

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Nora Mead Brownell, and Suedeen G. Kelly.

FirstEnergy Corp.

Docket No. EC05-84-001

ORDER DENYING REHEARING

(Issued February 13, 2006)

1. American Municipal Power-Ohio, Inc. (AMP-Ohio) and the City of Cleveland (Cleveland) request rehearing of the Commission's order<sup>1</sup> authorizing an internal corporate restructuring. The transaction involved the disposition and acquisition of jurisdictional assets through the transfer of certain Nuclear Assets to an affiliate that will own only nuclear generation.<sup>2</sup> For the reasons discussed below, we deny the request for rehearing.

**I. Background**

2. The Applicants are: FirstEnergy Corp. (FirstEnergy) on behalf of The Cleveland Electric Illuminating Company (CEI), Ohio Edison Company (Ohio Edison), Pennsylvania Power Company (Penn Power), and The Toledo Edison Company (Toledo Edison) (collectively, FirstEnergy Operating Companies); FirstEnergy Solutions Corp. (Solutions); and FirstEnergy Nuclear Generation Corp. (Nuclear Genco). They filed an application under section 203 of the Federal Power Act (FPA)<sup>3</sup> requesting authorization for the disposition and acquisition of jurisdictional facilities through the transfer of FirstEnergy Operating Companies' ownership interests in the Nuclear Assets to Nuclear Genco. The jurisdictional facilities are generator step-up transformers and interconnection facilities associated with the Nuclear Assets. The Applicants further requested authorization under section 203 for Solutions to acquire the stock of Nuclear

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<sup>1</sup> *FirstEnergy Corp.*, 112 FERC ¶ 61,243 (2005) (*FirstEnergy*).

<sup>2</sup> The Nuclear Assets are Units 1 and 2 of the Beaver Valley Nuclear Generating Station, the Davis-Besse Nuclear Generating Station, and the Perry Nuclear Generating Station.

<sup>3</sup> 16 U.S.C. § 824b (2000).

Genco, which initially will be owned by Penn Power, after the asset transfers have occurred, so that Nuclear Genco will become a direct, wholly-owned subsidiary of Solutions.

3. AMP-Ohio and Cleveland argued that the Commission should approve the proposed transaction only on the condition that First Energy commit, on behalf of itself and the FirstEnergy Operating Companies, to adhere to certain licensing conditions (Licensing Conditions) that are in the operating licenses for the Nuclear Generating Stations issued to each of the FirstEnergy Operating Companies by the Nuclear Regulatory Commission (NRC).<sup>4</sup> The Licensing Conditions arose out of an antitrust investigation by the NRC, and were intended to prevent anti-competitive conduct by the FirstEnergy Operating Companies.<sup>5</sup> AMP-Ohio and Cleveland argued that the Licensing Conditions were initially imposed on vertically integrated utilities having generation, transmission, and distribution assets and that they would be nullified if the license is transferred to a nuclear generation-only company that has no fossil generation, transmission or distribution assets.

4. The Commission authorized the proposed transaction, finding that it would not have an adverse effect on competition, rates, or regulation and was thus consistent with the public interest.<sup>6</sup> The Commission refused to impose the requested condition. We found that AMP-Ohio and Cleveland had not shown that the proposed transaction would adversely affect competition, rates, or regulation. We stated that their concern was outside the scope of the proceeding. The Commission also suggested that because the Licensing Conditions were imposed by the NRC, it would be more appropriate to discuss their future applicability in that forum.<sup>7</sup>

5. After the Commission issued its order in this proceeding, the NRC issued an order approving the transfer of licenses and conforming amendments.<sup>8</sup> The NRC stated that Nuclear Genco would become subject to the antitrust conditions and would be responsible for any actions that contravene such conditions. It noted that the Applicants were not proposing any changes to the substantive requirements in the antitrust

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<sup>4</sup> Specific provisions in the Licensing Conditions pertain to, for example, the sale or exchange of wholesale power or coordination services; interconnection services; wheeling; and the selling of maintenance and emergency power.

<sup>5</sup> See *In the Matter of The Toledo Edison Co. and the Cleveland Electric Illuminating Co., et al.*, 5 NRC 133 (1977); *aff'd as modified* 10 NRC 265 (1977).

<sup>6</sup> *FirstEnergy*, 112 FERC ¶ 61,243 at P 2.

<sup>7</sup> *Id.* at P 24.

<sup>8</sup> Order Approving Transfer of Licenses and Conforming Amendments, Docket Nos. 50-334 and 50-412 (2005) (NRC Order).

conditions. It also recognized that Nuclear Genco 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. The NRC stated that it was still considering motions filed by AMP-Ohio and Cleveland, but also noted that, because the Atomic Energy Act of 1954, as amended, does not require or authorize antitrust reviews of post-operating license transfer applications, no antitrust review is required or authorized.<sup>9</sup>

## II. Request for Rehearing

6. AMP-Ohio and Cleveland request rehearing, arguing that the Commission erred in basing its refusal to impose the requested condition upon the finding that AMP-Ohio and Cleveland failed to present evidence that the proposed asset transfer would harm competition. They argue that the effective elimination of license conditions imposed to prevent anticompetitive conduct could result in future anticompetitive conduct. They argue that it is unclear what type of evidence could have been presented regarding anticompetitive conduct that might occur in the future.

7. They further maintain that FirstEnergy is effectively revoking the Licensing Conditions by transferring responsibility for the conditions to a nuclear generation company that will be unable to comply with the majority of the conditions pertaining to generation and all of the conditions related to transmission and distribution. They argue that FirstEnergy should not be permitted to evade the conditions, however, by reorganizing its subsidiaries.

8. AMP-Ohio and Cleveland argue that the Commission erred by determining that the antitrust conditions should be addressed by the NRC. They argue that the Commission should not permit FirstEnergy to avoid the obligations imposed by the Licensing Conditions merely because the NRC is the agency that imposed those conditions. They further argue that requiring a commitment by FirstEnergy and its subsidiaries to comply with the Licensing Conditions would advance the Commission's consumer protection mandate and preserve competition.<sup>10</sup> AMP-Ohio and Cleveland assert that if the NRC fails to condition its approval of the transfer on the applicability of the Licensing Conditions to FirstEnergy and its affiliates, the Commission should issue an order imposing the condition sought by AMP-Ohio and Cleveland.

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<sup>9</sup> *Id.* at 10 (citing *Kansas Gas and Electric Co., et al.*, 49 NRC 441 (1999)).

<sup>10</sup> *Id.* at 12 (citing *Pennsylvania Power Co. v. FPA*, 343 U.S. 414, 418 (1952); *Central Iowa Power Coop. v. FERC*, 606 F.2d 1156, 1162 (D.C. Cir. 1979); *Public Systems v. FERC*, 606 F.2d 973, 979 n. 27 (D.C. Cir. 1979)).

### III. Commission Determination

9. AMP-Ohio and Cleveland argue that their concerns regarding the Licensing Conditions raise competitive issue sufficient to warrant consideration. Although AMP-Ohio and Cleveland speculate that there could be anti-competitive effects if the Licensing Conditions are not applicable to the entire FirstEnergy family, they admitted in their initial comments that “it could be argued that much contained in those conditions is no longer necessary,”<sup>11</sup> and stated that the conditions are important as “a second line of defense.”<sup>12</sup> They said that they were acting “out of an abundance of caution.”<sup>13</sup> Cleveland even conceded that the Licensing Conditions are “made less important by changes to the FPA and industry restructuring.”<sup>14</sup>

10. We find that AMP-Ohio’s and Cleveland’s claims that the licensing agreements are required to make this transaction consistent with the public interest are weak and vague. There have been major structural changes to the electric power industry and in regulation of that industry in the years since the Licensing Conditions were imposed by the NRC in the 1970s. For example, in 1996 the Commission promulgated Order No. 888,<sup>15</sup> which required the nation’s public utilities to open their transmission lines to competitors. All public utilities that own, control or operate facilities used for transmitting electric energy in interstate commerce are now required to have open access transmission tariffs that contain minimum terms and conditions of non-discriminatory service. In addition, the electric power industry is now much more competitive than it

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<sup>11</sup> City of Cleveland Comments at 5; AMP-Ohio Comments at 5.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 6

<sup>14</sup> Cleveland Comments at 8.

<sup>15</sup> See *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (1996), FERC Stats. and Regs., Regulations Preambles January 1991-June 1996 ¶ 31,036 (1996), *order on reh’g*, Order No. 888-A, 62 Fed. Reg. 12,274 (1997), FERC Stats. and Regs. ¶ 31,048 (1997), *order on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d in relevant part sub nom. 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).

was in the 1970s, and customers generally have far more choice than they did at that time. In fact, the Commission has found that FirstEnergy Companies satisfy the Commission's standards for market-based rate authority.<sup>16</sup>

11. Given these dramatic changes in the electric energy industry, we see no reason to condition approval of FirstEnergy's proposed transaction by imposing the NRC Licensing Conditions based on AMP-Ohio's and Cleveland's vague claims. As we noted in the previous order in this proceeding, we have found that the proposed transaction will not adversely affect competition,<sup>17</sup> and nothing in the request for rehearing has persuaded us that the transaction is not consistent with the public interest. Accordingly, we deny the request for rehearing.

The Commission orders:

AMP-Ohio and Cleveland's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.

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<sup>16</sup> See *FirstEnergy Operating Companies*, 111 FERC ¶ 61,032 (2005). The Commission accepted FirstEnergy's application for market-based rate authority subject to the Commission's acceptance of a compliance filing to address whether FirstEnergy Companies satisfy the Commission's concerns with regard to affiliate abuse. FirstEnergy's compliance filing was accepted on July 14, 2005. *FirstEnergy Operating Companies*, Docket No. ER01-1403-003 (July 14, 2005) (unpublished letter order).

<sup>17</sup> *First Energy* at P 15.