

BEFORE THE
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C.



In the Matter of

ALABAMA POWER COMPANY

(Joseph M. Farley Nuclear Plant,
Units 1 and 2)

Docket Nos. 50-348A
50-364A

OPPOSITION OF
MUNICIPAL ELECTRIC UTILITY ASSOCIATION
OF ALABAMA
TO ALABAMA POWER COMPANY'S
PETITION FOR REVIEW



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The Municipal Electric Utility Association of Alabama ("MEUA") respectfully submits that the July 27, 1981 Petition for Review of ALAB-646 submitted by the Alabama Power Company ("APC") should be denied.

The APC Petition seeks review of the June 30, 1981 decision of the Atomic Safety and Licensing Review Board (the "ALAB") which imposed certain conditions upon the license granted to APC for the construction and operation of the Joseph M. Farley Nuclear Plant, Units 1 and 2 (the "Farley Plant"). The ALAB found that granting APC an unconditional license with

respect to the Farley Plant would create or maintain a situation inconsistent with the antitrust laws within the meaning of Section 105c of the Atomic Energy Act, 42 U.S.C. §2135(c). The APC Petition seeks review of numerous of the ALAB's factual and legal determinations; it fails, however, to demonstrate that any of its appeal issues satisfies any of the criteria for review set forth in the Commission's regulations.* The APC Petition raises no important antitrust or public policy questions or procedural issues and fails to assert that any factual finding below was clearly erroneous.

MEUA has also filed a Petition for Review (the "MEUA Petition") requesting that the Commission reopen the remedial stage of these proceedings for consideration of the impact of recent events materially affecting the competitive

* 10.C.F.R. §2.786(b)(4) sets forth the criteria for Commission review of an ALAB decision, in pertinent part, as follows:

"(4) The grant or denial of a petition for review is within the discretion of the Commission, except that:

(i) A petition for review of matters of law or policy will not ordinarily be granted unless it appears the case involves an important matter that could significantly affect the environment, the public health and safety, or the common defense and security, constitutes an important antitrust question, involves an important procedural issue, or otherwise raises important questions of public policy;

(ii) A petition for review of matters of fact will not be granted 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;"

structure of the retail electric power market in Alabama. MEUA respectfully submits that the MEUA Petition, unlike the APC Petition, raises an issue which satisfies the Commission's criteria for review and that the Commission's review of the ALAB Decision should be limited to the issue raised in the MEUA Petition.

I.

The APC Petition sets forth five general areas in which it alleges that the ALAB erred and asserts specific assignments of alleged error within the general areas. The five general assignments of error in the APC Petition are that:

1. the ALAB refused to limit the scope of review of APC's past conduct and considered activities of APC during the period 1941 to the present in reaching its determination that granting APC an unrestricted license with respect to the Farley Plant would create or maintain a situation inconsistent with the antitrust laws;
2. the ALAB erred in defining the relevant product and geographic markets;
3. the ALAB erred in concluding that APC has monopoly power in the relevant markets;
4. the ALAB ignored the fact that APC is a regulated utility in reaching its conclusion regarding APC's monopoly power; and
5. the ALAB erred in failing to make adequate findings that the conditions imposed upon APC's license with respect to the Farley Plant are necessary to protect the public interest and in basing such conditions upon inadequate findings of liability on the part of APC.

When viewed in the light of the restrictive standard for Commission review and the extensive consideration of these issues by the ALAB, these assignments of error should be seen as ordinary attempts for reconsideration of issues already properly and conclusively decided against APC, and the APC Petition accordingly should be denied.

In the face of the extensive record on which the ALAB Decision was based, it cannot be disputed that APC enjoys monopoly power in the various markets in which it operates. Even APC concedes that it is a "natural monopoly". (APC Petition at 6.) Thus, it is irrelevant whether the ALAB limited its examination and findings to the present market context, as APC contends it should have, or considered APC's well documented history of exclusionary and anti-competitive activities over the last 40 years. The conclusion of the ALAB that APC has monopoly power in the relevant markets today is plainly correct and amply supported by the record herein (ALAB Dec. at 74-85), and the exclusionary practices which justify the license limitations--e.g., APC's refusal to offer shared ownership of the Farley Plant--represent current, ongoing anticompetitive acts. (ALAB Dec. at 86-111.) Moreover, the ALAB's findings with regard to the relevant product and geographic markets are fully supported by the record and are not clearly erroneous. (ALAB Dec. at 30-73.)

The ALAB also gave full consideration below to APC's contention that the various state and federal regulations to which it is subject preclude a finding of liability and properly rejected that argument. (ALAB Dec. at 14-21.)

With respect to the remedial portion of the ALAB Decision, MEUA agrees with APC that certain aspects of the remedial proceedings should be reviewed--but not for the reasons set forth in the APC Petition. MEUA submits that the ALAB had a more than adequate basis for finding liability on the part of APC and with one exception--i.e., the improper exclusion of MEUA from the remedial proceedings--fully and properly considered all the relevant and necessary facts then in the record bearing upon the conditions to be imposed upon APC's license for the Farley Plant. The ALAB properly found that the conditions it imposed are required "as a minimum" to achieve the purposes of the Atomic Energy Act.* (ALAB Dec. at 145-63.)

In short, the APC Petition does not raise any important antitrust questions or public policy issues, does not assert that any factual findings below were clearly erroneous, and does not put forward any other valid basis for Commission review of APC's purported assignments of error. The only ground APC asserts for Commission review here is that the Commission has never before reviewed an ALAB decision

* The sole error of excluding MEUA from the remedial stage does not, of course, afford APC a basis for seeking review by the Commission.

regarding the antitrust implications of licensing actions. (APC Petition at 9-10.) This ground is adequate in that absence of an issue that falls within one of the criteria set forth in the regulations. Accordingly, the APC Petition should be denied.

II.

MEUA submits, however, that the remedial portion of the proceedings below should be reopened for the limited and exclusive purpose of considering recent developments which could not have been considered either by the Licensing Board or by the ALAB and which materially alter the competitive structure of the relevant wholesale electric power market as determined by the ALAB. More specifically, as set forth in the MEUA Petition, an Alabama Municipal Electric Authority (the "Authority") is currently being established pursuant to an Act passed by the Alabama legislature on May 18, 1981. The Authority will enable municipal electric systems (i.e., MEUA's members) to engage in the wholesale electric power market through the acquisition, funding and operation of generation facilities. Thus, it is clear that MEUA and its members are now potential competitors in the wholesale market (contrary to findings of the ALAB) and face from APC precisely the sort of exclusionary, monopolistic practices which can only be remedied by mandatory ownership access to the Farley Plant such as was granted to the Alabama Electric Cooperative ("AEC")

by the ALAB Decision. MEUA submits that the effect of creation of the Authority on the wholesale market "constitutes an important antitrust question" and also "raises important questions of public policy" within the meaning of 10 C.F.R. §2.786(b)(4)(i) which the ALAB did not have the opportunity to consider.

Moreover, the creation of the Authority renders the ALAB's finding that MEUA and its members are not potential entrants into the wholesale market "clearly erroneous" even if this finding may have been correct (which it was not) based upon the record available to the ALAB at the time of its decision.* 10. C.F.R. §2.786(b)(4)(ii).

Given the fact that the Authority, and through it MEUA and its members, are now potential entrants into the wholesale electric power market, a failure to reopen the remedial stage of these proceedings would fundamentally subvert the very purpose of the 1970 amendments to the Atomic Energy Act which imposed upon the Commission the responsibility to consider the antitrust implications of its licensing decisions and to shape its licensing actions to promote the purposes of the antitrust

* Furthermore, the second ground for MEUA's Petition for Review-- that MEUA was denied its due process right to participate in the remedial proceedings before the Licensing Board-- "involves an important procedural issue" which the Commission should review. 10 C.F.R. 2.786(b)(4)(i).

laws. The ALAB discussed the purposes of the 1970 amendments in the Midland decision, CCH Nuclear Reg. Rep., 1975-78 Tr. Brinder, ¶30, 263, as follows:

"As the Commission has reiterated, the Atomic Energy Act's antitrust provisions reflect 'a basic Congressional concern over access to power produced by nuclear facilities' and represent legislative recognition 'that the nuclear industry originated as a Government monopoly and is in great measure the product of public funds [which] should not be permitted to develop into a private monopoly via the [NRC] licensing process. . . .'" Id. at p. 28,360.

To ignore the creation of the Authority and to refuse to reopen the remedial stage of these proceedings and permit consideration of the effect of this recent material change in the wholesale power market would be a complete abdication of the Commission's duties under the 1970 amendments. The inevitable result of such an abdication by the Commission would be to sanction officially the continuation of APC's admitted monopoly power through the sole access to nuclear power to the detriment of the Authority, MEUA and its members, and the public at large--i.e., those whom the antitrust laws (and the Atomic Energy Act) are specifically designed to protect. It cannot be disputed, therefore, that the creation of the Authority raises both important antitrust questions and important public policy issues which the Licensing Board and the ALAB had no opportunity to consider and which the Commission is mandated to take into account in its licensing decisions. Thus, the only issues which satisfy the Commission's standards

for granting review of an ALAB Decision are those raised by the MEUA Petition regarding the access of MEUA and its members, through the newly created Authority, to the wholesale electric power market by means of an ownership interest in the Farley Plant similar to that granted to AEC.

CONCLUSION

Accordingly, for the reasons set forth above, MEUA respectfully submits that the Commission's review of the ALAB Decision should be limited to those issues raised by the MEUA Petition and that to the extent the APC Petition seeks to raise other issues, the APC Petition should be denied.

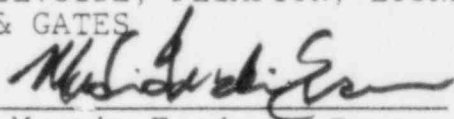
Dated: New York, New York
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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have this date duly served by mail, postage prepaid, the foregoing Opposition of the Municipal Electric Utility Association of Alabama to the Alabama Power Company's Petition for Review upon the attorneys for all parties to this proceeding at the addresses set forth below.

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