UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)	
	)	
ALABAMA POWER COMPANY	)	Docket Nos. 50-348A
(Joseph M. Farley Nuclear Plant,	)	50-364A
Units 1 and 2: Antitrust	)	

ALABAMA ELECTRIC COOPERATIVE'S OPPOSITION
TO ALABAMA POWER COMPANY'S PETITION FOR REVIEW

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JULY 31, 1981

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Alabama Power Company's (APCo's) Petition for Review should be denied. It is utterly devoid of allegations meriting full consideration by the Commission. APCo's claims are of far less substance than the claims of the petitioners in Davis-Besse, ALAB-560, 10 NRC 265 (1979), where the Commission denied review pursuant to 10 CFR §2.786(b)(5).[1/]

The Appeal Board decision is plainly correct. It has been made after long deliberation, based on an exceptionally extensive record. It fully accords with precedent within this Commission and in the courts. APCo's contentions have been fairly weighed and found wanting by a tribunal both experienced and expert in the application of the antitrust laws and policies to nuclear licensing. Under the circumstances it would be a needless diversion of the time and energies of this Commission to give plenary consideration to this case by granting the APCo Petition for Review.

While affirming the Licensing Board's finding that APCo has monopoly lock on the wholesale relevant market (LBP-77-24, 5 NRC 890-901; ALAB-646, 30, 74), the Appeal Board went on to determine that APCo enjoys monopoly power in both the coordination services and retail relevant markets. In

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1/ Letter To Terence H. Benbow, et al. from Secretary of the Commission (March 4, 1980).

so doing, the Appeal Board rejected none of the basic, underlying facts the Licensing Board found, but merely applied to the established facts the legal and market analysis required by NRC, Supreme Court, and other judicial precedents. ALAB-646, 30-54, 75-80; 54-73, 80-85. In reviewing APCo conduct, the Appeal Board affirmed all the Licensing Board's findings of numerous instances and patterns of APCo anticompetitive conduct.[2/] ALAB-646, 90-91.

In addition, ALAB-646 determined that in light of APCo's monopoly lock on all three relevant markets and properly viewing the evidence as a whole, rather than in isolated compartments:

> "it would have been permissible to find any number of additional alleged instances of misconduct to have been part of an anticompetitive pattern and thus subject to obloquy." (ALAB-646, 90).

But with respect to these additional items, the Appeal Board deferred to the Licensing Board, except in two areas in which the record compelled additional findings of anticompetitive conduct:

(i) Viewed in the perspective of APCo's pattern of litigation opposing construction of AEC's own generating capacity, APCo's evident pattern of rate reductions to AEC timed and for the purpose of discouraging AEC's development of self-generation was in derogation of the antitrust laws. ALAB-646, 91-100.

2/ For example, "Applicant consistently refused to make fair interconnection and coordination arrangements with AEC, for the sole purpose of maintaining and protecting Applicant's wholesale customer business from competition by AEC. Applicant's refusals to offer AEC reasonable interconnection and coordination in these circumstances can only be viewed as anticompetitive, and inconsistent with the antitrust laws and their underlying policies. We find that Applicant's behavior in regard to offering AEC interconnection and coordination in this period evinces an anticompetitive intent toward AEC", LBP-77-24, 5 NRC 925; and "Applicant clearly intended to, and did, deny in concert with other utilities, publicly owned utilities in its service area the benefits of economic coordination in order to eliminate competition from them." LBP-77-24, 5 NRC 954.

(ii) After thoroughly reviewing both the testimony of APCo's key executives and APCo's actual conduct over the decade in which AEC has been seeking ownership participation in the Farley nuclear units, the Appeal Board also found that APCo constantly refused ownership access by AEC to the nuclear units in order to preserve or enhance APCo's monopoly position in the competitive market--an action unacceptable under, and condemned by, Section 105c and the antitrust laws referred to therein. Id. at 100-112. Indeed, APCo's "position: to resist to the last selling an ownership share of the plant to AEC" (Id. at 108) continues to this hour.

On the basis of its findings as to APCo's pervasive monopoly power, and the anticompetitive uses to which this was, and is being, put, and pursuant to the remedial standards and purposes of Section 105c, the Appeal Board determined that appropriate license conditions must, at a minimum, include inter alia, for AEC proportionate ownership access to the Farley nuclear units and wheeling access within and through APCo's system. Id. at 133-164.

The Commission has by rule provided that it will not ordinarily review an antitrust case unless the case "constitutes an important antitrust question, involves an important procedural issue, or otherwise raises important questions of public policy." 10 CFR §2.786(b)(4)(i). Further, review of factual issues is precluded "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." 10 CFR §2.786(b)(4)(ii).[3/] A

3/ In promulgating 10 CFR §2.786(b)(4)(ii), the Commission determined "that as to factual matters, two levels of decision within the agency are enough, and that there is no need for a third factual review by the Commission itself." 42 F.R. 22129 (May 2, 1977).

scrutiny of APCo's Petition for Review, item by item, reveals not a single "assignment of error" which meets this heavy burden.

APCo 1. The Appeal Board correctly affirmed the Licensing Board's determination of the appropriate scope of NRC antitrust review and the Licensing Board's rejection of APCo's reading of Section 105c. ALAB-646, 22-26.[4/] LBP-77-24, 5 NRC 837-845. If adopted, APCo's reading would have rendered Section 105c meaningless. APCo's contention that the NRC may review only APCo's future conduct under its licenses and may not consider the history of APCo's misuses of monopoly power has long since been settled contrary to APCo's position and warrants no attention from the Commission. Wolf Creek, 1 NRC 559, 565-574 (1975).

APCo 2a. APCo's complaint regarding the finding of the coordination services relevant market is based on an inaccurate description of the treatment of this issue by the Licensing and Appeal Boards. With respect to the coordination services market, the Licensing Board recognized the importance of the cluster of product factors--the elements of inter-utility coordination (5 NRC 833-837, 879-880, 886-901)--but, through a misreading of Grinnell,[5/] concluded that the various elements had to be interchangeable with

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4/ Contrary to APCo's claim, the Appeal Board in its discussion relied extensively on the Commission's teachings in Louisiana Power & Light Co. (Waterford II), 6 AEC 619, 621 (1973), as discussed and followed in Wolf Creek, ALAB-279, 1 NRC 559, 572-573 (1975), as did the Licensing Board in its discussion of the scope of Section 105c antitrust review in Alabama Power, LBP-77-24, 5 NRC 804, 840-843, 958-959 (1977). APCo's scope-of-review arguments were first rejected in the Licensing Board's Memorandum and Order of February 9, 1973; Order denying request for stay and certification to Appeal Board issued March 6, 1973. APCo requested reconsideration of the Board's denial of its motion for certification on the basis of Waterford I, CLI-73-7, 6 AEC 48 (1973). This was denied after pleadings and oral argument at Tr. 35 (March 20, 1973).

5/ United States v. Grinnell Corp., 384 U.S. 563 (1966).

each other to constitute a distinct product market (5 NRC 886-887).[6/]

The Appeal Board here upheld the contentions of the Department of Justice, the Staff, AEC and MEUA as to the factual reality of the coordination services market. ALAB-646, 39-54. In so doing, it did not disturb or reject any of the basic facts found by the Licensing Board as to the commercial, or trade, realities of inter-utility coordination (see LBP-77-24, at 5 NRC 832-837). Nor in the Appeal Board's determination that Alabama Power exercises dominant, monopoly control of this relevant market (ALAB-646, 74-80) did the Appeal Board reject any of the basic facts found by the Licensing Board, which facts compel the finding of APCo's monopoly lock on generation and transmission capacity (LBP-77-24, at 5 NRC 898-901). The fundamental commercial realities of the market, having been confirmed by both Boards, are not open to review here. 10 CFR §2.786(b)(4)(ii). The detailed discussion in ALAB-646, 33-37 makes evident that the Licensing Board's error (5 NRC at 887) was one of legal analysis--the failure to recognize that a bundle of noninterchangeable products and services can constitute a relevant market. The Appeal Board independently reviewed the record (ALAB-646, 40-51)--making no findings in conflict with

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6/ In so concluding the Licensing Board rejected the United States v. Philadelphia National Bank, 374 U.S. 321, 356 (1963) analysis and reached results inconsistent with another Licensing Board's decision, Davis-Besse, LBP-77-1, 5 NRC 133, 159-165 (1977), which recognized the commercial reality and antitrust significance of normal inter-utility coordination, pooling, and coordinated planning as reflected in the bulk power services and regional power exchange markets adopted by that Board. The Davis-Besse Licensing Board's analysis of Philadelphia National Bank and Grinnell (5 NRC 133, 160-161 (1977)) was confirmatory of the relevant market contentions of the Staff, Department, and AEC in this proceeding. The LBP-77-1 analysis in Davis-Besse was affirmed by the Appeal Board in ALAB-560, 10 NRC 265, 301-302 (1979). The Farley Licensing Board's analysis had also been undermined by the Appeal Board's detailed analysis of the commercial realities of inter-utility coordination services and the Appeal Board's correct reading of Grinnell in Midland, 6 NRC 892, 945-977 (1977).

those of the Licensing Board--and determined the commercial realities of inter-utility coordination in the area, which the Appeal Board also found bore close similarity to those in Michigan which had been found in Midland. It then concluded that a relevant market for coordination services exists in the area of APCo's operations.[7/]

The Appeal Board's conclusion as to APCo's monopoly control in the coordination services market is firmly based on affirmed facts found by the Licensing Board, ALAB-646, 75-80. APCo's claim (APCo 3b.) that it does not have a monopoly lock on transmission lines was considered thoroughly in LBP-77-24.[8/] The Appeal Board reviewed this factual claim in even greater detail, including the testimony of APCo witness Elmer Harris that APCo's transmission is a necessary path for AEC access for coordination to other electric systems.[9/] Pursuant to 10 CFR §2.786(b)(4)(ii), these findings, which compel the monopoly power conclusion, were affirmed by the Appeal Board and are not subject to further review.

7/ APCo's contention (APCo 2b.) that it coordinates only with its affiliates is frivolous in light of the extensive findings of regional coordination made by the Licensing Board and affirmed by the Appeal Board (e.g., LBP-77-24, 5 NRC at 820-824, 827, 828-833, 899-901), including the evidence of the conspiracy among APCo and numerous large utilities in the southeastern United States to foreclose AEC and other small utilities from opportunities for regional economic coordination engaged in by those large systems. 5 NRC at 946-957.

8/ 5 NRC 899-901; see also 5 NRC 821, 826, 827, 828-833, 919, 957-959.

9/ ALAB-646 at 75-80 (APCo "simply has failed to rebut the showing that its predominant control of transmission and generation gives it monopoly power over the sale of coordinated services in the relevant market area"); Id. at 158-159. See also Mayben direct testimony, 19-21, 34-47, 51; Lowman direct, 140-141; Rogers direct 12-14; Vann direct, 2, 23; Porter direct, 23; DJ-301, DJ-1004a, DJ-1008, AEC CRL-2 (updated); Lowman, Tr. 26,380-26,387; AEC-76 through AEC-84; AEC CRL-90, Sections 3.04 and 5.03; AEC Reply Brief before the Licensing Board, pp. 26-34 and citations therein (August 16, 1976). APCo vigorously argued this point orally before the Appeal Board, whose eventual findings on APCo transmission dominance confirmed those of the Licensing Board.

APCo 2c. and 2d. With respect to the retail relevant market, the Appeal Board rejected none of the basic facts found by the Licensing Board, which had found a distinct product market for the retail distribution of electric power and had found direct retail competition for existing and new loads, and yardstick competition (5 NRC 887-890). The Appeal Board corrected the Licensing Board's clearly erroneous conclusion, based on a misreading of Otter Tail,[10/] that retail competition "is presumably outside the scope of antitrust remedy" (5 NRC at 889). The Appeal Board reviewed the extent of the various forms of retail competition established in the record and found it substantial and clearly, under both judicial and agency precedent, entitled to antitrust protection. ALAB-646, 54-68. The Appeal Board went on to define the geographic parameters of the market based on the evidence adduced by the Licensing Board, and in a manner consistent with controlling judicial and agency analyses (ALAB-646, 68-73), and to find, largely on the basis of facts found by the Licensing Board, that APCo incontestably holds the monopoly lock in that market. ALAB-646, 80-85.

APCo 3a. and 4. APCo's "time worn and discredited argument"[11/] that because some aspects of its operations are regulated, it cannot as a factual matter have monopoly power has been amply considered and firmly rejected by both tribunals below. LBP-77-24 at 5 NRC 882-885,[12/] and ALAB-646 at 21, 81-85. A third consideration by the Commission of this factual issue would be wholly unwarranted.

10/ Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

11/ ALAB-646 at 16.

12/ See also 5 NRC 861-867 for the Licensing Board's rejection of the same argument in its "immunity" disguise; and see AEC's Answering Brief on Exceptions before the Appeal Board, pp. 23-34 (April 14, 1978).

APCo 4a. Here APCo mischaracterizes the Appeal Board's finding as to APCo's refusal to grant ownership access. ALAB-646, 100-112. The Board did not reject Mr. Farley's testimony--it based its finding of APCo's anticompetitive refusal on Mr. Farley's testimony, viewed together with APCo's actual conduct. Its finding, based on an abundance of evidence, was not only reasonable; it was compelled by the record. There is nothing about it that calls for Commission review.

APCO 4b. Here APCo merely requests the substitution of its fanciful theories for the Appeal Board's detailed consideration of this record. Viewed in the perspective of APCo's pattern of litigation in opposition to any construction by AEC of AEC's own generating capacity, APCo's evident pattern of rate reductions to AEC timed to discourage AEC's development of self-generation was clearly undertaken, in derogation of the antitrust laws, for the purpose of preventing such self-generation. Id. at 90-100. As the Appeal Board summed up (Id. at 99):

> "What we are left with, then, is the conclusion that these lowered rates were the opening salvo in the pattern adhered to through the years in which the applicant sought to forestall AEC from installing its own generating capacity, and to keep AEC as a captive customer--even at the cost of short-term profit--rather than allow it to develop as a competitor, thus assuring applicant's long-term health. As already indicated, it might be possible to build on this to find that a great many more instances of anticompetitive conduct fit into this same pattern."

APCo 4c., 4d. and 4e. These again constitute merely APCo objections to findings by the Licensing Board all of which were expressly affirmed by the Appeal Board. ALAB-646.

APCo 5. APCo's complaints relative to the license conditions adopted by the Appeal Board are based on mischaracterizations of the Board's articulated grounds for imposing the conditions, contain serious errors of

law,[13/] and raise no matters warranting review by the Commission. The Appeal Board's detailed articulation of the bases for the remedy applied in this case is consistent with antitrust principles and the specific statutory directives to the Commission, and the legislative history thereof,[14/] with respect to the Commission's antitrust jurisdiction. ALAB-646, 145-164. The shallowness of APCo's claims of error with respect to remedy is typified by its complaint that the Appeal Board took into consideration the directive of Section 1 of the Atomic Energy Act in its remedial determination. ALAB-646, 145.

It is abundantly clear that the matters raised by APCo are factual arguments which have been considered and rejected by two tribunals, or are matters of relevant market or legal analysis which have been resolved with painstaking detail wholly consistently with Section 105c, applicable antitrust principles, and NRC agency antitrust precedent. APCo has failed to raise any important antitrust or public policy question meriting Commission consideration.

13/ The contention that the REA Act immunizes APCo from competition from AEC (APCo 5c.) is patently frivolous. This frivolous contention was summarily dismissed in Midland: "Aside from the fact that anticompetitive conduct cannot be justified on the ground that a competitor has a tax advantage, see American Federation of Tobacco Growers v. Neal, 183 F.2d 869, 872 (4th Cir. 1950), those tax and financing advantages are a matter of federal policy. If Consumers finds them unpalatable, its remedy lies with the Congress; in the interim it must take its competitors as it finds them." 6 NRC 892, 1019 (1977). It was again firmly rejected here. ALAB-646, 148-151.

14/ Specific circumstances mentioned in the legislative history of Section 105c indicate that when a single-owner applicant has been found to possess monopoly power and a general anticompetitive intent inconsistent with Section 2 of the Sherman Act, sharing of ownership is the appropriate remedy, according to traditional antitrust doctrine. Joint Committee on Atomic Energy, Prelicensing Antitrust Review of Nuclear Powerplants, Hearings, 91st Cong., 1st and 2nd Sess., Part 1, 133 [Testimony of Walker B. Comegys, Acting Assistant Attorney General, Antitrust Division, Department of Justice] (1969).

APCo concludes by asserting (Petition For Review, pp. 9-10) that if the Commission does not grant APCo's Petition For Review, "it will also provide a clear signal to the electric utility industry that NRC has simply abdicated its institutional role in oversight of the licensing process." Nothing could be more far-fetched. By and large the utility industry has been able to have an excellent accommodation with the antitrust laws in connection with nuclear reactor projects. APCo, however, has distinguished itself by becoming a virtually solitary holdout against the applicable antitrust laws and policies which this Commission is charged with enforcing. The Commission has many problems to solve if it wants to convince the country and the nuclear industry that its regulatory process is capable of being carried out in an efficient and safe manner. It would hardly contribute to the solution of those difficult problems--or to the growth of public confidence in the efficacy of the regulatory process--if the Commission were to further protract this already-protracted proceeding by diverting its own time and energies to the plenary review of ALAB-646 in a situation where the APCo Petition For Review is so totally undeserving of being granted.

Respectfully submitted,

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JULY 31, 1981

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached document have been served on the following by United States Mail, postage prepaid, this 31st day of July, 1981.

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