



II. THE COMMISSION SHOULD DEFER REVIEW OF ALAB-452

The NRC Staff believes that the Commission should defer review of ALAB-452 until the supplemental remand hearing on relief mandated by ALAB-452 has been completed and the Appeal Board has had an opportunity to review the results. The NRC Staff believes that there are practical considerations which weigh strongly in favor of such deferral.

First, duplicative effort and time delay would be likely to occur if the Commission reviews ALAB-452 prior to completion of the remand hearing. If the Commission were to review ALAB-452 at this time, it would not have before it any license conditions which might be appropriate as relief since that matter has been remanded to the Licensing Board. No license conditions appear in the record because the Licensing Board found no situation inconsistent with the antitrust laws and the Appeal Board directed that the record be supplemented before imposing license conditions. Hence, unless the Commission reverses ALAB-452 completely, a supplemental remand hearing on relief will be held. The results of the remand hearing would then also be subject to review by the Appeal Board and appeal to the Commission. For the Commission to review effectively the results of the remand hearing, it is likely that significant portions of the record underlying ALAB-452 would have to be re-examined. Thus, duplicative effort by the Commission would be a strong possibility under this "piecemeal" approach.

The Staff contends that the least time-consuming and most efficient approach is to permit the remand hearing to go forward prior to any Commission review. The remand hearing is essentially supplemental in nature and, therefore, likely to be much more abbreviated in scope and

duration than either the initial phase of an antitrust hearing or Commission review of ALAB-452 at this point. Thus, there would be a discernible savings in both time and agency resources if the Commission chooses to avoid the "piecemeal approach" by deferring its review of ALAB-452.

Second, if the Commission elects to review ALAB-452 at this time under the "piecemeal approach," that Commission would not have a complete record before it; the record would lack both a full hearing record and the Appeal Board's views on appropriate license conditions. The remedy or relief phase of an NRC antitrust proceeding is crucial to any review of the entire record in determining what license conditions, if any, are appropriate to remedy a given factual situation. Accordingly, deferral of review of ALAB-452 would enable a full and complete record to be developed prior to any Commission review.

The NRC Staff also believes that there would be no prejudice to Consumers Power Company or any other party to this proceeding by permitting the remand hearing to go forward at this time while deferring Commission review of ALAD-452. The construction permits for Midland Units 1 & 2 have been issued, and their continued effectiveness would not be affected by deferral of Commission review since these units were "grandfathered." Accordingly, there will be no delay in the licensing or construction of the units if the Commission accepts the Staff's position.

The NRC Rules of Practice, 10 CFR Part 2, would not prevent the remand hearing from proceeding concurrently with the Commission's review of ALAB-452. However, such concurrent actions would be inadvisable, in the Staff's view, since Commission review might make the efforts expended in the remand hearing either unnecessary, duplicative, or misdirected. Given the probability of an abbreviated scope and duration of the remand hearing and the desirability of a full and complete record for Commission review, the Staff believes that the remand hearing should precede any Commission review.

The Staff concludes that the interests of avoiding piecemeal review avoiding wasted effort, conserving agency resources, and the lack of prejudice to any of the parties weigh heavily in favor of deferring Commission review at this time. The Staff finds no countervailing interests which would require that the Commission review ALAB-452 now. This can be seen, in part, by the Staff's summary of the effects upon ongoing antitrust proceedings which appear below.

### III. STATUS OF OTHER PENDING ANTITRUST HEARINGS AND APPEALS

A. The following antitrust proceedings are in the early stages of the antitrust review process or before an Atomic Safety and Licensing Board (ASLB):

- (1) Pacific Gas and Electric Company, Stanislaus Nuclear Project, Unit No. 1, NRC Dkt. No. P-564A: intervention granted; discovery under way; hearing dates not yet set.
- (2) Houston Lighting and Power Company, South Texas Project Unit Nos. 1 and 2, NRC Dkt. Nos. 50-498A, 50-499A: awaiting Attorney General's advice letter; any hearing, if necessary, to commence thereafter.
- (3) Florida Power & Light Company, St. Lucie Unit 2, NRC Dkt. No. 50-389A: intervention granted by ASLB; affirmed by Appeal Board; awaiting decision by Commission on its review of Appeal Board decision on intervention.

- (4) Detroit Edison Company, Enrico Fermi 2, NRC Dkt. No. 50-341A: awaiting intervention ruling by ASLB.

B. The following two proceedings are presently pending before the Atomic Safety and Licensing Appeal Board (ASLAB):

- (1) Cleveland Electric Illuminating Company et al., Perry Nuclear Power Plant, Units 1 and 2, Davis-Besse Nuclear Power Station, Units 1, 2 and 3, NRC Dkt. Nos. 50-440A, 50-441A, 50-346A, 50-500A, and 50-501A: briefs submitted; oral argument completed; awaiting ASLAB decision (ASLB found situation inconsistent with the antitrust laws and ordered license conditions).
- (2) Alabama Power Company, Joseph M. Farley Nuclear Units 1 and 2, NRC Dkt. Nos. 50-348A and 50-364A: final briefs due to ASLAB by April 13, 1978; oral argument to follow thereafter (ASLB found situation inconsistent with the antitrust laws and ordered license conditions).

C. In assessing the effects of Commission deferral of its review of ALAB-452, it is the Staff's view that:

- (1) There will be no adverse impact on the licensing, construction, or operation of any of the nuclear units which are the subject of the above pending antitrust proceedings before a Licensing Board or an Appeal Board. The absence of adverse effects stems from: (a) the "grandfathered" nature of some of the proceedings (Davis-Besse and Farley); (b) agreement of the parties that the construction permit could issue subject to later antitrust proceedings (St. Lucie 2); and (c) the construction permit or operating license has issued after an initial decision of an ASLB (Perry and Farley). In addition, Fermi Unit 2 has a construction permit, and the intervention proceedings are in the context of a post-construction permit amendment to add new co-owners. South Texas is also being constructed pursuant to a construction permit, and any pro-

ceedings in that matter would be in the context of an operating license application. The Stanislaus proceeding is an anticipatory antitrust review, and the health, safety and environmental aspects of the construction permit application have not yet been filed.

- (2) The only adverse impact which the Staff can perceive is on the application of substantive antitrust law standards to the various proceedings before the respective Licensing and Appeal Boards. However, there would be no adverse procedural impact on or delay of those proceedings. For example, the Appeal Board could decide Perry. Davis-Besse in accordance with its present view on the substantive law, much as the Licensing Boards have ruled in other proceedings before any guiding decision was rendered by the Appeal Board. Certainly, the Appeal Boards and Licensing Boards would be benefitted by the Commission's guidance on the application of substantive antitrust law standards, but deferral of Commission review in ALAB-452 would not prevent those Boards from deciding matters before them based on existing precedent.



On balance, therefore, the Staff believes that the benefits to be gained by avoiding piecemeal review and waste of agency and other parties' resources outweigh any adverse effects which flow from deferral of Commission review of ALAB-452.

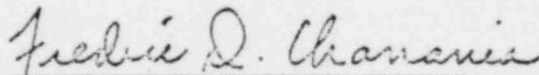
IV. CONCLUSION

For the reasons stated above, the Staff urges the Commission to defer its review of ALAB-452 until such time as the supplemental evidentiary remand hearing on relief is held before the Licensing Board and the Appeal Board reviews the outcome of that proceeding.

Respectfully submitted,



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this 27th day of January 1978.





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