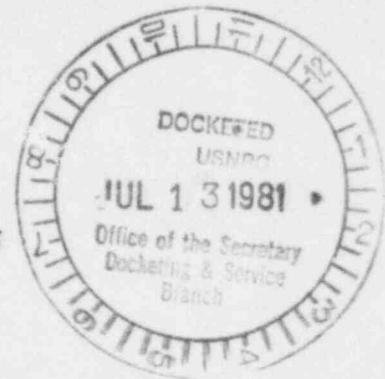


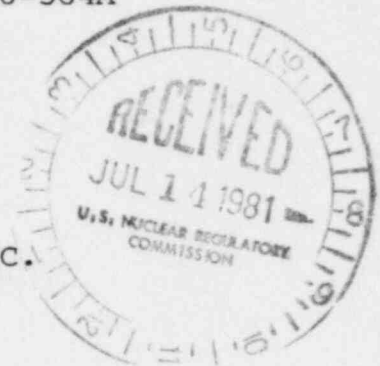
UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Commission



In the Matter of )  
 )  
ALABAMA POWER COMPANY ) Docket Nos. 50-348A  
 ) 50-364A  
(Joseph M. Farley Nuclear Plant,) )  
Units 1 and 2: )  
Antitrust Proceeding) )

ANSWER OF ALABAMA ELECTRIC COOPERATIVE, INC.  
IN OPPOSITION TO ALABAMA POWER COMPANY'S  
"MOTION FOR EXTENSION OF TIME LIMIT FOR  
FILING APPLICATION FOR STAY OF  
APPEAL BOARD DECISION"



Pursuant to 10 CFR §2.730(c) intervenor, Alabama Electric Cooperative, Inc. (AEC) hereby opposes Alabama Power Company's "Motion For Extension Of Time Limit For Filing Application For Stay Of Appeal Board Decision" which the Company lodged with the Commission on July 8, 1981. AEC opposes for the reasons set forth below Alabama Power's effort to further delay this proceeding, which for a variety of reasons has already been exceptionally protracted.

Alabama Power seeks an extension of the time limit established by 10 CFR §2.788 for filing an application for

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a stay of a decision of the Atomic Safety and Licensing Appeal Board ("Appeal Board"), ALAB-646, issued June 30, 1981. In ALAB-646, the Appeal Board reviewed a two-phase antitrust decision rendered by the Atomic Safety and Licensing Board (LBP-77-24, 5 NRC 804, April 8, 1977; and LBP-77-41, 5 NRC 1482, June 24, 1977) pursuant to section 105(c) of the Atomic Energy Act, as amended, (42 U.S.C. §2135(c)) to determine whether the granting of a license to Alabama Power "would create or maintain a situation inconsistent with the antitrust laws." ALAB-646 modified and affirmed the decision rendered by the Licensing Board by finding additional anticompetitive conduct and amended the existing License Conditions in accordance with the additional findings. In ALAB-646, the Appeal Board:

"determined that the applicant enjoyed a dominant position in all three product markets. We also determined that the applicant had acted inconsistently with the antitrust laws and the policies thereunder in seven different instances, including its refusal to share ownership of the Farley plant with AEC. We found that this refusal to share in the ownership of Farley was in furtherance of the applicant's long held objective of preserving the dominant power which it enjoyed in all aspects of the electric power business in central and southern Alabama. Upon full consideration of the situation and the requirements and objectives of the Act, the conclusion we must reach is clear: To eliminate the concerns and to strengthen free

competition in private enterprise, the license to the applicant for the construction and operation of the Farley plant must, as a minimum, include conditions providing (1) AEC with an opportunity to obtain a proportionate share in the ownership of the plant and (2) reasonable transmission or wheeling services as may be needed by AEC and MEUA." (ALAB-646, pp. 147-148.)

Thus, Alabama Power seeks an extension of time in which to seek a stay of license conditions directing it to comply with the antitrust laws with which its past conduct over a period of decades has been found to be inconsistent.

It is evident that Alabama Power's request for extension of time should be addressed to the forum which will eventually pass on its stay request. From this it is clear that the Company's Motion should properly be considered by the Appeal Board pursuant to the Commission's procedural norms. Alabama Power's effort to avoid scrutiny of its request by the Appeal Board here is clearly inconsistent with the Commission's policy that stay requests be heard in the first instance by the tribunal issuing the order, which is the subject of the stay.

10 CFR §2.788(b)(3) and (f) provide in pertinent part:

"In the case of an application to the Commission for stay of decisions or actions by an Atomic Safety and Licensing Appeal Board, a statement where (including record citation, if available)

a stay was requested from the Appeal Board and denied. If no such request was made of the Appeal Board, the application should state why it could not have been made; . . . ."

\* \* \*

"An application to the Commission for a stay of a decision or action by an Atomic Safety and Licensing Appeal Board will be denied if a stay was not, but could have been, sought before the Appeal Board."1/

In this instance there are particularly compelling substantive and practical reasons for directing Alabama Power to seek its requested relief from the Appeal Board. By going to the Commission, the Company seeks to avoid having its request for an extension of time and its anticipated stay request considered and passed on by the Appeal Board, which is intimately familiar with the extensive record of Alabama

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1/ Regarding §2.788(f), the Appeal Board recently said: "Unfortunately, subsection (f) sheds no illumination on what might constitute circumstances in which a stay need not be sought initially from this Board. Presumably, however, the urgency of the perceived need for a stay was not thought by the Commission to be such a circumstance; had it been, the subsection likely would have so indicated." South Carolina Electric and Gas Company (Summer Nuclear Station, Unit 1), ALAB-643, at 3, n. 4 (June 15, 1981).

See also, Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-505, 8 NRC 527, 531 (1978); Florida Power & Light Company (St. Lucie Nuclear Power Plant, Unit 2), ALAB-404, 5 NRC 1185, 1186, n. 2 (1977), and decisions cited therein.

Power's prolonged and obdurate resistance to compliance with the antitrust laws and their underlying policies. Familiar as it is with this record, the Appeal Board can best determine whether Alabama Power's latest request for delay is based on good cause, or whether it is part and parcel of Alabama Power's practice, as found by the Appeal Board, "to resist to the last selling an ownership share of the [Farley nuclear] plant to AEC." ALAB-646, p. 108.

Alabama Power's Motion gave lip service to §2.788(b)(3) by claiming without support that "none of the members of the Appeal Board rendering decision in ALAB-646 is still employed by the Commission." The Commission can readily verify whether this assertion was not only wrong as a matter of fact at the time of Alabama Power's filing but is wrong at the present time.<sup>2/</sup> There is further no basis for the Company's unsupported assertion that the Appeal Board could not act in a timely fashion. As noted above, the Appeal Board's familiarity

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<sup>2/</sup> See, unpublished Memorandum of the Appeal Board of August 14, 1980 in these Dockets.

By letter dated July 10, 1981, the Company corrected certain factual misstatements in its Motion regarding the availability of the Appeal Board to pass on the Company's Motion and proposed stay request. The corrections left the Motion without any excuse for the Company's effort to bypass the Appeal Board.

with the record including Alabama Power's "protracted use of judicial and administrative proceedings . . ." (ALAB-646, at 96) is a compelling "reason to rely on the Appeal Board for resolution of a procedural motion relating to a stay." (Alabama Power's Motion, p. 2.)<sup>3/</sup> We submit that it is because of this very compelling reason that the Company seeks to avoid having the Appeal Board consider the Company's Motion and anticipated stay request. The Company's Motion, if not denied forthwith, should be referred to the Appeal Board.

Alabama Power's grounds for requesting an extension of time in which to file a stay request are totally without merit. The Company is obviously familiar with the record and the Licensing Board's Decisions issued in 1977. The Company delayed eight days from the issuance of ALAB-646 before filing

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<sup>3/</sup> Some light is shed on the Company's tactical approach by the fact that while on the one hand the Company anticipates requesting a stay of the Appeal Board's Decision and its remedial license conditions, on the other hand the Company is simultaneously seeking to delay the time in which it must file a petition for review by the Commission of ALAB-646 by two months -- until September 19, 1981. See Alabama Power's "Motion For Extension Of Time Limit For Filing Petition For Commission Review Of Appeal Board Antitrust Decision" lodged with the Commission on July 9, 1981. AEC is filing a separate opposition to this Motion.



its Motion.<sup>4/</sup> This has been ample time for the Company to familiarize itself with the Decision which deals with facts and legal issues which the Company has been briefing and arguing for over a decade. The Company's extraordinarily long period of familiarity with the subject matter of ALAB-646 is good cause to deny its extension of time request.

The Company's ability to promptly consider and pursue its perception of its legal rights was recently demonstrated by its filing in the United States Court of Appeals for the Fifth Circuit a petition for review of ALAB-646 on the same day that ALAB-646 was issued and a day before it was docketed or served. In effectuating this petition, the Company utilized the combined services of three law firms: Troutman, Sanders, Loc. man & Ashmore; Balch, Bingham, Baker, Hawthorne, Williams & Ward; and Winthrop, Stimson, Putnam & Roberts. In addition, it used a fourth firm, Shaw, Pittman, Potts & Trowbridge, in effectuating the Motion here under consideration. In light of the resources at its call, the Company's

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<sup>4/</sup> Moreover, by so procrastinating in the filing of its Motion, the Company has knowingly forced any responding party to forego the time period allowed for responses or risk Commission action on the Motion without benefit of such response, since the period for response extends beyond the July 16 deadline for the Company's proposed stay request.

claim of inability to meet the normal deadline requirements of the Commission's procedural rules is not merely lame; it is preposterous.

In 1978 the Commission amended its rules to extend the time limit for filing on applications for stays of decisions and extended the time allowed for mail service in §2.710, which the Company has the additional benefit of here. 43 F.R. 17798-17803 (April 26, 1978). In so doing, the Commission stated that it "is committed to developing a hearing process which will produce decisions in a timely fashion," 43 F.R. 17798. To this end (43 F.R. 17799):

"The Commission takes this opportunity to set forth more reasonable time limits for certain portions of the review and hearing process, but wishes to indicate that it expects that these new time limits will be more closely adhered to, and that there will be less reason for extensions of time in such proceedings."

In the case at hand, the Commission has been presented with no credible reason for extending the time limits for the Company's benefit.

The Company's claim that its executive officers are absent from their duty stations and that its management and attorneys need an extended period of time in which to ponder the extent to which the Company will seek a stay of its



legal obligations is a matter of its own making and deserves no weight in determining whether Alabama Power should be permitted to further prolong this proceeding. Given the depth and breadth of its legal representation, the Company must be held to have been aware of the time limits of §2.788. The Company could have readily anticipated the alternative possible outcomes and implications of ALAB-646, which deals with issues long-since articulated and crystallized. The Company has advanced no credible excuse for avoiding the Commission's procedural requirements, and for inflicting on AEC the burden of being deprived for an even longer time of the basic relief to which AEC has been held entitled.

For these reasons Alabama Electric Cooperative, Inc. respectfully requests this Commission to deny Alabama Power's Motion for extension of time, or in the alternative, to refer such Motion to the Appeal Board for prompt disposition.

Respectfully submitted,

*Bennett Boskey*

BENNETT BOSKEY

*D. Biard MacGuineas*

D. BIARD MACGUINEAS

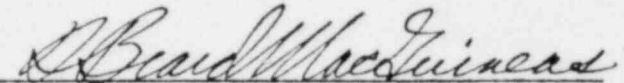
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July 13, 1981

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached document has been served on the following by hand delivery to those indicated by asterisk and by United States Mail, postage prepaid, to the remainder this 13<sup>th</sup> day of July, 1981.

  
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