
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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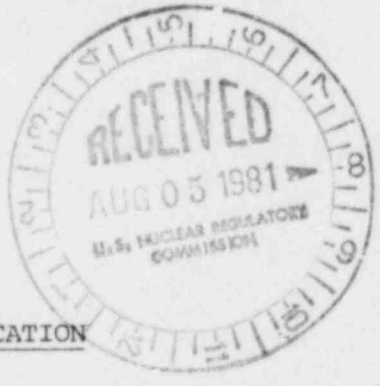
| ALABAMA POWER COMPANY | ) | Docket Nos. 50-348A |
| (Josepn M. Farley Nuclear Plant, | ) | 50-364A |
| Units 1 and 2: Antitrust | ) | |




ALABAMA ELECTRIC COOPERATIVE'S
OPPOSITION TO ALABAMA POWER COMPANY'S STAY APPLICATION

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July 30, 1981



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ALABAMA ELECTRIC COOPERATIVE'S
OPPOSITION TO ALABAMA POWER COMPANY'S STAY APPLICATION

Alabama Electric Cooperative, Inc. (AEC) strongly opposes Alabama Power Company's (APCo's) stay application. A stay would enable APCo without justification to put off its long-avoided compliance with the antitrust laws and their underlying policies. The Commission has a statutory obligation to enforce these laws and policies by the license conditions which, after careful scrutiny of an extensive record, the Appeal Board has determined to be necessary. APCo seeks to stay only those portions of its operating licenses which require it to comply with the antitrust laws, thereby continuing to preserve and aggravate the situation inconsistent with the antitrust laws. See Davis-Besse, ALAB-385, 5 NRC 621, 625-626 (1977).

The standards APCo must satisfy to obtain a stay are codified by the Commission at 10 CFR §2.788(e) and embody the established criteria of Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). See also 42 F.R. 22128, 22129 (May 2, 1977). Controlling precedent requires that the stay be denied. Davis-Besse, ALAB-385, supra. Indeed, here the reasons for denying the stay are even more compelling than in Davis-Besse.

While affirming the Licensing Board's finding that APCo has monopoly lock on the wholesale relevant market (LBP-77-24, 5 NRC 890-901; ALAB-646, 30, 74), the Appeal Board went on to determine that APCo enjoys monopoly power in both the coordination services and retail relevant markets. In so doing, the Appeal Board rejected none of the basic, underlying facts found by the Licensing Board, but merely applied to the established facts the legal and market analysis required by NRC, Supreme Court, and other judicial precedents. ALAB-646, 30-54, 75-80; 54-73, 80-85. In reviewing APCo conduct, the Appeal Board affirmed all the Licensing Board's findings of numerous instances and patterns of APCo anticompetitive conduct.[1/] ALAB-646, 90-91.

In addition, ALAB-646 determined that in light of APCo's monopoly lock on all three relevant markets and properly viewing the evidence as a whole, rather than in isolated compartments, "it would have been permissible to find any number of additional alleged instances of misconduct to have been part of an anticompetitive pattern and thus subject to obloquy" (ALAB-646, 90). But with respect to these additional items, the Appeal Board deferred to the Licensing Board, except in two areas

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1/ For example, "Applicant consistently refused to make fair interconnection and coordination arrangements with AEC, for the sole purpose of maintaining and protecting Applicant's wholesale customer business from competition by AEC. Applicant's refusals to offer AEC reasonable interconnection and coordination in these circumstances can only be viewed as anticompetitive, and inconsistent with the antitrust laws and their underlying policies. We find that Applicant's behavior in regard to offering AEC interconnection and coordination in this period evinces an anticompetitive intent toward AEC", LBP-77-24, 5 NRC 925; and "Applicant clearly intended to, and did, deny in concert with other utilities, publicly owned utilities in its service area the benefits of economic coordination in order to eliminate competition from them." LBP-77-24, 5 NRC 954.

in which the record compelled additional findings of anticompetitive conduct:

(i) Viewed in the perspective of APCo's pattern of litigation opposing construction of AEC's own generating capacity, APCo's evident pattern of rate reductions to AEC timed and for the purpose of discouraging AEC's development of self-generation was in derogation of the antitrust laws. ALAB-646, 91-100.

(ii) After thoroughly reviewing both the testimony of APCo's key executives and APCo's actual conduct over the decade in which AEC has been seeking ownership participation in Farley, the Appeal Board also found that APCo constantly refused ownership access by AEC to Farley in order to preserve or enhance APCo's monopoly position in the competitive market--an action unacceptable under, and condemned by, Section 105c and the antitrust laws referred to therein. Id. at 100-112. Indeed, APCo's "position: to resist to the last selling an ownership share of the plant to AEC" (Id. at 108) continues to this hour. APCo even now refuses to engage in initial discussions of ownership access as required by the Appeal Board's decision. See Attachments A and B hereto.

On the basis of its findings as to APCo's pervasive monopoly power and the anticompetitive uses to which this was, and is, being put, and pursuant to the remedial standards and purposes of Section 105c, the Appeal Board determined that appropriate license conditions must, at a minimum, include inter alia, for AEC proportionate ownership access to the Farley nuclear units and wheeling access within and through APCo's system. Id. at 133-164.

APCo clearly fails to make any of the showings requisite for a stay.

1. There is no likelihood that APCo will prevail on the merits. APCo's claims of alleged errors in ALAB-646 relate largely to factual claims considered and rejected by both the Licensing and Appeal Boards. APCo's claim that it does not have a monopoly lock on transmission lines was considered thoroughly in LBP-77-24.[2/] The Appeal Board reviewed this factual claim in even greater detail, including the testimony of APCo witness Elmer Harris that APCo's transmission is a necessary path for AEC access to other electric systems.[3/] Pursuant to 10 CFR §2.786(b)(4)(ii), these and the multitude of other Licensing Board findings affirmed by the Appeal Board are not subject to further review.[4/]

APCo's "time worn and discredited argument"[5/] that because some aspects of its operations are regulated, it cannot as a factual matter have monopoly power has been amply considered and firmly rejected by both tribunals below. LBP-77-24 at 5 NRC 882-885,[6/] and ALAB-646 at

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2/ 5 NRC 899-901; see also 5 NRC 821, 826, 827, 828-833, 919, 957-959.

3/ ALAB-646 at 75-80 (APCo "simply has failed to rebut the showing that its predominant control of transmission and generation gives it monopoly power over the sale of coordinated services in the relevant market area"); Id. at 158-159. See also Mayben direct testimony, 19-21, 34-47, 51; Lowman direct, 140-141; Rogers direct 12-14; Vann direct, 2, 23; Porter direct, 23; DJ-301, DJ-1004a, DJ-1008, AEC CRL-2 (updated); Lowman, Tr. 26,380-26,387; AEC-76 through AEC-84; AEC CRL-90, Sections 3.04 and 5.03; AEC Reply Brief before the Licensing Board, pp. 26-34 and citations therein (August 16, 1976). APCo vigorously argued this point orally before the Appeal Board, whose eventual findings on APCo transmission dominance confirmed those of the Licensing Board.

4/ In promulgating 10 CFR §2.786(b)(4)(ii), the Commission determined "that as to factual matters, two levels of decision within the agency are enough, and that there is no need for a third factual review by the Commission itself." 42 F.R. 22129 (May 2, 1977). This doctrine further drains APCo's stay application of any vitality.

5/ ALAB-646 at 16.

6/ See also 5 NRC 861-867 for the Licensing Board's rejection of the same argument in its "immunity" disguise; and see AEC's Answering Brief on Exceptions before the Appeal Board, pp. 23-34 (April 14, 1978).

14-21, 81-85. APCo's contention having been given two burials, it is no longer ripe for resurrection. 10 CFR §2.786(b)(4)(ii).[7/]

APCo's critique (Application, p. 5) of the Appeal Board's standard for measuring the Company's conduct (ALAB-646 at 89) is completely baseless. The ultimate authority relied on by APCo in the citations given on p. 5 of APCo's Application appears to be merely an article by Messrs. Watson and Brunner criticizing the Supreme Court's decision in Otter Tail (see Almeda Mall, supra, 615 F.2d at 354, n. 21). The two footnotes cited by APCo, which go to the question of how much evidence of anti-competitive intent should be required in a case involving a regulated utility, were in the context of private antitrust actions for recovery of damages. Here the requisite intent is clearly articulated in LBP-77-24, at 5 NRC 853-855, and in ALAB-646 at 97-99, 109-112. Accord, Midland, ALAB-382, 6 NRC 892, 922-923 (1977); and City of Mishawaka v. American

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7/ APCo claims (Application, pp. 3-5) to draw support from two 1980 Fifth Circuit decisions, neither of which can possibly aid it. Mid-Texas Communications v. A.T.&T., 615 F.2d 1372, was a private antitrust suit where the court simply held that the regulated aspects of the industry were to be considered by the fact finder--there a jury--in determining monopoly power, which could not merely be assumed. This is totally consistent with the Licensing and Appeal Boards' actions in determining that the regulatory schemes affecting APCo did not in fact foreclose the existence of, or the blatant and prolonged misuse of, APCo's monopoly power. Almeda Mall, Inc. v. Houston Lighting & Power Co., 615 F.2d 343, was a private triple-damage suit by a shopping center customer (in no way a competitor) seeking to become a middleman to resell retail electric service--a customer who had not proved any damages. Moreover, the dicta APCo quotes are wholly consistent with the Boards' analyses below. See, e.g., 5 NRC 884-835, 899-901; ALAB-646 at 20-21, 83-85.

APCo made no effort to bring these decisions to the Appeal Board's attention when they were issued in 1980. APCo clearly had an obligation to do so had it believed they had any significance to this proceeding. See colloquy between Board and APCo counsel at Tr. 242-245, 254-256 (Oral Argument before the Appeal Board, March 8, 1979). Had APCo done so, the Appeal Board would have had no difficulty in showing that the decisions lend no support whatsoever to APCo's contentions.

Electric Power Co., Inc., 616 F.2d 976, 985 (7th Cir. 1980), cert. denied 101 S.Ct. 892 (1981). And in any event, the conduct condemned by the two Boards clearly includes findings of specific anticompetitive intent directed against AEC. See 5 NRC 925, 944-945, 953-954, 957-959; ALAB-646 at 90, 96-99, 109-110, 111-112.

In sum, APCo's claims of errors are either based on factual claims twice rejected by the tribunals below or clearly insubstantial.[8/] They are not only a country mile from the strong showing required (Davis-Besse, supra, at 5 NRC 631), they do not even rise to the dignity of meriting review.

2. APCo has shown no "special burden, let alone irreparable injury"[9/] from immediate compliance with the antitrust conditions which are an integral part of its license. One fundamental defect in APCo's stay request is the controlling fact that APCo has been on formal notice that permission to construct and operate the Farley units has always been conditioned upon APCo's willingness to accept whatever antitrust license conditions (which APCo knew might include proportionate ownership access to the units by, and wheeling services for, other parties) might be determined to be appropriate. This notice, which explicitly warned that "In the course of its planning and other activities, applicant [APCo]

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8/ Aside from mischaracterizing the Appeal Board's basis for requiring ownership access, APCo's Application (pp. 6-7) seriously distorts the thrust of the legislative history of Section 105c. See AEC Brief In Support of Exceptions before the Appeal Board, pp. 32-41 (November 14, 1977); Justice Brief on Exceptions, pp. 34-41 (November 14, 1977).

9/ Davis-Besse, LBP-77-7, 5 NRC at 462 (denying stay of antitrust license conditions), affirmed and quoted with approval in ALAB-385, 5 NRC 621, 628 (1977).

will be expected to conduct itself accordingly", has been embodied in APCo's construction permits (CPPR-85 and 86) for nearly a decade. See Attachment C hereto.[10/] It may be inconvenient for a business to comply with the antitrust laws and policies, but that is hardly a reason for prolonging APCo's immunity from such compliance. Thus, any APCo claims that compliance with the antitrust conditions would now result in effects on its property interests, disruption, costs, diseconomies, or other speculative and ill-defined claims of adverse economic impact[11/] must be rejected--even absent the lack of merit to these claims. "With its eyes open, [APCo] has willingly accepted that risk, however great." Power Reactor Development Co. v. Electrical Union, 367 U.S. 396, 415 (1961). Moreover, APCo has totally failed to explain how, if such factors are really serious problems, it has become so commonplace for utilities all over the country to work out ownership participation

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10/ Presumably APCo has long since disclosed to the financial community the potential and actual conditions to its authorizations, so that there has been full opportunity for such factors to have been considered and discounted by the credit markets. Indeed, if such disclosures were not adequately made, APCo's failure to have done so is no ground for granting a stay.

11/ The Alabama PSC long ago urged APCo to sell as much as a 25% interest in the Farley Plant (see quote at 5 NRC 878). This decision was affirmed in pertinent part sub nom. Alabama Power Company v. Alabama Public Service Commission, Circuit Court of Montgomery, Alabama, In Equity, Order issued August 11, 1976. APCo's present suggestion (Application, p. 8, and accompanying Harris Affidavit, pp. 2-3) that a stay be granted to avoid the Alabama PSC's being subjected to undue "pressure" in proceedings clearly within that body's jurisdiction--aside from being a gratuitous slur on that body--is not a contention to which any weight can be given; as the Supreme Court said of the Atomic Energy Commission, "We cannot assume that the Commission will exceed its powers, or that these many safeguards to protect the public interest will not be fully effective." Power Reactor Development Co. v. Electrical Union, supra, 367 U.S. at 415-416.

arrangements for nuclear reactor projects. To give weight to such claims by APCo would be to repudiate the underlying basis for the construction permits APCo agreed to abide by, and to render meaningless the Commission's explicit warnings in the construction permits. Even absent these particular considerations negating the Company's claims of injury, the claims clearly fail under the Davis-Besse criteria, 5 NRC 621, at 626-629.

3. Contrary to APCo's bald assertions, AEC will be substantially harmed if a stay is granted. See Affidavit of Charles R. Lowman, Attachment D hereto. A stay would, of course, permit APCo to continue its unlawful anticompetitive conduct found to be harmful to AEC, with the situation aggravated by APCo's continuing to retain the economic advantages of having both Farley units in operation.[12/] APCo now claims (Application, p. 9) that Farley capacity and energy would be "nonremunerative" to AEC. It is true that this might occur if APCo were permitted to refuse to wheel that power for AEC; but there is no ground for thinking it might occur otherwise. By claiming that AEC would be economically injured by displacing wholesale purchases from APCo with Farley power, APCo is arrogating to itself economic decisions which are the right of AEC to make--a characteristic exercise of anticompetitive conduct on APCo's part. This case is squarely governed by the considerations

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12/ As the Licensing Board found, as affirmed by the Appeal Board, "deliberately to withhold access to such essential nuclear facilities from a smaller competing entity would itself constitute anticompetitive conduct, with a clear nexus or connection between a situation inconsistent with the antitrust laws and the effect of reasonably probable activities under the license. We find that the exclusion of AEC from the Farley nuclear facilities probably would create a decisive competitive advantage to Applicant [APCo]." (5 NRC 960).

discussed in Davis-Besse (denial of stay), 5 NRC 621, 629-630, which compel the denial of APCo's stay application.

4. A stay would clearly be contrary to the public interest. Further delay in halting APCo's long illegal course of conduct would be plainly contrary to the public interest. APCo has shown no likelihood of prevailing on the merits; it is evident that substantial harm to AEC would be inherent in the continued unconditioned enjoyment by APCo of the decisive competitive advantage of exclusive access to the Farley units and to wheeling opportunities; and the grossly exaggerated claims of APCo concerning irreparable injury lack credibility under accepted stay criteria. APCo has enjoyed full-power operation of Unit 1 since June 1977 and now has full-power authority for Unit 2. Continuation of this situation, without superimposing on it the antitrust conditions set forth in the Appeal Board's decision, would be a legal and economic monstrosity incontestably detrimental to the public interest. Davis-Besse, supra, 5 NRC at 630-631.

For at least ten years APCo has been stonewalling AEC with respect to AEC's efforts to obtain ownership participation in Farley. The Appeal Board has recognized APCo's course of conduct for what it obviously is--a serious affront to the antitrust laws, and to the policies underlying them, involving matters which are at the heart of this Commission's statutory obligations in the licensing process. To grant a stay would unjustifiably reward APCo for its serious misconduct and would enable APCo to extend into the indefinite future the obdurate

illegality from which it has already benefitted over so many years.

The stay should be denied.

Respectfully submitted,

Bennett Boskey

BENNETT BOSKEY

D. Biard MacGuineas

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Attorneys for Alabama Electric
Cooperative, Inc.

July 30, 1981

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached document have been served on the following by United States Mail, postage prepaid, this 30th day of July, 1981.

D. Biard MacGuineas

Secretary
Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing
Appeal Board Panel
Nuclear Regulatory Commission
Washington, D.C. 20555

Michael C. Farrar, Chairman
Atomic Safety and Licensing
Appeal Board
Nuclear Regulatory Commission
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ATTACHMENT A

Alabama Electric Cooperative, Inc.
POST OFFICE BOX 550
Andalusia, Alabama 36420

July 17, 1981

Mr. Joseph Farley, President
Alabama Power Company
P. O. Box 2641
Birmingham, Alabama 36202

Dear Joe:

This is to request that, pursuant to the decision of the Atomic Safety and Licensing Board of NRC issued June 30, 1981 (ALAB-646), Alabama Power Company promptly begin discussions with AEC concerning the drafting of appropriate contracts regarding the Farley Nuclear Plant to the end that the Company comply with the NRC license conditions which the Appeal Board decision makes applicable to the two units of that Plant.

In this regard, and in order to enable the negotiations to be fully meaningful, we request that the Company as soon as possible furnish AEC with detailed cost information relating to each of the two units.

Your personal attention to this matter will be most appreciated.

Sincerely yours,

Charles

Charles R. Lowman
General Manager

CRL:elf

ATTACHMENT B

BALCH, BINGHAM, BAKER, HAWTHORNE, WILLIAMS & WARD

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July 23, 1981

Mr. Charles R. Lowman
Alabama Electric Cocperative, Inc.
P. O. Box 550
Andalusia, Alabama 36420

Dear Charles:

Your letter of July 17, 1981, to Mr. Farley, concerning the decision issued by the Atomic Safety and Licensing Appeal Board on June 30, 1981, has been referred to me for response. This matter, of course, is still in litigation. The Company has determined to seek review of that decision and, because of our advice that such review is likely to result in reversal, the Company is also seeking a stay of the operation of certain of the license conditions, including condition 2. In view of this situation, we feel it is premature to initiate discussions now.

Yours very truly,

Robert A. Buettner

Robert A. Buettner

RAB/jw

cc: D. Biard MacGuineas, Esq.