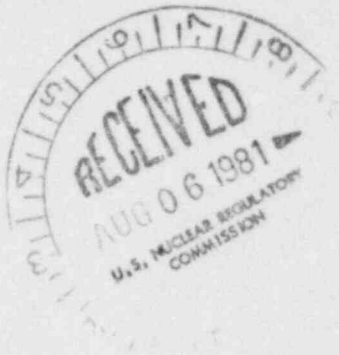

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

ALABAMA ELECTRIC COOPERATIVE'S OPPOSITION TO THE MUNICIPAL ELECTRIC UTILITY ASSOCIATION'S PETITION FOR REVIEW

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August 3, 1981

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The Petition to review ALAB-646 filed by Municipal Electric Utility Association of Alabama (MEUA) is devoid of allegations meriting plenary review by the Commission and should be denied.

The individual members of MEUA, an unincorporated association, are 12 municipally-owned retail distribution systems which receive their wholesale power supply from Alabama Power Co. (APCo) through purchase, or as wheeled to them by APCo from the Southeastern Power Administration (SEPA). Farley, LBP-77-2, 5 NRC 804, 827-828.[1/] The Licensing Board determined: (i) that certain provisions in APCo contracts with Alabama Electric Cooperative (AEC), with AEC's members, and with MEUA members were anti-competitive measures by APCo in precluding alternative sources of wholesale power supply to those members (5 NRC at 931-932); (ii) that APCo's contract with SEPA for the wheeling of SEPA power to preference customers (AEC, its members, and MEUA members) and related contract clauses required AEC members and MEUA members to take all their remaining power

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1/ A brief summary of LBP-77-2 and ALAB-646, dealing with their substance on matters other than those raised by MEUA's Petition For Review, is found in "Alabama Electric Cooperative's Opposition To Alabama Power Company's Peitition For Review" filed in this proceeding.

supply requirements from APCo, and as such were exclusive dealing arrangements proscribed by the antitrust laws and their underlying policies (6 NRC at 933-937). The Licensing Board concluded (5 NRC at 961) that:

> "No access to nuclear facilities as such appears to be required in the case of MEUA or its members. This result is based upon our finding that there is no significant actual or prospective competition between these entities at the retail distribution level.[301] We have also found that there is no 'price squeeze' practiced by Applicant at the wholesale level, because its wholesale rates to MEUA customers have not been set too high, and Applicant is not serving its own retail customers at less than either long-run average or long-run incremental costs.[302] If AEC is granted reasonable access to nuclear facilities, presumably it could continue to be a competing wholesale power supplier. Therefore MEUA and its members would thereby have an alternative bulk power supply source. To go beyond this might be considered an unwarranted attempt to restructure the electric power industry at the retail distribution level, rather than fulfilling the statutory mandate of antitrust review under Section 105c.[303]
>
> 301 See pp. 887-890, supra.
> 302 See p. 939, supra.
> 303 See p. 840, supra."

On the basis of these determinations the Licensing Board determined that no licensing conditions running specifically to MEUA were warranted, but MEUA was afforded an opportunity, which it accepted, to make an offer of proof as to what it considered appropriate remedy to its benefit and why it deemed itself entitled to such remedy. ALAB-646, 160-161.

The Appeal Board in affirming the Licensing Board found as a matter of fact that MEUA and its members, as retail distribution systems purchasing wholesale power, are not in fact actually competing for the sale of wholesale power in the relevant wholesale market. ALAB-646, 112-114. Consistent with the Licensing Board decision, the Appeal Board found as a fact that no member of MEUA had ever been driven from the wholesale market by APCo's conduct. ALAB-646, 118. The Appeal Board, again

consistent with the Licensing Board, found that MEUA's members were not in fact potential competitors in the wholesale market. ALAB-646, 118-125. The Appeal Board affirmed the Licensing Board's rejection of MEUA's price squeeze contention (Id. at 129-132), and determined that the MEUA members competed in the relevant retail market, but that APCo had not injured them in that market. Id. at 125-129.

On the basis of these findings the Appeal Board determined that any contractual restrictions on MEUA's members to obtain wholesale power from sellers other than APCo must be eliminated, and that APCo must afford the MEUA members wheeling access for obtaining alternative wholesale power supply. The Appeal Board based its remedy determination on the situation inconsistent with the antitrust laws, the record of which was developed solely in the Phase I hearing in which MEUA fully participated, and for this purpose the Appeal Board fully accepted as if proven MEUA's offer of proof in Phase II. Id. at 159-164.

The Commission has by rule prescribed that, in antitrust cases, the Commission shall not ordinarily review a matter unless it "constitutes an important antitrust question, involves an important procedural issue, or otherwise raises important questions of public policy". 10 CFR §2.786(b)(4)(i). Further, review of factual issues is precluded "unless it appears that the Atomic Safety and Licensing Appeal Board has resolved a factual issue necessary for decision in a clearly erroneous manner contrary to the resolution of that same issue by the Atomic Safety and Licensing Board". 10 CFR §2.786(b)(4)(ii). A review of MEUA's Petition discloses no assignment of error which meets this heavy burden.

MEUA contends that the Licensing and Appeal Boards' findings that MEUA is neither an actual nor potential competitor in the wholesale market are erroneous or have in some way been undermined by recent Alabama legislation. These contentions are without substance. The findings of the two Boards on this point are entirely consistent with each other and review of those findings is foreclosed by 10 CFR §2.786(b)(4)(ii). The findings of the two Boards in no way whatsoever depended upon the legal ability or authority of MEUA's members to join together for joint generation and/or purchased power projects. The passage on May 18, 1981, of Alabama Act No. 81-681 does not affect the Appeal Board's plainly correct determination that "MEUA's capability to enter the market must be assessed without regard to the Farley facility [footnote omitted]." ALAB-646, 123-124. The Board's factual conclusion in this regard is not affected by whether the members of MEUA desire access to Farley as individual retail distribution systems or jointly.[2/] Since the passage of the Alabama statute which MEUA relies on in no way impacts on the factual findings made by the two Boards, for the purposes of this proceeding it cannot in any event constitute a significant development following the close of the record below. Midland, ALAB-452, 6 NRC 892, 1098 (1977).

2/ Moreover, it should be noted that Alabama Act No. 81-681 by its own terms forecloses MEUA's members from a joint venture ownership interest in Farley Nuclear Unit No. 1. See p. 4 of Appendix A to MEUA Petition For Review, from which it appears that Section 1(i) of the Act expressly provides that the term "Project" "shall not include . . . (b) any undivided fractional interest in any electric generation facilities which, on or prior to January 1, 1981, were being used by a private utility to generate electricity for distribution pursuant to a certificate of convenience and necessity obtained from the Alabama Public Service Commission."

MEUA, which together with its members played a prominent role in connection with the enactment of the Alabama statute, was certainly fully aware of the statute's existence as soon as it was enacted. Had MEUA genuinely considered the passage of the Alabama statute on May 18, 1981, to be a "significant development" in connection with this particular proceeding, then MEUA was obliged to bring this matter to the attention of the Appeal Board before which this proceeding was then pending. But during the period of more than six weeks which elapsed between the enactment of the Alabama statute and the Appeal Board's issuance of ALAB-646, MEUA never in any way suggested to the Appeal Board that a new development had occurred which the Appeal Board ought to take into account. Since this matter could have been, but was not, raised before the Appeal Board, 10 CFR §2.786(b)(4)(iii) precludes it as a basis for Commission review. There are no proper grounds, legal or equitable, for reopening this record now.3/

3/ This is particularly true in the circumstances of the present proceeding. On January 15, 1981, MEUA had filed in the United States District Court for the District of Columbia (Civil Action 81-0105) a Complaint For Mandatory Injunction to compel this Commission to direct the prompt issuance of a decision by the Appeal Board in this proceeding. The Complaint did not even refer to the fact that active consideration of this proposed Alabama legislation had been renewed, although it is evident from the newspaper articles now included in Appendix B to MEUA's Petition For Review that the bill was being strongly promoted at that time; nor did the Complaint contain any hint that, if such a bill were enacted, then MEUA might assert that such legislation might have a bearing on the present proceeding. Even after the bill was enacted in Alabama on May 18, 1981, MEUA did not withdraw its Complaint in the District Court to compel a prompt decision by the Appeal Board; nor did MEUA file in the District Court any submission suggesting that MEUA intended to make some claim, before the Appeal Board or otherwise, that the statute had some bearing on this NRC proceeding. As stated above, the fact is that no such contention was ever presented by MEUA to the Appeal Board, even during the 43 days between the enactment of the statute and the issuance of the Appeal

MEUA's claim that it was denied a right to be he d in the Licensing Board's Phase II hearings states no ground for plena review by the Commission. MEUA complains (Petition, p. 9) that "i was precluded from participating in any way in that proceeding, includ. g cross-examination of witnesses." MEUA offers no indication of any injury suffered by as a result of the Appeal Board's treatment of this procedural issue. Its offer of proof was accepted by ALAB as proven and found not to be decisionally significant. Further, MEUA's Petition does not even hint at what relevant evidence it might have developed through cross-examination of Phase II witnesses.[4/] The Appeal Board determined (ALAB-646, 160-161) that:

> "In the circumstances, we could remand the case to the Licensing Board to allow MEUA an opportunity to present evidence on the subject of remedy. We do not, however, believe such a course is either necessary or desirable. In the first place, our views on remedy are shaped largely by our findings concerning the 'situation inconsistent.' Defining that situation was the purpose of the Phase I hearing, a phase in which MEUA participated actively. Second, MEUA was allowed to and did make an offer of proof at the Phase II hearing. We have

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(footnote continued from previous page)
Board's decision. The MEUA Complaint in the District Court was not withdrawn until July 21, 1981, by which time the action had become moot by virtue of the issuance of the Appeal Board's decision dated June 30, 1981; accordingly, a stipulation of dismissal was then entered in the District Court.

4/ Moreover, in its Phase II Brief (pp. 10-12) filed before the Licensing Board (May 27, 1977), although MEUA complained about having been excluded from participation in the Phase II hearing, its complaint related to the denial of the opportunity to present its own evidence; it did not even mention any desire to have cross-examined the witnesses who did appear, nor did it intimate anything additional it thought it might have adduced by any such cross-examination. In its Exceptions filed with the Appeal Board (July 11, 1977; see Exception 40 on p. 6), and in its Brief in Support of Exceptions (November 14, 1977, pp. 120-122), the situation was the same; MEUA never mentioned the lack of opportunity to cross-examine. And MEUA even now does not suggest one iota of contribution of additional non-cumulative facts which any such cross-examination might have adduced for this record.

carefully reviewed the offer[274/] and find nothing therein which would, if developed more fully, cause us to change our opinion on remedy.

274/ Tr. 27,437-27,445."

This treatment clearly gave MEUA's contentions every benefit of the doubt and has afforded MEUA a full and fair opportunity to be heard.

The questions sought to be raised by MEUA's Petition For Review are unique to this proceeding as well as lacking in substance. MEUA has made no showing of any changed circumstances which could plausibly affect the decision of the Appeal Board; its procedural rights have been fully protected; it has made no showing of any injury from the Appeal Board's treatment of MEUA's contentions; and it has described no facts or contentions which, if proven at a new hearing, would be likely to alter the Appeal Board's disposition of this case. In any event MEUA has alleged nothing that should delay the immediate effectiveness and finality of the Appeal Board's license conditions as they impact on AEC's rights and interests. 167 days of hearing; 29,000 pages of transcript; over 800 exhibits; hundreds of pages of briefs; and two oral arguments on the merits--all this stretched out over a period of years--are enough. Remand and reopening of the record is completely unjustified and would in the circumstances here constitute administrative overkill of grotesque proportions.

Thus MEUA's Petition For Review plainly does not meet the criteria which the Commission has directed shall govern the granting of plenary review. From the standpoint of the public interest, such a review would

involve a wholly inappropriate diversion of the time and energies of this Commission. MEUA's Petition For Review should be denied.

Respectfully submitted,

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August 3, 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 3rd day of August, 1981.

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