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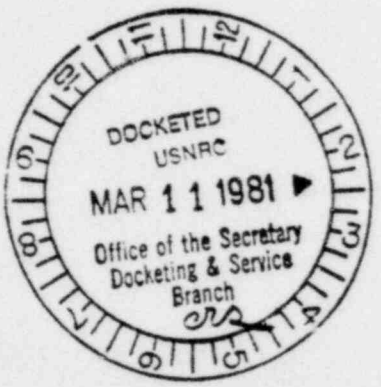

Leonard Bickwit, Esq.
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Nuclear Regulatory Commission
1717 H Street N. W.
Washington, D. C. 20555

Re: Municipal Electric Utility Association of Alabama v. The Nuclear Regulatory Commission, John F. Ahearne, Chairman, and Commissioners Victor Gilinsky, Peter Bradford, and Joseph Hendrie
Civil Action No. 81-0105

Dear Mr. Bickwit:

On behalf of Alabama Power Company ("Alabama Power"), holder of operating licenses for the Joseph M. Farley Nuclear Plant Units No. 1 and 2 ("Farley Plant"), I am writing to advise you of the astonishment and concern of Alabama Power upon learning that a petition for extraordinary relief had been filed in the above-styled matter which relates directly to the Farley Plant. Petitioner, Municipal Electric Utility Authority ("MEUA") is seeking to hasten a decision from the Atomic Safety and Licensing Appeal Board ("ALAB") of the Nuclear Regulatory Commission ("NRC" or "Commission") on the antitrust review conducted to determine the necessity of conditions to the license for the Farley Plant (Docket Nos. 50-348A, 50-364A). Even though Alabama Power will be affected by such a decision, and is necessarily concerned with the deliberations and decision-making process involved in this appeal, Alabama Power received no notice of any kind from MEUA of its filing of this action.

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Only in the last few weeks, and purely as a result of the courtesy of counsel for Alabama Electric Cooperative,

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Inc. ("AEC"), who likewise learned of the action only recently, did we discover that MEUA had petitioned in the federal judiciary for this extraordinary relief. It was not until March 2, 1981 that we received a copy of the petition seeking a mandatory injunction "directing the prompt issuance" of a decision by the ALAB.

It is our understanding that you, as general counsel for NRC, are charged with the duty of responding to this complaint. We are writing to make you aware of certain facts of which you might desire to be apprised as you develop the response NRC will file.

The "Complaint for Mandatory Injunction to Compel Agency Action" ("Complaint") was filed in the United States District Court for the District of Columbia on January 15, 1981 by the MEUA. Civ. Act. No. 81-0105. The Complaint names the NRC and its four commissioners as defendants. MEUA seeks a mandatory injunction against defendants "directing the prompt issuance of a decision on the appeal from the Licensing Board's decisions" in conditioning Alabama Power licenses on the Farley Plant (Alabama Power Company, 5 NRC 804 (1977)). See Complaint at 3-4.

As you are undoubtedly aware, the cited dockets are proceedings under section 105(c) of the Atomic Energy Act, 42 U.S.C. § 2135(c), to determine whether the grant of an unconditioned license to operate the Farley Plant, Units 1 and 2, would maintain a situation inconsistent with the antitrust laws. The history of the dockets may be briefly summarized as follows:

October 10, 1969 - application by Alabama Power for construction permit for Unit 1.

June 26, 1970 - similar application for Unit 2.

August 16, 1971 - Department of Justice advises NRC that a hearing should be held to assess section 105(c) issues.

February 23, 1972 - MEUA petitions to intervene.

September 27, 1972 - Prehearing conference; MEUA petition to intervene granted.

December 4, 1972, December 11, 1972, March 20-21, 1973, September 24, 1973 - prehearing conferences before Atomic Safety and Licensing Board ("Board").

May 23, 1974 - Motion by Alabama Power to bifurcate proceeding into Phase I (liability) and Phase II (remedy) granted.

December 4, 1974 - April 26, 1976 - Phase I (liability) evidentiary hearings.

November 22, 1976 - briefing completed; Phase I oral argument held.

April 8, 1977 - Phase I decision (5 NRC 804). Based on five limited instances of alleged anti-competitive conduct, the Board found that the grant of an unconditioned license for the Farley units would maintain a situation inconsistent with the antitrust laws. However, these findings were limited to a second intervenor, AEC. With respect to MEUA, the Board's findings in Phase I were summarized by the Board as follows:

"Although we expressed this tentative view regarding relief, we determined no access to the Farley Plant was required in the case of Intervenor Municipal Electric Utility Association of Alabama (MEUA) or its members, because of our finding on the basis of evidence of record that there was no significant actual or prospective competition between Applicant and these entities at the retail distribution level, nor other conduct of Applicant toward MEUA or its members which was inconsistent with the antitrust laws within the meaning of Section 105c of the Atomic Energy Act. We concluded that if access to nuclear facilities were granted to MEUA in the face of our findings of no significant actual or prospective competition at the retail distribution level, and of no other anticompetitive conduct of applicant toward MEUA, such a ruling might be considered an unwarranted attempt to restructure the electric power industry at the retail level, rather than fulfilling the

statutory mandate of antitrust review, under Section 105c." (5 NRC at 1484).[1]

May 9, 1977 - Phase II (remedy) hearings commence.

May 17, 1977 - Phase II hearings end.

June 24, 1977 - Phase II decision issued. (5 NRC 1482) Conditions placed on license for Farley units. (5 NRC at 1506-09)

Appeals were thereafter taken to the ALAB by all parties. Briefing was completed on April 14, 1978. Oral argument before the ALAB was held on March 8, 1979. The appeal is sub judice before the ALAB.

As we view the Complaint, MEUA's principal contention[2] is that the present 22 month delay in issuing a decision

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1. The Board noted in footnote 5 in this connection:

"MEUA attempted to participate in the second phase of this proceeding by seeking to offer evidence that MEUA and its members were prospective competitors of Alabama Power in the wholesale market, which we found was the relevant market for purposes of this antitrust review. The Board ruled that MEUA could not participate in the second phase on grounds that our findings as to MEUA in the first phase were controlling and that the purpose of phase two was to fashion a remedy consistent with our findings in the first phase. (Tr. 27,189)." 5 NRC at 1484.

2. Paragraph 6 of the Complaint also erroneously suggests that MEUA was improperly excluded from Phase II hearings because one of the five alleged anticompetitive acts of Alabama Power concerned Alabama Power's wholesale contracts with MEUA members. However, as the Board stated in its Phase II decision (supra), MEUA was excluded because the record revealed no actual or prospective competition between Alabama Power and MEUA thereby eliminating the need for remedial conditions in MEUA's favor.

between oral argument and the filing of the Complaint is unreasonable because (1) 22 months is excessive "measured against the time reasonably necessary to dispose of this proceeding" (Complaint, ¶ 12); (2) MEUA and its members have sustained damage by reason of the delay (Complaint, ¶ 13); (3) the ALAB has decided two other fully litigated antitrust hearings pursuant to Section 105(c) which allegedly "have resolved issues of law relating to both liability and remedies which are common to the Farley proceeding" (Complaint, ¶ 10).

First, when measured against the only two fully litigated proceedings to come before the ALAB, 22 months is not an excessive or unreasonable period of time for decision. See The Toledo Edison Company, et al. (Davis-Besse Nuclear Power Station, Units 1 and 2), 10 NRC 265 (1979) (hereinafter sometimes referred to as "CAPCO"); Consumers Power Co. (Midland Plant, Units 1 and 2), 6 NRC 892 (1977). In both proceedings, the elapsed period between oral argument before the ALAB and the ALAB decision was at least 21 months. In CAPCO, the period after oral argument was almost 24 months. Moreover, and significantly, the record in this proceeding is dramatically larger than the record in either CAPCO or Consumers.

The importance of the size of the record on the period for decision can be demonstrated by reference to the "Study of the Nuclear Regulatory Commission's Appellate System" (NUREG-0648) issued in January 1980 by the Office of the General Counsel of the NRC. The Study described the workload of the ALAB for the period between November 1, 1977 and November 1, 1978. Among other things, it was noted that the ALAB Panel published 64 "decisions" and "memoranda and orders." An additional 100 unpublished "memoranda and orders" were also written. The total number of appeals, petitions and motions was 51 and over 95 different issues were addressed. Id. at 33-34.

The Study continued:

> "The aggregate length of the written records of the cases reviewed was phenomenal. The records included a total of 13,316 documents, 45 volumes

of interrogatories, 55 volumes of written testimony, 1939 exhibits and 164,309 pages of transcript. Under the current rules of practice in which the Appeal Boards can and do make findings of fact based on their own examination of the record (unlike appellate courts which do not directly address the records themselves) the boards are responsible for taking proper account of every piece of those massive records.

"One particular aspect of the Appeal Panel's workload to date should be mentioned. To date, the Panel has issued two merits decisions on substantive antitrust proceedings. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-560, 10 NRC ___ (1979); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-452, 6 NRC 892 (1977). Members of the Panel estimate that preparation of each opinion required over a full man-year from the Panel member principally assigned to drafting the opinion, as well as requiring substantial time commitments from other Panel members who served on the Board, and from the Panel's counsel and law clerks. During that year the member who worked on the antitrust case had little time to devote to other matters before the Panel. Furthermore, it should be noted that these antitrust decisions do not present technical or policy questions of the sort normally decided by the Commission and the Boards. Rather, they present only legal and, to a lesser extent, economic issues that would likely prove highly difficult for any person who lacks previous familiarity with antitrust law." (Id. at 34-35)

If the aggregate length of written records during the entire year being studied was deemed "phenomenal," then the record in the instant proceeding can only be termed unprecedented. The transcript alone covers approximately 29,000 pages which is approximately 18% of the transcript pages reviewed in rendering 164 opinions and memoranda during the entire year being studied. It is several times the number of transcript pages reviewed in either CAPCO or Consumers. Those decisions, of course, were 432 and 314 typewritten pages long respectively. Moreover, contrary to the suggestion of MEUA, the ALAB must take proper account of all this record

and cannot properly assume that the facts in either CAPCO or Consumers can be mechanically applied to the far different situation involved in the case at bar.

Given the dramatic size of the instant record and the Study's estimate that preparation of the CAPCO and Consumers opinions each required in excess of one full man-year, the period elapsed to date in preparation of the instant opinion is neither "unreasonable" nor "unlawful," (Complaint, ¶ 12) but, if anything, is too short to properly dispose of this proceeding. This is particularly true where one member of the three-member reviewing panel left the Commission soon after oral argument had been completed and a second member went on a "part-time intermittent basis" in August 1980. In addition, pursuant to Presidential and Congressional direction over the past two years, the Commission and its personnel have had to devote substantial attention to the safety, environmental, enforcement and re-start issues and proceedings arising from the Three Mile Island accident.

Second, Paragraph 13 of the Complaint states that MEUA and its members "have sustained substantial and irreparable damage" because ALAB has not issued a decision. While it is true that the Atomic Safety and Licensing Board's ("Board") June 24, 1977 decision granted no relief to MEUA, it is not true that legally cognizable damages have been suffered. Uncontroverted testimony in the Farley antitrust review revealed that MEUA does not have legal authority under Alabama law to engage in the generation of electricity, or ownership of generation facilities with others. Nor do the members of MEUA have the authority under state law to jointly own such facilities among themselves. Denial of ownership access to the Farley Plant could not, therefore, constitute damage, as alleged.

In addition, MEUA has no status as a bulk power supplier, being only an association of individual municipal electric power distributors serving only their individual political constituencies. Contrary to the allegations in Paragraph 2 of the Complaint: "The plaintiff is a corporation organized and existing under the laws of the State of Alabama.", MEUA, as the association permitted to intervene

in the Farley proceeding, is not a corporation under the laws of Alabama. Likewise, the individual municipalities, or their utility boards, engaged in the distribution of electricity have suffered no damage in any case during the period since the issuance of the license for the Farley Plant. During this period, Alabama Power has continued to make wholesale power available to those municipalities desiring to manage and control their own distribution facilities. Moreover, it has continued to transmit or "wheel" to individual municipalities low priced power marketed by the government-sponsored Southeastern Power Administration ("SEPA"), the only other power source identified by the municipalities as being available to them. These power supply arrangements are on terms which eliminate contractual provisions identified by the Board as anticompetitive. See Alabama Power Company II, 5 NRC 1482, 1501 (1977).

MEUA and its individual municipalities have had ample opportunity to complain to regulatory agencies of any unfair rates and terms or conditions in these wholesale power supply arrangements. As records of the Federal Energy Regulatory Commission ("FERC") reflect, there have been successive schedules filed by Alabama Power for regulatory approval. MEUA is a continuing intervenor in these proceedings and any objections to provisions of these schedules have been resolved by the FERC.

Alabama Power has offered to negotiate the sale of unit power from the Farley Plant to the municipalities which are members of MEUA. As you may already know, the Board required that unit power sales be offered to AEC as a condition to the Farley Plant license. Such a requirement is embodied in the license terms issued by NRC. Alabama Power made such an offer in a Memorandum of Principles for the sale of unit power sent to AEC on October 27, 1977. While not obligated to do so by the terms of the license conditions issued for the Farley Plant, Alabama Power also informed the municipalities which are members of MEUA that the same offer for unit power sales would be available to them. Beyond simple requests for information, none of the municipal distributors have pursued this matter during the period since the offer was made.

Nothing in the chain of events occurring since the Board's decision suggests that Alabama Power would not in good faith engage in negotiating unit power sales and ancillary transmission arrangements for delivery of power to the members of MEUA which are interested in acquiring a direct output from the Farley Plant.

Unit power sales from the Farley Plant have not been consummated to date with any of the municipalities or with AEC. Such failure has been solely a result of lack of interest on their part, not bad faith by Alabama Power. AEC last responded to Alabama Power's October 1977 Memorandum of Principles on unit power sales on January 3, 1978. At that time, AEC indicated it had not had an opportunity to analyze the Memorandum sent the previous October. No further interest has been expressed by either AEC or the municipalities.

Alabama Power has continually manifested its willingness to coordinate with smaller utilities seeking interconnection and wheeling. As a matter of fact, Alabama Power has engaged in interconnection and transmission services beyond what the Board required with respect to AEC in the prescribed license conditions. Alabama Power has amended its Interconnection Agreement with AEC to rectify any unfairness identified by the Board therein by making AEC's obligation for maintenance of reserves equal to Alabama Power's obligation for reserves under the Intercompany Interchange Contract among the four operating companies comprising the Southern Company Pool. The reserve sharing arrangement negotiated with AEC offers AEC even greater benefits than those required by the license condition because it requires AEC maintain reserves equal to Alabama Power's reserve obligation only so long as Alabama Power's reserves under the Pool Intercompany Interchange Contract do not exceed twenty percent. The amended Agreement is on file with the Federal Energy Regulatory Commission ("FERC") for its approval (Docket No. ER-80-506).

We would also note that during the period since the Board's decision, AEC has completed construction of additional generating capacity and has reserves in excess of its needs. Because of such excess reserves, AEC approached

Alabama Power seeking to utilize the Company's transmission system for the sale of excess power to or through other utilities to which Alabama Power is interconnected. Pursuant to service Schedule I of the amended Interconnection Agreement referred to above, Alabama Power has agreed to transmit or "wheel" certain power on AEC's behalf. This wheeling service schedule has been approved by the Alabama Public Service Commission in its Order No. 2806 on August 29, 1980, and has been filed with FERC for approval in Docket No. ER-80-506.

Reliability of service is not a problem for the members of MEUA. They, in fact, are backed up by the combined electric system resources of Alabama Power and its Southern Company affiliates, as well as the resources of Tennessee Valley Authority and other bulk power suppliers in the Southeast and the Middle South. The same resources have been made available to AEC through its Interconnection Agreement with Alabama Power. The current Agreement with AEC provides for emergency power, maintenance power, and other bulk power supply services as well as other interchange services.

Had any of the municipalities seen fit to pursue the purchase of unit power from the Farley Plant, they too would have been invited to enter into interconnection agreements containing similar provisions, tailored, nevertheless, to meet their particular needs. No events since the order of the Board would serve as a basis to assume that the municipalities would not be treated similarly.

In summary, there are no barriers to market entry for municipal distributors other than those established by state law. The damages claimed in Paragraph 13 of the complaint for mandatory injunctive relief simply do not exist.

Third, Paragraph 10 of the Complaint erroneously alleges that issues relating to both liability and remedies common to the Farley proceeding have been resolved in two other fully litigated antitrust proceedings before the ALAB. Without addressing the factual details here, it should suffice to point out that in the development of almost 29,000 pages of record testimony and a multitude of contentions

as to both law and fact, the Farley proceeding developed many issues distinguishable from those developed in other antitrust hearings before the ALAB. Thus, we believe that MEUA should be required to carry the burden of showing that the issues involved in this proceeding are common to issues in other proceedings which the ALAB resolved.

In addition, as a general matter, the Farley proceeding essentially involves issues of liability and remedy under Section 2 of the Sherman Act in contrast to the two previous ALAB proceedings. One of the previous proceedings, known as CAPCO, involved application of Section 1 of the Sherman Act. See The Toledo Edison Company, 10 NRC 265, 277, 280 (1979). There, several distinct electric utility companies which had formed a power pool designated the "Central Area Power Coordination" group (CAPCO) were seeking licenses for nuclear plants and a conspiracy in restraint of trade was alleged. Here, only one utility sought a license. The other proceeding, known as Consumers, which was a Sherman Act Section 2 proceeding did not resolve the issues of law relating to the appropriate remedy. The matter was remanded to the Licensing Board to fashion remedies. See Consumers Power Company, 6 NRC 892, 1098-1100 (1977). Thus, the allegations by MEUA that the ALAB has decided two fully litigated cases which resolved issues relating to both liability and remedies common to the Farley proceeding are simply untrue.

Finally, we suggest that there have been significant developments in the applicable law since the earlier proceedings were conducted. The application of the antitrust laws to regulated electric utilities has undergone a change since the CAPCO and Consumers decision of the ALAB. The mechanical application of principles enunciated in earlier decisions has been, and continues to be, independently re-evaluated in the federal judiciary.

In the last thirteen months, several major decisions have been rendered dealing with the antitrust laws and regulated electric utilities. These cases make it clear that, while the antitrust laws undoubtedly apply to the electric industry, pervasive regulation tempers the application. They do so particularly with respect to the application of Section 2 of the Sherman Act, the essential legal

provision at issue in the case under deliberation, both by noting the impact of regulation in finding monopoly power and by raising the level of necessary intent so as to accommodate the role of the natural monopoly in carrying out public policy.

The Public Utility Regulatory Policies Act of 19[illegible] ("PURPA") [Pub. L. No. 95-617, 92 Stat. 3117 (Nov. 9, 1978)], passed after the record closed in the Farley proceeding, is especially important here because it provides additional powers to the FERC to compel interconnection and transmission of electricity. See 16 U.S.C.A. §§ 824i; 824j (1974). At the conclusion of oral argument before the ALAB in the Farley proceeding, the ALAB called upon the parties to submit briefs on the extent to which PURPA impacts on FERC's power to order interconnection and transmission. This is significant because the existence and the extent of jurisdiction in the FERC to regulate and thus require the supply of transmission services or "wheeling" was a matter central to the decision of the ALAB in the Consumers case. See Consumers, supra at 1005-1009. The extent of FERC's power in these matters is still the subject of ongoing debate in cases where FERC has assumed jurisdiction. The simple presence of such additional regulatory powers, however, have significant impact on the ALAB's ability even to find Alabama Power possesses monopoly power. Furthermore, the presence of the state and federal regulatory scheme must be considered in determining Alabama Power's monopolistic intent under the new federal cases. Mere adverse effect on the number of competitors resulting from the business practices of a dominant firm in regulated natural monopoly industries will no longer result automatically in a finding of monopolistic intent under Section 2 of the Sherman Act.

We have studied these new federal cases, and can furnish you or the ALAB with a memorandum discussing their impact in more detail should you or the ALAB desire.

If the ALAB mechanistically adheres to certain of its past articulated positions, as MEUA would have it do, it will commit error. In view of such developments in the law applicable to this proceeding, the ALAB should be given full

opportunity to take account of the ongoing developments in the law and reach a decision which is correct. If the ALAB desires further argument or briefing in these developments, the rash move by MEUA should not be permitted to preclude the ALAB from requiring the parties to file supplemental briefs on the evolving antitrust standards applicable to regulated electric utilities. With over 29,000 pages of transcript and several hundred exhibits, the task of factoring regulatory impact on industry behavior into the analytical technique now required for the electric industry in monopolization claims under the Sherman Act by more recent cases, is awesome.

The ALAB should not be pressured in any way in reaching a decision, especially in view of the lack of injuries or damages presently being suffered by any party. Alabama Power assures that it will not complain about the ALAB taking sufficient time to reach a proper decision, but does take exceptions to ALAB being pressured into what might be an ill-considered determination. We remain ready to cooperate in implementing any alternatives available to insure that the correct rules of law will be applied to the facts of this case which is a matter of great concern to Alabama Power and affects the public interest including that of the hundreds of thousands of customers of Alabama Power.

If we can be of any assistance in this matter, please let us know.

Yours very truly,

S. Eason Balch

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