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August 8, 1996

U.S. Nuclear Regulatory Commission
Att'n: Document Control Desk
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738

Re: In the Matter of Cleveland Electric Illuminating Company,
Dockets Nos. 50-440 and 50-346
(City of Cleveland's 2.206 Petition to Enforce Antitrust Conditions)

Dear Sir:

On August 2, we provided a draft copy of a recent FERC decision related to the wheeling transaction that was raised as an issue in the City of Cleveland's 2.206 petition. A copy of the final FERC order is enclosed.

In our August 2nd letter, we indicated that we would advise the NRC of our response to that FERC decision shortly. After reviewing the FERC decision, we have provided the City of Cleveland a signed service agreement reserving 40 MW of firm transmission service for the requested period September 1, 1996 through December 31, 1996.

On August 5, 1996, the City of Cleveland requested that we provide transmission service for 30 MW of this power beginning earlier (August 17) than previously requested. CEI is currently determining whether it has the capacity to provide this additional service.

Sincerely,

David R. Lewis
Counsel for Licensee

130036

Enclosure

cc: Service List

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Elizabeth Anne Moler, Chair;
Vicky A. Bailey, James J. Hoecker,
William L. Massey, and Donald F. Santa, Jr.

Cleveland Electric Illuminating Company	)	Docket No. EL96-9-000
Cleveland Public Power of the City of Cleveland, Ohio	)	
v.	)	Docket No. EL96-21-000
Cleveland Electric Illuminating Company	)	

ORDER DENYING PETITION FOR DECLARATORY ORDER AND GRANTING COMPLAINT

(Issued July 31, 1996)

I. Introduction

These cases, a petition for declaratory order and a complaint, involve the same transaction. Cleveland Public Power of the City of Cleveland, Ohio (Cleveland) seeks transmission service under an existing transmission agreement with Cleveland Electric Illuminating Company (Cleveland Electric). Cleveland plans to use the transmission to purchase power from a third party. It will then combine the purchased power with its other resources so that, beginning September 1, 1996, it can serve an existing (i.e., through August 31, 1996) retail customer of Cleveland Electric. Cleveland Electric opposes the request. Each party asks us to decide the dispute.

For the reasons discussed below, we agree with Cleveland that Cleveland Electric is obligated under an existing agreement to provide the requested transmission service. We further conclude that the requested transmission service does not violate section 212(h) of the Federal Power Act (FPA). Therefore, we will deny the petition for a declaratory order and summarily decide the complaint in favor of Cleveland. Finally, we dismiss Cleveland Electric's request for stranded cost recovery, without prejudice to refiling and demonstrating that it meets the criteria for seeking recovery under our recent Open Access Rule.

II. Background

Cleveland, a municipal utility, is dependent on Cleveland Electric for transmission service to reach alternate suppliers. Cleveland and Cleveland Electric have engaged in door-to-door competition for retail customers since the early 1900's, and the instant controversy arises out of a retail customer's desire to change power suppliers. The Medical Center Company (Medical Center) has been served at retail by Cleveland Electric for approximately 60 years. Recently, however, Medical Center decided to switch to Cleveland upon the termination of its existing five-year contract with Cleveland Electric (i.e., as of September 1, 1996).

On March 1, 1995, Cleveland and Medical Center entered into the Electric Power Service Agreement (Cleveland/Medical Center Agreement). Medical Center will purchase up to 50 MW of power and energy from Cleveland for a period of five years, commencing September 1, 1996. Cleveland will deliver the power and energy to Medical Center over a 138 kV transmission line owned by Cleveland.

On August 11, 1995, Cleveland sent a letter to Cleveland Electric requesting transmission service under the parties' existing agreement for up to 50 MW of power and energy from Ohio Power Company (Ohio Power). By letters dated November 2 and 3, 1995, Cleveland Electric refused because "[t]his transaction, although contractually described as a wholesale sale from Ohio Power to [Cleveland], will be the functional equivalent of a sale [from Ohio Power] 'directly to an ultimate consumer'" prohibited by section 212 of the FPA, 16 U.S.C. § 824k (1994). 1/ Cleveland Electric clarified that its refusal to provide transmission for the proposed Ohio Power/Cleveland transaction is not due to any limitation on the Cleveland Electric transmission system. 2/

Petition and Complaint

On November 2, 1995, in Docket No. EL96-9-000, Cleveland Electric filed a petition for a declaratory order. Cleveland Electric requests that the Commission clarify that Cleveland Electric cannot be required to provide transmission service that

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1/ See Cleveland Protest in Docket No. EL96-9-000, Attachment 5 at 1 (November 2, 1995 Letter from Cleveland Electric to Cleveland).

2/ Id.

is retail wheeling prohibited under sections 211 and 212 of the FPA, 16 U.S.C. §§ 824j, k (1994). 3/

On December 13, 1995, in Docket No. EL96-21-000, Cleveland filed a complaint, motion for summary disposition and motion for expedited procedural schedule. Cleveland states that Cleveland Electric already is obligated to provide the requested transmission service under the parties' existing transmission service agreement 4/ and under certain antitrust conditions in a Nuclear Regulatory Commission (NRC) license. 5/ Cleveland requests that the Commission expedite the resolution of this matter so that the proposed power sale may commence as scheduled (on September 1, 1996). 6/

Notices and Responses

1. Docket No. EL96-9-000

Notice of Cleveland Electric's petition in Docket No. EL96-9-000 was published in the Federal Register, 7/ with comments,

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3/ We note that a proceeding is pending in state court in which Cleveland Electric argues, among other things, that the Ohio Power/Cleveland transaction also would violate state law.

4/ Cleveland Electric provides transmission service to Cleveland under Cleveland Electric's FERC Electric Tariff, First Revised Volume No. 1. See Cleveland Electric Illuminating Company v. City of Cleveland, Ohio, et al., 72 FERC ¶ 61,040 at 61,250 (1995), reh'g denied, 75 FERC ¶ 61,258 (1996).

5/ The license conditions stem from a licensing proceeding in which the NRC granted licenses to Cleveland Electric and Toledo Edison Company (Toledo Edison) for the Davis-Besse Nuclear Power Station, Units 1, 2 and 3, and to Cleveland Electric for the Perry Nuclear Power Station, Units 1 and 2. See Toledo Edison Company and the Cleveland Electric Illuminating Company, et al., 5 NRC 133 (1977), aff'd in part, 10 NRC 265 (1979).

6/ On December 1, 1995, Ohio Power filed (in Docket No. ER96-501-000) the Ohio Power/Cleveland Agreement. Under that agreement, Cleveland will purchase up to 50 MW of power and energy from Ohio Power for a five-year period, commencing on or about September 1, 1996. Docket No. ER96-501-000 is currently pending.

7/ 60 Fed. Reg. 58,065 (1995).

protests, or motions to intervene due on or before December 13, 1995.

On November 24, 1995, Ohio Power filed a motion to intervene and a motion for expedited summary disposition. On December 7, 1995, Cleveland Electric filed an answer to Ohio Power's motion to intervene. Cleveland Electric states that it has no objection to the intervention of Ohio Power. However, Cleveland Electric does object to, among other things, Ohio Power's assertion that there are no material facts in dispute.

On December 13, 1995, Medical Center filed a protest against what Medical Center characterizes as "Cleveland Electric's continuing attempt to interfere with [Medical Center's] right under Ohio law to contract with an alternative supplier of electric service." 8/ On December 13, 1995, Cleveland filed a protest, motion to intervene and motion for summary disposition.

On December 28, 1995, Cleveland Electric filed an answer to Cleveland's pleading. On January 11, 1996, Cleveland filed an answer in opposition Cleveland Electric's request for an evidentiary hearing or, alternatively, a motion for leave to file opposition. On January 26, 1996, Cleveland Electric filed an answer in opposition to Cleveland's January 11, 1995 motion for leave.

On December 12, 1995, Southern California Edison Company (Edison) filed a motion to intervene. On December 15, 1995, Long Island Lighting Company (LILCO) filed a motion to intervene out-of-time. On December 22, 1995, Ohio Power filed an answer opposing the motions to intervene of Edison and LILCO. On January 3, 1996, Cleveland filed a motion for leave to answer out-of-time and an answer in opposition to the motions to intervene filed by Edison and LILCO.

2. Docket No. EL96-21-000

Notice of Cleveland's complaint in Docket No. EL96-21-000 was published in the Federal Register, 9/ with comments, protests, or motions to intervene due on or before January 16, 1996.

On January 16, 1996, Cleveland Electric filed an answer in opposition to Cleveland's complaint. On December 22, 1995, Ohio

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8/ Medical Center Protest at 2.

9/ 60 Fed. Reg. 64,429 (1995). In response to a motion for extension of time filed by Cleveland Electric, the time by which Cleveland Electric's answer was due was extended from January 12, 1996 to January 16, 1996.

Power filed a motion to intervene. Ohio Power states that it supports "whatever Commission action is necessary for Cleveland Electric to provide transmission service for Ohio Power's sale of power to [Cleveland]." 10/

3. Motion to Expedite

On April 4, 1996, Cleveland filed a motion for an expedited ruling in the proceedings in Docket Nos. EL96-9-000, EL96-21-000 and ER96-501-000. On April 19, 1996, Ohio Power filed an answer to Cleveland's April 4 motion supporting Cleveland's motion for expedited treatment.

III. Discussion

A. Procedural Issues

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (1995), the timely, unopposed motion to intervene filed by Cleveland in Docket No. EL96-9-000 and the timely, unopposed motions to intervene filed by Ohio Power in Docket Nos. EL96-9-000 and EL96-21-000 serve to make them parties to the respective proceedings.

Edison and LILCO concede in their filings that they have no direct interest in this case, but wish to intervene because of the industry-wide implications they see arising from a ruling here. Cleveland argues that Edison and LILCO should not be allowed to intervene because the Ohio Power/Cleveland transaction involves the parties' local, case-specific circumstances and will not establish precedent for the entire industry. Ohio Power also opposes intervention, on the grounds that exploring the generic implications of this case would delay the start of service to Medical Center. The controversy in this proceeding involves not only case-specific issues, but also the Commission's interpretation of section 212(h). Accordingly, we find it in the public interest to grant the motions to intervene of Edison and LILCO.

B. Cleveland Electric's Obligation to Provide the Transmission Service at Issue in This Proceeding

1. We find that Cleveland Electric is obligated to provide the requested transmission service under Cleveland Electric's currently effective transmission service agreement. 11/ The relevant sections of this agreement require Cleveland Electric to provide for the transmission of electric power:

10/ Ohio Power Motion to Intervene at 2.

11/ See supra note 4.

> [B]etween delivery (interconnection) points of [Cleveland Electric] to, from, between, or among rural electric cooperatives or municipalities located within the Combined CAPCO (Central Area Power Coordination Group) Company Territories (CCCT) . . . . [12/]

It further provides that:

> [Cleveland Electric] shall provide Transmission Service within the limits of the capacity of its bulk transmission facilities, and related facilities, . . . to the extent that such Transmission Service does not impose a burden upon the system of [Cleveland Electric]. [13/]

The language of the parties' agreement thus states that Cleveland Electric will transmit to "municipalities located within . . . CAPCO," which includes Cleveland, if Cleveland Electric has sufficient transmission capacity and doing so will not impose a burden on Cleveland Electric's transmission system. 14/ Here, there is no question that Cleveland Electric has the necessary capacity, and the requested transmission would impose no burden on its system. Cleveland Electric stated in its November 2 and 3, 1995 letters rejecting Cleveland's request that lack of system capacity played no part in the utility's refusal; Cleveland Electric stated, "[p]lease be further advised that [Cleveland Electric's] refusal to provide the requested

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12/ Cleveland Complaint in Docket No. EL96-21-000, Attachment 5 at 2.

13/ Id.

14/ See Yankee Atomic Electric Company, Opinion No. 390, 67 FERC ¶ 61,318 at 62,113 & n.80 (Commission has an obligation under the FPA to enforce the provisions of parties' contracts, citing, e.g., United Gas Pipe Line Company v. Mobile Gas Service Corporation, 350 U.S. 332 (1956) and FPC v. Sierra Pacific Power Company, 350 U.S. 348 (1956)), reh'g denied, Opinion No. 390-A, 68 FERC ¶ 61,364 (1994), aff'd in relevant part sub nom. Town of Norwood, Massachusetts v. FERC, 80 F.3d 526 (1996); accord City of Lebanon, Ohio v. Cincinnati Gas & Electric Company, 64 FERC ¶ 61,341 at 63,445 (1993) (Commission will hold parties to the language they drafted and to which they agreed); Public Works Commission of the City of Fayetteville, North Carolina v. Carolina Power & Light Company, 60 FERC ¶ 61,283 at 61,960 (1992) (Commission is obligated to enforce contracts as written consistent with the public interest).

transmission services is not due to any limitation on the [Cleveland Electric] transmission system . . . ." 15/ In addition, Cleveland Electric has not claimed in any of its pleadings that the transmission at issue here would impose a burden upon its system. Therefore, pursuant to the terms of the transmission service agreement, Cleveland Electric must provide the transmission service necessary to implement the Ohio Power/Cleveland Agreement.

2. We next address Cleveland Electric's arguments that we may not require it to provide the requested transmission service because that would violate sections 212(h) of the FPA, 16 U.S.C. § 824k(h) (1994). Cleveland Electric argues that while, on paper, Ohio Power will make a wholesale sale to Cleveland, which, in turn, will serve Medical Center at retail, the reality belies that description. In support, Cleveland Electric argues that the price Cleveland will charge Medical Center is directly tied to the costs of the power and energy Ohio Power will supply to Cleveland. Cleveland Electric also cites to the legislative history of the Energy Policy Act of 1992 (EPAct), and argues that the Ohio Power/Cleveland transaction is precisely the kind of transaction that section 212(h) prohibits. 16/ Finally, Cleveland Electric argues that it should not be required to provide the requested transmission under its transmission service agreement since "[i]mplicit in any transmission tariff intended to provide for wholesale transmission is a legitimate wholesale sale." 17/

In response, Cleveland argues that sections 211 and 212 are irrelevant since the Commission "has authority to order a utility to comply with its filed tariff . . . totally independent of any limitations upon its enhanced Energy Policy Act authority." 18/ In support, Cleveland cites an order in which the Commission held that the utility was required by an existing contract to provide transmission service to a customer, stating that "no expansion of a utility's commitment to wheel is being ordered, but rather a utility is being required to perform the

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15/ See Cleveland Electric Petition in Docket No. EL96-9-000, Attachment D at 1.

16/ See Cleveland Electric Petition in Docket No. EL96-9-000 at 1-2, 4-5, 12-21.

17/ Cleveland Electric Answer in Docket No. EL96-21-000 at 4.

18/ Cleveland January 11, 1996 Answer in Opposition to Answer and Motion for Summary Disposition of Cleveland Electric in Docket No. EL96-9-000 at 4.

service it voluntarily obligated itself to perform by entering into the [contract]." 19/

Cleveland also responds to Cleveland Electric's argument that the Ohio Power/Cleveland Agreement is not a legitimate wholesale sale. Cleveland states that the power it will purchase from Ohio Power is not earmarked for any particular retail customer, and that the power it supplies to Medical Center will be commingled with power from other sources. Cleveland argues that the fact that the pricing of Cleveland's retail sale to Medical Center is tied to the pricing of Cleveland's purchase from Ohio Power does not transform the requested transmission for power under the Ohio Power/Cleveland Agreement into retail wheeling. In support, Cleveland states that upon the termination of Medical Center's current contract with Cleveland Electric, Cleveland will be undertaking the obligation to serve Medical Center. Cleveland adds that it will have the obligation to serve Medical Center even if the power to be purchased from Ohio Power should become unavailable. Additionally, Cleveland states that the price Medical Center will be charged is assured, regardless of the actual sources from which Cleveland will purchase the power. 20/

We reject Cleveland Electric's arguments that the Commission is prohibited by section 212(h) of the FPA from ordering the requested service for two reasons. First, we conclude that section 212(h) does not preclude us from enforcing contractual commitments on file with the Commission. Second, we conclude that, even if section 212(h) applies, on the facts of this case the requested transmission does not violate 212(h).

There is nothing in the language of section 212(h) or its legislative history to indicate that the Commission cannot enforce contracts that are on file as rate schedules. While section 212(h) prohibits the Commission from issuing any order under the FPA that is conditioned upon or requires the transmission of electric energy directly to an ultimate consumer or to certain entities that will sell the electric energy directly to an ultimate consumer, we do not interpret section

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19/ American Municipal Power-Ohio, Inc., et al., 19 FERC ¶ 61,158 at 61,300, reh'g denied, 20 FERC ¶ 61,018 (1982), further order instituting hearing procedures, 23 FERC ¶ 61,439 (1983), order denying motions and setting schedule, 27 FERC ¶ 61,021, reh'g denied, 27 FERC ¶ 61,256 (1984), opinion and order requiring service, Opinion No. 259, 37 FERC ¶ 61,311 (1986), order on rehearing, Opinion No. 259-A, 38 FERC ¶ 61,175 (1987).

20/ See Cleveland Protest in Docket No. EL96-9-000 at 7-10; Cleveland Complaint in Docket No. EL96-21-000 at 8-9.

212(h) to prohibit the Commission from requiring public utilities to fulfill their contractual transmission obligations on file with this Commission -- including contractual transmission obligations which we could not otherwise order. 21/ The Commission clearly has the authority to enforce parties' transmission agreements and rate schedules filed under the FPA. 22/ That is the circumstance before us.

Moreover, even if section 212(h) applied, the Commission's order would not be prohibited under either 212(h)(1) or 212(h)(2). Section 212(h) provides that:

> No order issued under this Act shall be conditioned upon or require the transmission of electric energy:
>
> (1) directly to an ultimate consumer, or
>
> (2) to, or for the benefit of, an entity if such electric energy would be sold by such entity directly to an ultimate consumer, unless:
>
> (A) such entity is . . . a State or any political subdivision of a State (or an agency, authority, or instrumentality of a State or a political subdivision); . . . and
>
> (B) such entity was providing electric service to such ultimate consumer on [October 24, 1992] or would utilize transmission or distribution facilities that it owns or controls to deliver all such electric energy to such electric consumer.
>
> * * * *

16 U.S.C. §§ 824k(h) (1994).

21/ Our decision here pertains only to enforcing the terms of contractual commitments, including those that may be undertaken voluntarily or pursuant to state retail programs. The Commission clearly cannot expand contractual commitments in a manner that would violate section 212(h).

22/ See, e.g., Duke Power Company v. FERC, 864 F.2d 823, 829 (D.C. Cir. 1989) (enforcement of filed rate schedules is a matter distinctly within the Commission's statutory mandate and the Commission has an independent regulatory duty to remedy a utility's violations of its filed rate schedule); accord supra note 14.

Here, section 212(h)(1) is not violated because the transmission will be over Cleveland Electric's lines to Cleveland. Cleveland's sale to Medical Center will be over Cleveland's 138 kV line. 23/ Thus, this case simply does not involve the transmission of electric energy by Cleveland Electric directly to an ultimate consumer.

Nor is section 212(h)(2) violated. Under section 212(h)(2), the Commission may not require the transmission of energy to, or for the benefit of, an entity if such electric energy would be sold by such entity directly to an ultimate consumer 24/ unless certain conditions are met. Here, Cleveland meets those conditions. Cleveland is an instrumentality of a state or a political subdivision thereof and it will utilize transmission or distribution lines that it owns or controls (i.e., the 138 kV line) to deliver all the electric energy to Medical Center.

Additionally, there is nothing in the facts of this case that would be inconsistent with the intent of Congress as expressed in EPAct's legislative history. Congress was primarily concerned that the Commission be prohibited from issuing orders which require wheeling where the substance of the transaction amounts to retail wheeling because the wholesale sale is, in fact, a subterfuge intended to circumvent the ban on retail wheeling, as in the case where mere "paper purchasing corporations" are interposed in front of the ultimate consumer. 25/ However, Congress also clearly intended that wheeling to an

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23/ Cleveland states that it "will utilize its own facilities to serve [Medical Center]," Cleveland Protest in Docket No. EL96-9-000 at 11, and Cleveland Electric does not dispute this. See Cleveland Electric Petition in Docket No. EL96-9-000 at 15 (stating that the Commission should not be "misled by the mere fact that [Cleveland] would serve [Medical Center] through distribution facilities owned and controlled by [Cleveland]").

24/ We note that whether the transmission of electric energy is directly to an ultimate consumer is a different issue than whether a sale of electric energy is directly to an ultimate consumer; i.e., a retail sale.

25/ Senator Johnston, the floor manager of the EPAct in the Senate, explained that section 212(h) prohibited the Commission from ordering transmission of electric energy to an entity for resale to an ultimate consumer "in instances in which the substance of the transaction amounts to retail wheeling because the wholesale sale

(continued...)

entity which meets the criteria in section 212(h)(2)(B) not be considered a prohibited sham wholesale transaction. 26/ Thus, the Commission may not order transmission to paper intermediaries used as a vehicle for end users to bypass their local utilities. Here, in contrast, Cleveland clearly is not a paper entity. It has for many years both owned and operated generation, transmission and distribution facilities, and competed with Cleveland Electric.

Given the above findings, there is no need to respond to Cleveland Electric's arguments that Ohio Power's sale to Cleveland is not a legitimate wholesale sale. We need only find that the transmission service meets the criteria of section 212(h), and we have done so.

In conclusion, we do not interpret section 212(h) to preclude the Commission from enforcing contractual commitments and tariffs on file with the Commission. Moreover, even if section 212(h) applied here, our order is not inconsistent with Congress' intent in prohibiting sham transactions under section 212(h).

C. Cleveland Electric's Request for Stay

We will deny Cleveland Electric's request for a stay pending judicial review. Cleveland Electric's justification for a stay

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25/(...continued)
to the entity is in fact a subterfuge intended to circumvent the ban on retail wheeling." 138 Cong. Rec. S17613-14 (daily ed. Oct. 8, 1992) (statement of Senator Johnston). However, Senator Johnston distinguished sales for resale to an ultimate consumer which are permissible under section 212(h)(2), stating that:

> It is important to note, however, that the "for the benefit of" language [sic] does not reach behind the "entity" referenced in section 212(h)(2). . . . [A] transmitting entity can only be required under the Federal Power Act to deliver transmitted electric energy to an entity described in section 212(h)(2). At that point such entity may . . . deliver such electric energy to ultimate consumers over transmission lines that it owns or controls. . . .

Id.

26/ Id.

is that Cleveland Electric and its remaining native load customers will be "irreversibly harmed." 27/ However, Cleveland Electric provides no specificity as to either the nature or the extent of the harm it anticipates if a stay is not granted. Indeed, the harm would appear to be only monetary, and that is not adequate justification for a stay. 28/

Therefore, we find that Cleveland Electric has failed to present sufficient grounds to grant a stay.

D. Miscellaneous Matters

1. Cleveland also argues that Cleveland Electric is obligated under License Condition No. 3 of the NRC license conditions to provide the requested service. 29/ Cleveland contends that this Commission has the authority to require Cleveland Electric to comply with the NRC license conditions, regardless of whether Cleveland Electric has filed the conditions with this Commission. 30/ Because we have found that

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27/ Cleveland Electric Petition in Docket No. EL96-9-000 at 23.

28/ See generally, e.g., Holyoke Water Company, 30 FERC ¶ 61,283 at 61,575 (1985).

29/ License Condition No. 3 provides, in relevant part, that:

> "[a]pplicants shall engage in wheeling for and at the request of other entities in the [Combined CAPCO Company Territories]:
>
> (1) of electric energy from delivery points of Applicants to the entity(ies); and,
>
> (2) of power generated by or available to the other entity, as a result of its ownership or entitlements in generating facilities, to delivery points of Applicants designated by the other entity.
>
> Such wheeling services shall be available with respect to any unused capacity on the transmission lines of Applicants, the use of which will not jeopardize the Applicants' system.

See Cleveland Complaint in Docket No. EL96-21-000, Attachment 6 at 1 (footnote omitted).

30/ Cleveland Complaint in Docket No. EL96-21-000 at 7, citing City of Cleveland, Ohio v. Cleveland Electric Illuminating Company, 71 FERC ¶ 61,324 at 62,268-69 (1995), reh'g pending.

Cleveland Electric's transmission service agreement provides a sufficient basis to decide this dispute, we need not reach the issue of whether the requested service also may be required under NRC Licensing Condition No. 3.

2. Because we are dismissing as moot Cleveland Electric's petition (in Docket No. EL96-9-000), we will dismiss Cleveland's request to consolidate the proceedings in Docket No. EL96-9-000 and Docket No. EL96-21-000.

3. Cleveland Electric asks that, if we decide it must provide the requested transmission service, we allow the company to recover the "unrecovered costs of the facilities that were installed to provide service to Medical Center." 31/ Cleveland Electric filed its petition prior to the issuance of the Open Access Rule. 32/ There, the Commission set forth the criteria and procedures by which a public utility may seek to recover stranded costs. 33/ Accordingly, we will dismiss Cleveland Electric's request without prejudice to making a filing in a separate proceeding demonstrating that it meets the requirements for seeking stranded cost recovery set forth in our regulations. 34/

The Commission orders:

(A) The motions to intervene of Edison and LILCO are hereby granted.

31/ Cleveland Electric Petition in Docket No. EL96-9-000 at 21.

32/ Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996) (Open Access Rule).

33/ See generally id. at 31,785-851.

34/ See 18 C.F.R. § 35.26. The Commission makes no determination here as to whether Cleveland Electric, under the criteria of the Open Access Rule, may seek stranded cost recovery in the circumstances of this case. Cleveland Electric must show that it falls within the circumstances under which the Commission will entertain requests for stranded cost recovery and, if it does, also must meet the other requirements for seeking recovery. See id.; FERC Stats. & Regs. at 31,814-851.

(B) Cleveland's complaint is hereby granted, as discussed in the body of this order.

(C) Cleveland Electric's petition for a declaratory order is hereby denied, as discussed in the body of this order.

(D) Cleveland's request for consolidation of Docket Nos. EL96-9-000 and EL96-21-000 is hereby dismissed as moot.

(E) Cleveland Electric's request for a stay is hereby denied.

(F) Cleveland Electric's request for stranded cost recovery is hereby dismissed without prejudice.

By the Commission.

(S E A L)

Lois D. Cashell,
Secretary.

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