

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

DOCKETED
USNRC

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In the Matter of)

ALABAMA POWER COMPANY)

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

Operating Licenses
Nos. NPF-2 and
NPF-8

DOCKET NUMBER
PROC. & UTIL. FAC.

50-348 A
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RESPONSE OF DEPARTMENT OF JUSTICE
TO ORDER CONCERNING PETITION OF ALABAMA POWER
COMPANY FOR A DECLARATORY ORDER

Pursuant to Subpart G of Part 2 of the Nuclear Regulatory Commission (NRC) Rules of Practice for Domestic Licensing Proceedings, 10 C.F.R. § 2.700, and the Commission's July 9, 1984, order requesting the views of interested parties, the Department of Justice files this response stating its views on the choice of procedures to follow in resolving a dispute created by two conflicting filings in the subject proceeding.

On June 29, 1984, Alabama Electric Cooperative, Inc. (AEC) filed a request under 10 C.F.R. § 2.206, to enforce an antitrust license condition requiring Alabama Power Company (APCO) to sell ownership in the two Farley Units to AEC. AEC alleges that APCO has violated the license condition by negotiating in bad faith and by trying to impose extraordinary and unreasonable cost burdens on AEC. On July 3, 1984, APCO

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sent to each Commissioner a "petition for a declaratory order," that set forth its version of the negotiations. APCO's petition, acknowledging the existence of the AEC request for enforcement action, seeks to have the Commission hold AEC's request in abeyance while proceeding with the declaratory order procedure outlined in APCO's petition. The Commission, faced with these two conflicting filings, is seeking views on the appropriate procedure to follow. The Department recommends that the NRC deny APCO's "petition" and proceed on AEC's properly filed request for an enforcement action.

The Department's interest in this matter is that of a statutory party. The Department has participated in all antitrust proceedings involving the Farley Units both at the NRC and the subsequent appeals. 1/ In those proceedings, the form of access to the Farley units was probably the single most important issue. The Department took the position that APCO's continued refusal to grant reasonable ownership access to AEC was inconsistent with the antitrust laws. We actively sought, at the initial hearing and through the appellate process, the license condition that AEC now seeks to have enforced.

1/ The Department has not, however, participated in any of the negotiations between AEC and APCO to implement the license conditions.

Subpart B of Part 2 of the Rules of Practice, 10 C.F.R. § 2.200 et. seq., sets forth the procedures for seeking enforcement of license conditions. ^{2/} Section 2.206(a) allows any person to "file a request . . . to institute a proceeding pursuant to § 2.202 to modify, suspend or revoke a license, or such other action as may be proper. . . . The requests shall specify the action requested and set forth the facts that constitute the basis for the request." Section 2.206(b) provides that "Within a reasonable time after a request pursuant to paragraph (a) of this section has been received, the . . . Director, Office of Inspection and Enforcement, . . . shall either institute the requested proceeding in accordance with this subpart [i.e., § 2.200 et. seq.] or shall advise the person who made the request in writing that no proceeding will be instituted in whole or in part, with respect to his request, and the reasons therefor."

AEC has filed its enforcement petition pursuant to § 2.206 alleging that APCO (the licensee) has violated a specific applicable license condition. It appears to the Department that the NRC must, under the above-stated Rules of Practice,

^{2/} Appendix C to Part 2, the General Policy and Procedure for NRC Enforcement Actions, does not contain any specific guidance for enforcement of antitrust license conditions. Appendix C simply states that Antitrust enforcement matters will be dealt with on a "case-by-case basis". (Footnote 1).

review the merits of and take action on AEC's petition. In the absence of any allegation that the AEC request for an enforcement proceeding was made in bad faith--and none has been made--the NRC should investigate the allegations that AEC has raised and notify the licensee of its finding. The licensee is afforded an opportunity to reply, and may request a hearing. Indeed, Section 2.202 requires a hearing only if the licensee requests one.

APCO, with its petition, seeks to avoid the procedures (and possible sanctions) in subpart B by establishing a completely different procedure--one not found in the NRC's Rules of Practice. APCO's suggested approach is that it, AEC, other interested parties, and the NRC staff submit memoranda to a special master to be appointed by the Commission, who will review the memoranda, conduct any further investigation and "create a record." The special master would then submit to the Commission a "report" --something short of an "initial decision," in that it would not "recommend policy," thereby enabling the Commission to "reach the policy questions efficiently." APCO Petition at 10 n.6. In turn, the Commission would then issue a declaratory order "interpreting"

the license condition. 3/

APCO's justifications for its proposed departure from the established dispute resolution mechanism do not withstand scrutiny. APCO's estimate that an enforcement proceeding would take 5 to 10 years to complete appears grossly inflated. The issues are sufficiently defined and the facts relating to the positions that AEC and APCO have taken in negotiations are reasonably easy to establish. An evidentiary hearing, should APCO request one, should not take more than a few days. APCO need only show that its offers were reasonable and consistent with the license condition. AEC, on the other hand, is entitled to an opportunity to cross-examine APCO witnesses and put in its own evidence.

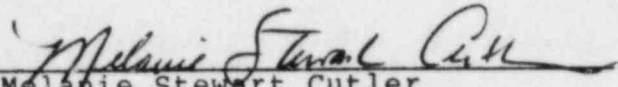
3/ It should be noted that conditions dealing with the ownership issue in numerous other nuclear plant licenses have used language similar to that used by the Appeals Board in this proceeding. See e.g., Toledo Edison Company and the Cleveland Electric Illuminating Company, (Davis-Besse Nuclear Power Station, Units 1, 2 and 3) 10 NRC 265, 408 (1979). Also, as AEC points out in its request, the Appeals Board gave specific guidance in its opinion as to why and how the APCO ownership condition should be applied. APCO, on the other hand, points to no specific ambiguity in the license condition requiring interpretation, thereby undermining its proffered rationale for this approach. Indeed, APCO's proposed declaratory order does not purport to explain or interpret the license condition; it merely seeks the NRC's endorsement of its conclusion that APCO's offer to AEC does not violate the license condition or, alternatively, the NRC's "guidance" on what APCO is required to do to comply with the license--the exact issue properly raised by AEC in its enforcement petition.

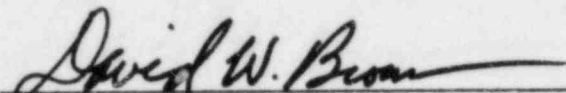
By contrast, APCO proposes that the various parties file essentially self-serving "memoranda," without any party being able effectively to cross-examine or rebut statements in others' memoranda. Just how such an approach can create a complete and reliable record as the factual predicate for the conclusory order APCO seeks from the Commission is nowhere explained. This deficiency is all the more problematical, given that there is an issue of good faith involved. That issue cannot be properly resolved in the absence of a hearing. Indeed, if APCO's novel approach is adopted, the Commission is likely to find at some point well into the future--after struggling to resolve the many uncertainties likely to be encountered by deviating from familiar and accepted procedures--that it has no basis upon which to make an informed decision.

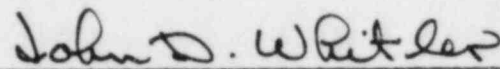
In summary, APCO's assertions that a declaratory order will save time are illusory at best. More likely, its novel procedure will delay an informed resolution of this dispute. The relief sought by both sides makes clear that there is nothing to be resolved that cannot be dealt with in an enforcement proceeding--the traditional, familiar and most suitable means to resolve disputes of this sort. APCO has totally failed to justify a departure from established procedure, and its petition should be denied.

Respectfully Submitted,

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Washington, D.C.
July 20, 1984

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached RESPONSE OF DEPARTMENT OF JUSTICE TO ORDER CONCERNING PETITION OF ALABAMA POWER COMPANY FOR A DECLARATORY ORDER have been served on the following by United States Mail, postage prepaid, this 20th day of July, 1984.

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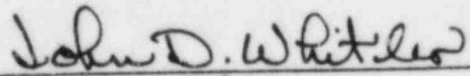
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