UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE NUCLEAR REGULATORY COMMISSION

In the matter of	)	Docket Nos. 50-348A
Alabama Power Company	)	50-364A
(Joseph M. Farley Nuclear Plant	)	
Units 1 and 2)	)	

Answer in Opposition of the Municipal Electric Utility Association of Alabama to Application of Alabama Power Company For an Order Staying Pendente Lite the Effectiveness of Antitrust Conditions

On July 22, 1981, Alabama Power Company (APCo.) filed with the Commission its Application for a Stay pendente lite of the effectiveness of license conditions ordered attached to the operating licenses for the Joseph M. Farley Nuclear Plant Units 1 and 2. The Municipal Electric Utility Association of Alabama (MEUA) opposes the Application.

INTRODUCTION

APCo. filed is Application for construction licenses for the Farley Units on October 10, 1969 and June 26, 1970. Notice of antitrust hearings pursuant to Section 105(c) of the Atomic Energy Act of 1954, as amended, was not issued by the Commission until 1972. The Licensing Board to which the matter was assigned did not issue its Phase I decision on liability until April 8, 1977. The Licensing Board's Phase II decision on remedies followed on June 24, 1977. Another 48 months elapsed before the

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Appeal Board rendered its decision on June 30, 1981 granting limited relief to MEUA. By its Application for a Stay, APCo seeks to delay even further the day when the anticompetitive situation is eliminated.

In its decision,[1/] the Appeal Board affirmed each of the five findings of anticompetitive acts found by the Licensing Board, i.e., (1) Section 4.2 of Applicant's contract with the Southeast Power administration was tantamount to an exclusive dealing arrangement inconsistent with the antitrust laws; (2) Applicant's conduct in competing for the right to serve Fort Rucker was inconsistent with the antitrust laws; (3) Applicant had, in concert with others, acted to preclude small electric utilities in central and southern Alabama from obtaining the benefits of coordinated operation and development; (4) Applicant unreasonably refused to engage in coordinated operation and development with Alabama Electric Cooperative (AEC) from 1968-1972; and (5) Applicant's contracts with municipal electric distributors and AEC contained provisions which were anticompetitive in precluding municipal systems and AEC from seeking alternative sources of supply. In addition, the Appeal Board found that the retail marked and the coordinate services markets were relevant and that APCo. had monopoly power in those markets. The Appeal Board also found that APCo. had committed additional anticompetitive acts in lowering its wholesale rates in an effort to forestall the construction of generation by AEC and in denying AEC an opportunity to acquire an ownership position in the Farley Units. More importantly the Appeal Board stated:[2/]

> Our own examination of the record . . . suggests strongly that it would be permissible

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1/ ALAB-646.

2/ Slip Op. p. 90.

> for us to find any number of additional alleged instances of misconduct to have been part of an anticompetitive pattern and thus subject to obloquy.

Based upon its findings, particularly with respect to the retail market, the Appeal Board imposed a limited remedy in the form of the license conditions, the effectiveness of which Applicant asks to have delayed.

THE LAW

APCo. is not entitled to a stay of the license conditions unless it can meet the four part test formulated in Virginia Petroleum Jobbers, Assoc. v. FPC, 259 F.2d 921 (D.C. Cir. 1958) as modified in Washington Metropolitan Area, etc. v. Holiday Tours, 559 F.2d 841 (C.D. Cir. 1977). The four part test is applicable to proceedings before the Commission under 10 CFR § 2.788.

It is important that APCo. must show that unless the stay is granted it will suffer irreparable injury. As the Court pointed out in Virginia Petroleum Jobbers,[3/] "mere injuries, however substantial in terms of money, time and energy necessary expended in the absence of a stay, are not enough." It is shown below that APCo. cannot meet the well-established standard for grant of a stay of the effectiveness of license conditions.

APCo. Has Not Made a Strong Showing of Likelihood that It Will Prevail On the Merits of Its Appeal

In accessinng the likelihood that APCo. will prevail on the merits of its appeal, it must be borne in mind that the Appeal Board's findings of anticompetitive conduct are the minimum findings supported by the record. The Appeal Board went out of its way to make clear that the

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3/ 295 F.2d at 925.

record would in fact support a finding of "any number of additional alleged instances of misconduct to have been part of an anticompetitive pattern and thus subject to obloquy;"[4/] and again, the Appeal Board stated: ". . . it might be possible to build on this to find a great many more instances of anticompetitive conduct fit into this same pattern."[5/] These deliberate statements by the Appeal Board make it clear that on further review, it will be found that the extent of APCo.'s wrong doing was greater not lesser than that found by the Appeal Board.

The thrust of APCo.'s argument that it is likely to prevail on the merits seems to be that APCo. is so pervasively regulated that it cannot posses monopoly power. Curiously, APCo. relies on Mid-Texas Communications Systems, Inc. v. A.T. & T.[6/] Mid-Texas has no relevance to APCo.'s argument, but merely held that it was error not to permit the jury to consider the impact of regulation on monopoly power. Mid-Texas does not state that the presence of regulation negates monopoly power. In this case the Licensing Board took extensive testimony regarding the impact of regulation on APCo. Mid-Texas is in full accord with the Appeal Board's conclusion that the impact of regulation is simply another fact of market life to consider.[7/]

APCo. contends that because it is a regulated company it cannot be found to have monopoly power based upon market share alone. The company's argument must fail because the Supreme Court has already ruled that an

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4/ Slip Op. p. 90.

5/ Slip Op. p. 99.

6/ 615 F.2d 1372 (5th Cir.), cert. denied sub. nom., Woodlands Telecommunication Corp. v. Southwestern Bell Telephone Co., 101 S. Ct. 286 (1980).

7/ Slip Op. p. 19.

inference of monopoly power may be drawn from a regulated electric utility's market share. Otter Tail v. United States[8/] Moreover, the Appeal Board did not rest its findings of monopoly power on market share alone. Rather, the Appeal Board considered APCo.'s domination of power generation and transmission.[9/]

APCo. also argues that the Appeal Board erred in holding that because the company had monopoly power, its actions should be tested by a more stringent standard than applies to actions of smaller concerns in more competitive markets.[10/] However, the recent decision of the Court of Appeals in the Second Circuit in Northeastern Telephone Co. v. American Telephone and Telegraph Co.,[11/] is to the contrary.

Finally, APCo. argues that the imposition of a licensing condition requiring the company to wheel power for the municipal systems was erroneous because MEUA was held not to be an actual or potential competitor at wholesale and that while APCo. has monopoly power in the retail market it has not monopolized the retail market.[12/] MEUA certainly does not agree that it is neither an actual nor a potential competitor in the wholesale market; nor does MEUA agree that APCo. has not monopolized the retail market. Nevertheless, assuming arguendo that those findings are correct, requiring APCo. to wheel power for MEUA and its members is the minimum possible remedy and in fact does not provide an adequate remedy.

8/ 410 U.S. 366 (1973).

9/ Slip Op. pp. 74-85.

10/ Application for Stay, p. 5.

11/ 1981-1 Trade Cases ¶ 64,027 (2d Cir. May 27, 1981).

12/ Application for Stay, p. 7.

The Appeal Board affirmed the Licensing Board's findings that APCo.'s contracts with municipal electric suppliers contained provisions which were anticompetitive in precluding municipal systems from seeking alternative sources of supply. It also affirmed the Licensing Board's finding that Section 4.2 of APCo.'s contract with the Southeast Power Administration which restricted municipal customers receiving SEPA power from purchasing their additional power from anyone other than APCo. was tantamount to an exclusive dealing arrangement inconsistent with the antitrust laws. Further, the Appeal Board affirmed the Licensing Board's finding that APCo. had monopolized the wholesale market and found that MEUA members were totally or partially dependent upon APCo. for their supply of power.[13/] In this regard, the case is much like Otter Tail wherein the defendant cut off its retail competitors' supply of wholesale power. In Otter Tail the Court ordered wheeling to break up the company's monopoly power. The same remedy is the minimum permissible relief in this case.

APCo. has failed to demonstrate a strong likelihood that it will prevail on the merits of its appeal.

APCo. Will Not Be Irreparably Damaged If a Stay Is Not Granted

APCo.'s argument and supporting affidavit which attempt to establish that the company will suffer irreparable injury unless the license conditions are stayed falls far short of the mark. The company raises a host of speculative arguments dealing with imagined impacts on a pending ratail rate case, higher financing costs, and the necessity of negotiating complex contractual agreements to effectuate the license

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13/ Slip Op. p. 84.

conditions. Substantially similar speculation was found insufficient to justify a stay of license conditions in the Davis-Besse proceedings.[14/]

APCo. claims that if the license conditions are permitted to remain in effect, it may have to pay more to borrow money because as an unfettered monopolist it is looked upon with favor by investors. Mere monetary loss is not irreparable injury. Traditionally the sort of irreparable injury that would justify a stay of license conditions is an injury which would render further appeal moot.[15/] No such injury is claimed by APCo.

While the company's chief concern is with license condition 2 which requires it to offer AEC ownership participation in the Farley Units, it also asks that the effectiveness of license condition 7 requiring it to wheel power for MEUA members be stayed. No serious effort is made to establish irreparable injury resulting from that license condition becoming effective. At most it is argued that the effect of license condition 7 may result in some loss of wholesale load if MEUA members are free to seek cheaper power elsewhere.

APCo.'s argument in effect admits that its control over transmission lines has forced MEUA members to purchase power from APCo. when they might do better elsewhere. This in itself points up the necessity of condition 7 to an elimination of the anticompetitive situation. Furhter, each municipality makes up less than 2% of applicant's total load - many of them are much less than 2%. Thus, the loss of any individual customer would have only minimal effect on APCo. (Tr. 6304-06). Moreover, APCo.

14/ ALAB-385, issued March 23, 1977.

15/ Stop H-3 Association v. Volpe, 353 F. Supp. 14 (D. Hawaii 1972).

insinuates without actually so stating that it would wheel for MEUA members if asked to do so even without a license condition.[16/]

APCo.'s entire argument attempting to demonstrate irreparable injury is pure speculation that compliance would cost some money and be inconvenient. There is no evidence whatsoever that compliance with the license conditions would make moot APCo.'s appeal.

MEUA and Its Members Would Be Injured
By A Stay of Licence Condition 7

As shown above MEUA and its members have waited a long time for a little relief from APCO.'s anticompetitive acts. Further delay in taking this minimum step to restore competition and redress the injury will harm MEUA and its members. Without wheeling MEUA members will be forced to continue to deal with APCo. as their sole source of supply. As APCo. points out,[17/] if license condition 7 remains effective MEUA members may purchase a portion of their wholesale power from some other supplier. Of course, they would not do so unless they were able to purchase cheaper power from another supplier. APCo. wishes to cut MEUA members off from other potential suppliers.

APCo. argues that on the only occasion on which it was asked to wheel power (the 1970 SEPA agreement) the company accommodated the request.[18/] Clearly, APCo. would like the Commission to believe that the company is perfectly willing to wheel and thus condition 7 is not necessary. On the other hand, if APCo. were willing to wheel in any event, it will not be injured by permitting condition 7 to remain in effect. Further, APCo.

16/ Application for Stay, p. 9.

17/ Application for Stay, p. 8.

18/ Application for Stay, p. 9.

carefully refrains from stating that it will in fact accommodate requests for wheeling. Finally, APCo. neglects to state that in agreeing to wheel the SEPA power from MEUA members it did so on terms which both the Licensing Board and Appeal Board found to be anticompetitive.

The Public Interest Requires That the License Conditions Remain in Effect

The continued effectiveness of the minimal license conditions imposed by the Appeal Board is in the public interest. APCo. in its two paragraph agrument makes no showing to the contrary.[19/]

In May of 1981 the Alabama legislature enacted legislation permitting MEUA members to form a joint power supply agency to supply all or part of the cities wholesale power requirements. The import of that legislation is that it is not in the public interest for MEUA members to remain captive customers of APCo. License condition 7 was similarly designed to offer MEUA members an alternative to dealing with APCo. Accordingly, condition 7 is in harmony with and augments the public interest in the state of Alabama. Moreover, without the ability to wheel power, the power supply agency will be delayed in its efforts to effectively achieve status as a power wholesaler in the public interest.

For the above stated reasons MEUA requests the Commission to deny the Application for a stay of licence conditions.

19/ Application for Stay, p. 10.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Answer in Opposition of MEUA to Application for Stay have been served on the following counsel for parties by United States mail, postage prepaid, this 30th day of July, 1981.

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