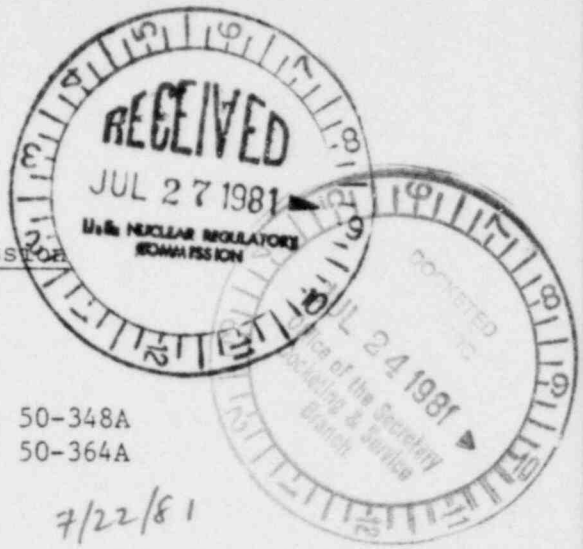

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Nuclear Regulatory Commission

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

7/22/81

APPLICATION FOR AN ORDER STAYING PENDENTE LITE THE EFFECTIVENESS OF ANTITRUST CONDITIONS

PLEASE TAKE NOTICE that upon the annexed affidavit of Elmer B. Harris duly sworn to July 22, 1981 ("Affidavit") and the pleadings and proceedings to date, Alabama Power Company ("APCO") hereby applies to the Nuclear Regulatory Commission ("NRC" or "Commission") pursuant to Section 2.788 of the Rules of Practice, 10 CFR § 2.788, for an order staying pendente lite the effectiveness of license conditions 2 and 7 and, absent clarification, 3, 4, 5 and 6 imposed by a decision of the Atomic Safety and Licensing Appeal Board ("ASLAB") dated June 30, 1981, ALAB-646.

The Action Sought to be Stayed

APCO is the holder of licenses for Joseph M. Farley Nuclear Plant, Units 1 and 2. Commercial operation of Unit 1 commenced in December 1977. ALAB-646 at 4 n.8.

ALAB-646 is the third fully litigated antitrust proceeding under section 105(c) of the Atomic Energy Act, 42 U.S.C. § 2135(c), none of which has been reviewed by the Commission or the Courts. Id. at 3 n.6. Although purporting to modify and affirm, the ASLAB reversed the decisions below (5 NRC 804, 1482 (1977)) in numerous critical respects.

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Specifically, unlike the lower board, the ASLAB determined that: (1) a "coordination services" and retail power market as well as a wholesale market existed in central and southern Alabama; (2) APCO had monopoly power in all these markets; and (3) APCO had abused its power not only in the five unrelated instances found by the lower board, but also by denying AEC* during the period 1969-74 part ownership in the Farley units and by lowering wholesale rates in 1941, 1946 and 1950 to forestall AEC from building its own generation. The ASLAB also rejected all but one of the license conditions mandated by the lower board and imposed seven new conditions.**

APCO has filed a petition for review of ALAB-646 in the United States Court of Appeals for the Fifth Circuit.

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* Alabama Electric Cooperative, Inc., an REA borrower, ("AEC") and the Municipal Electric Utility Association of Alabama ("MEUA") are intervenors in this proceeding.

** Condition 2 in general requires APCO to offer AEC an undivided ownership interest in the Farley Plant. Condition 7 in general requires APCO to engage in wheeling for and at the request of any municipally owned distribution system and to make reasonable provision for the disclosed transmission requirements of such entities. APCO has voluntarily entered into agreements with AEC to provide transmission services to AEC's "off-system" customers and between AEC and other utility systems. APCO has also entered into a revised Interconnection Agreement with AEC providing for reserve sharing and an array of other "coordination services" as needed by AEC. To the extent that conditions 3, 4 and 5 require APCO to deal with AEC on some basis other than these existing agreements, their stay is also sought. Similarly, to the extent that condition 6, which requires APCO to refrain from preventing any entity from fulfilling all or part of its bulk power requirements, through self-generation or through purchases from alternative sources, embraces existing two year notice provisions prior to discontinuance of existing service by APCO, its stay is also sought. APCO does not seek a stay of conditions 1 and 8.

Grounds for the Stay

1. Likelihood that APCO Will Prevail on the Merits

ALAB-646 is so fundamentally flawed that it is highly likely that it will be reversed on numerous critical issues. We mention only a few.

In spite of uncontroverted evidence of pervasive state and federal regulation of APCO's prices for electric service and its use of its generation and transmission facilities, the ASLAB concluded that APCO possessed monopoly power, i.e., the power to control prices or exclude competitors based upon its predominant market share of the wholesale and retail markets and its alleged predominant control of generation and transmission in the coordination services market. ALAB-646 at 74-85. This was error. In Almeda Mall, Inc. v. Houston Lighting & Power Co., 615 F.2d 343, 354-55 (5th Cir.), cert. denied, 101 S. Ct. 208 (1980), the Court stated:

> "As a natural monopoly with regulated rates and services, HL & P does not fit the mold of the traditional monopolist sought to be restricted by Section 2. It does not have the direct power to control prices or exclude competition. Monopolization cases involving such regulated industries are special in nature and require close scrutiny. The reason for this is that regulation is considered an adequate replacement for the lack of competition that exists with a natural monopoly. In such a case, controlling a predominant share of the relevant market cannot infer the traditional monopoly power associated with an entity outside the regulated field." (emphasis ad ed)

In Mid-Texas Communications Systems, Inc. v. A.T.&T., 615 F.2d 1372 (5th Cir.), cert. denied sub. nom., Woodlands Telecommunications Corp. v. Southwestern Bell Telephone Co., 101 S. Ct. 286 (1980), Bell was requested by Mid-Texas to interconnect and provide certain codes which Mid-Texas needed to provide telephone service to a new suburban community. Bell refused to interconnect voluntarily because (1) it planned to serve the

area itself; and (2) the establishment of a new independent telephone company was contrary to the public interest and a wasteful duplication of facilities. Bell stated that only if ordered to do so by regulatory authorities would it interconnect. 615 F.2d at 1376.* Mid-Texas sued alleging Sherman Act violations. After rejecting Bell's contention that Section 201(a) of the Communications Act which governed telephone interconnections under a "public interest" standard conferred implied immunity upon Bell, the Court nevertheless reversed a jury instruction that "Bell has 'monopoly power' in the relevant market . . . in that . . . [Bell] controlled the essential facilities of long-distance lines and NNX codes to which competitors must have access to do business."** 615 F.2d at 1386. The Court stated:

> "We hold that the district court erred in directing the jury to assume the existence of monopoly power while at the same time refusing to instruct the jury that there existed a regulatory mechanism to compel interconnection. The regulatory procedure was directly relevant to Bell's power to exclude competition. Undoubtedly, section 201(a) must be taken into account in any consideration

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* It bears noting that the ASLAB condemned precisely the same alleged conduct in this proceeding. See ALAB-646 at 99 (condemning APCO's motivation to prevent "uneconomic and wasteful duplication"); Id. at 107 (condemning (and misstating) APCO's alleged position that only if compelled by NRC would APCO enter into a joint ownership arrangement with AEC).

** Compare ALAB-646 at 77, 75-80 (finding that APCO had monopoly power over the "coordination services market" due to its dominance of transmission facilities which placed APCO in the unique position to control access to the market for coordination services). Without explanation, the ASLAB rejected APCO's contention that it did not possess monopoly power due to the jurisdiction of the Alabama Public Service Commission over transmission service subject to the preemption in favor of the Federal Energy Regulatory Commission ("FERC") by the Federal Power Act and amended by the Public Utility Regulatory Policies Act of 1978 which, among other things, conferred broad powers to compel interconnection, coordination and access to transmission in FERC. ALAB-646 at 2.

> of Bell's decision on interconnection. See Watson & Brunner, Monopolization by Regulated 'Monopolies': The Search for Substantive Standards, 22 Antitrust Bull. 559, 573-74 (1977). Whether Bell possessed sufficient power to exclude competition in light of section 201(a) is a question for the jury's consideration. Accordingly, the district court should have instructed the jury on the applicable regulatory provision pertaining to interconnection and on the jury's duty 'to take into account the unique federal and state regulatory restraints.' Thus the jury should have been permitted fairly to resolve the issue of Bell's alleged monopoly power. The court's failure to do so constituted reversible error." 615 F.2d at 1386-87.*

Since the ASLAB erred in finding that APCO possessed monopoly power in any relevant market, its decision is fatally defective. Nor is it surprising that the ASLAB compounded its error by applying the wrong standard to assess APCO's conduct. The ASLAB Board concluded that since APCO was a "dominant business enterprise wielding monopoly power", its actions must be "tested against a more stringent standard than applies to actions of smaller concerns in highly competitive markets." ALAB-646 at 89. While this may be true of unregulated industries, it was error to apply this standard to APCO's conduct. See Almeda Mall, supra, 615 F.2d at 354 n.21; City of Groton v. Connecticut Power & Light Co., 497 F. Supp. 1040, 1051 n.13 (D. Conn. 1980).

Lying at the foundation of the ASLAB decision is its determination that APCO owns all transmission lines in the relevant markets which could provide access to utilities outside the market area (ALAB-646 at 76) and there is no assurance that such "other utilities memtioned [sic] would

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* The ASLAB concluded that APCO's contention that it lacked monopoly power was simply a "back door" attempt to plead an implied immunity from antitrust scrutiny. ALAB-646 at 19. Mid-Texas compels reversal of this conclusion.

engage in the arrangements" (Id. at 79) for coordination services. These determinations are unsupported by the record and are contrary to uncontroverted facts appearing in the record. The ASLAB thus ignores facts of record which demonstrate that (i) AEC is already interconnected with two 115 KV lines (the primary voltage utilized on AEC's electric system) with Georgia Power at the site of the Walter F. George Lock and Dam; (ii) existing transmission lines of AEC traverse existing lines of Gulf Power within the panhandle of Florida; (iii) AEC already has in place a transmission line capable of operating as high as 230 KV within 8 or 10 miles of Mississippi where both Mississippi Power and South Mississippi Electric Power Association own transmission lines; and (iv) any access to power from or sales of power to or through the transmission systems of utilities outside the market area would necessarily require that AEC successfully negotiate with such utilities and there is no showing that APCO has the power to veto or prevent such negotiations.

The imposition of license condition 2 was also erroneous. Condition 2 was imposed, in part, due to the ASLAB's finding that during the period 1969-74 APCO unreasonably offered AEC access to the output of the Farley Plant in the form of unit power rather than joint ownership as a tenant in common. ALAB-646 at 148-153. Yet, in 1968 Donald F. Turner, Assistant Attorney General, told the Joint Committee on Atomic Energy:

> "We are not suggesting that the only form of access should be by ownership participation. It may well, indeed, be access to the power on a purchasing basis.
>
> * * *
>
> "We are not suggesting that . . . access on an ownership basis must necessarily be given." (emphasis added)

This view was reiterated in 1969 by Brock Comegys, Acting Assistant Attorney General, who also endorsed the following statement of Roland W. Donnem of the Justice Department:

> "Second, it may well be necessary in some circumstances to make explicit allowance for the competitive advantage conferred on municipally owned companies by virtue of their tax exempt status. Failure to make such allowance might confer an unfair competitive advantage on municipally owned companies who are permitted to participate, and thus hamper competition and perhaps discourage the very creation of large-scale generating facilities." (Hearings Before the Joint Committee on Atomic Energy, 91st Cong., 1st Sess. Pt. 1, p. 10) (emphasis added)

The above, together with the legislative history shown at 5 NRC 1491-1496, show that the offer of unit power, but not joint ownership, access cannot without more be deemed "anticompetitive behavior" nor can condition 2 be justified on that basis.

Condition 7 is equally erroneous. The ASLAB found that MEUA was not an actual (ALAB-646 at 118) or potential (Id. at 125) competitor of APCO in the wholesale market. Although it did find that MEUA and APCO competed at the retail level, it was unconvinced that any conduct of APCO (including allegedly restrictive contractual provisions) had any effect on MEUA's retail business. Id. It found no evidence that the municipals "were either seriously interested in or capable of building their own generating plants or seeking out other bulk power supplies." Id. at 127. Nor did the Board find that APCO had ever refused to wheel for MEUA or its members. This led it to state unequivocally, "The evidence . . . does not show that [APCO] has unlawfully monopolized the retail market or sought to do so." Id. at 162.

Despite these findings, ASLAB determined that not only must the offensive contractual provisions (condition 6) be removed but also that

any member of MEUA must be provided wheeling over APCO's transmission facilities (condition 7). That conclusion is unsupported by the record and is contradicted by ASLAB's own findings.

2. APCO Will Be Irreparably Injured Unless a Stay is Granted

A substantial effect on APCO's existing property interests sufficient to warrant a stay occurs if a sale is required. See International Boxing Club of New York v. United States, 2 L.Ed. 2d 15, 78 S. Ct. 4 (Harlan, Circuit Judge, 1957) staying, United States v. International Boxing Club of New York, Inc., 117 F. Supp. 841 (S.D.N.Y. 1957). In addition, if condition 2 is not stayed, APCO will be subjected to substantial costs. Affidavit at 3-4. It is unclear whether APCO could recover such costs upon successful appeal. More importantly, there is no assurance that the mortgage of AEC's ownership interest in the Farley Plant to a bona fide purchaser for value can be "undone" should condition 2 be reversed later. See Id. at 4-5. Further, APCO is presently engaged in a retail rate case seeking over $300 million in relief. Id. at 1. Unless license condition 2 is stayed, there is a probability that this unreviewed condition, together with pressure emanating from a proposal submitted by MEUA on July 7, 1981, will be used to influence the Alabama Public Service Commission to deny some or all of the requested relief. See Id. at 2-3.

Similarly, failure to stay conditions 3 through 7 will have a deleterious effect on APCO's ability to finance during the pendency of further appeals. Simply stated, APCO's lenders exact compensation for the risks which they are asked to take or which they perceive they must take in making money available to APCO. The possible loss of load resulting if conditions 3 through 7 are not stayed, will likely be

perceived by the credit markets as an additional risk for which they will seek compensation from APCO irrespective of the probability that those conditions will be reversed on appeal. See Id. at 5-6.

3. The Other Parties will not be Harmed by a Stay

Unlike APCO, AEC's rates are unregulated and its ability to finance is not dependent upon the same perceptions of private credit markets since its loans come from REA or are guaranteed or insured by REA. A stay of condition 2 would, therefore, not impact AEC financially Further, a stay of conditions 3 through 7 would not harm AEC or MEUA.

AEC presently has in place excess capacity which it is attempting to market elsewhere on a short term basis. Id. at 7. The injection of substantial Farley capacity (for which AEC will be required to advance substantial sums) would inject further, presently nonremunerative capacity into AEC's system. Id. Moreover, APCO is selling wholesale power to the "off-system" member cooperatives of AEC at APCO's system average cost which is less than the cost of power from the Farley Plant. Id. at 6-7. Were AEC to substitute power from the Farley Plant for such wholesale power supply during the appeal of ALAB-646, these customers would be adversely affected because their power supply cost would increase. See Id.

With respect to MEUA under condition 7, it should be noted that in only one instance in recorded history have the MEUA members identified a power source for which APCO was requested to provide transmission services. In that instance (the 1970 SEPA arrangement) APCO accommodated such request. Notably absent from the findings of the lower board or ASLAB is any refusal by APCO to wheel. All contractual terms allegedly restricting opportunities of MEUA and its members to pursue other

transactions have been eliminated. MEUA and its members were granted no access to the Farley Plant by ASLAB. Accordingly, like AEC, MEUA and its members will suffer no harm if a stay is granted.

4. The Public Interest Favors a Stay

It seems clear that where ALAB-646 will likely be reversed in whole or part and implementation thereof pendente lite will irreparably harm APCO (and APCO's ratepayers) with no demonstrable harm to other parties or their ratepayers, the public interest favors the granting of a stay.

Also, condition 2 does not take account of the situation which would confront APCO and its ratepayers should the Farley Plant suffer an incident such as that which occurred at Three Mile Island and AEC, as part owner, is unable to raise funds to cover its pro rata share of the "clean up" and the staggering costs which could exceed the total cost of the Farley Plant. Affidavit at 7-8.

In view of the important policy considerations outlined above, APCO respectfully requests oral argument before the full Commission.

Respectfully submitted,

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