consider is the transmission rights. Indeed, this is the petitioners’ only claim of injury that even approaches the required level of specificity:

[A]ll of the power purchased by or for members in the FirstEnergy control area must ultimately be delivered by ... ATSI.... Therefore, the antitrust conditions have the potential to affect AMP-Ohio and its members.³¹

[AMP-Ohio’s members] compete with FirstEnergy and the Operating Companies for generation and transmission services and are, at the same time, dependent upon access to the First Energy transmission system for the transmission of energy to their systems for delivery to their customers.³²

But even as to their transmission rights, the petitioners fail to demonstrate how the license transfers would have any bearing on the petitioners’ current ability to seek enforcement action regarding transmission under the existing antitrust license conditions. The current licensees transferred their transmission facilities to ATSI (FirstEnergy’s subsidiary transmission company) years ago, before the applications here were filed. Thus, long before the current

²⁸ AMP-Ohio’s Petition to Intervene at 7; City of Cleveland’s Petition to Intervene at 7.

²⁹ AMP-Ohio’s Petition to Intervene at 9.

³⁰ See, e.g., *Oyster Creek*, CLI-00-6, 51 NRC at 203. See also *Pacific Gas and Elec. Co.* (Diablo Canyon Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 337 (2002) (criticizing intervenor for filing a “cursory” argument on standing).

³¹ AMP-Ohio’s Petition to Intervene at 5.

³² *Id.* at 9.

restructuring and the resulting license transfers, the operating companies had no capability to fulfill the conditions' wheeling provisions. The license transfers at issue here would not change this fact. Furthermore, on October 1, 2003, ATSI turned over functional control of its transmission facilities to Midwest ISO,³³ and this latter organization's FERC-approved "Open Access Transmission Tariff" *guarantees* the petitioners non-discriminatory open access to transmission facilities, interconnections and energy markets.³⁴ FENOC in its Answer directs our attention to these facts regarding the role of the ISO,³⁵ and the petitioners' failure to submit a Reply Brief has left them unchallenged.

³³ See, e.g., *Midwest Independent Transmission Sys., Inc.*, 113 FERC P 61,096 (2005), 2005 WL 2775657 at *1, *3 n.7 (FERC).

³⁴ FENOC's Answer at 21. See generally *Midwest Independent Transmission Sys., Inc.*, 111 FERC P 63,028 (2005), 2005 WL 1031398 (FERC) (ALJ order referring uncontested settlement to the Commission); *Troy Energy, LLC*, 107 FERC P 63,018 at p. 65,090 (2004), 2004 WL 868596 (FERC) (ALJ order referring uncontested settlement to the Commission), *settlement approved*, 107 FERC P 61,226 (2004), 2004 WL 1201421 (FERC). The FERC's open access scheme derives from its transmission-deregulation rulemaking that was affirmed by the United States Court of Appeals for the District of Columbia Circuit and, ultimately, the United States Supreme Court. See FERC Order No. 888, "Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities," 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. Regulations Preambles (January 1991-June 1996) P 31,036 (1996), 1996 WL 239663 (F.R.), *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12,274 (March 14, 1997), FERC Stats. & Regs., Regulations Preambles (July 1996-December 2000) P 31,048 (1997), 1997 WL 111594 (F.R.), *order on reh'g*, Order No. 888-B, 81 FERC P 61,248 (1997), 1997 WL 833250 (FERC), *order on reh'g*, Order No. 888-C, 82 FERC P 61,046 (1998), 1998 WL 18148 (FERC), *aff'd in relevant part, Transmission Access Policy Study Group. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

³⁵ FENOC's Answer at 21.

In sum, we find no risk of injury to the petitioners traceable to the approval of these two license transfers. Absent injury, we find that the petitioners lack standing. And as they lack standing, we deny their petitions to intervene and terminate this adjudicatory proceeding.

IT IS SO ORDERED.³⁶

For the Commission

***/RA by Andrew L. Bates Acting
For/***

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 31st day of January, 2006.

³⁶ Petitioners recently filed a "Request for Clarification" regarding the NRC Staff's already-issued approval of the license transfer. The Staff issued its approval order on November 15, 2005, and revised it on December 16, 2005. But petitioners did not file their "Request for Clarification" until January 9, 2006 -- nearly nine weeks after the initial order's issuance and more than three weeks after the revised order's issuance. The "Request" -- which we treat as a motion -- is inexcusably late. Our rules require that motions be filed no more than ten days after "the occurrence or circumstance from which the motion arises." 10 C.F.R. § 2.323(a). Petitioners show no good cause for waiting so long to file their "Request." In any event, the "Request" raises the same arguments as the petition to intervene, and we therefore see in it no reason to alter the views we express in today's decision.