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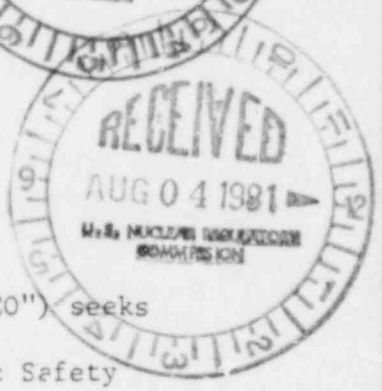

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Nuclear Regulatory Commission

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

PETITION FOR REVIEW OF ALAB-646

Pursuant to 10 CFR § 2.786(b), Alabama Power Company ("APCO") seeks review of the June 30, 1981 decision ("ALAB-646") of the Atomic Safety and Licensing Appeal Board ("ALAB") in this proceeding.

Proceedings Below

In an effort to fulfill its duty to serve the public and in response to the policy of the Atomic Energy Act of 1954 ("the Act") (42 U.S.C. 2011 et seq.) to further the development and commercial application of nuclear power with private funds, APCO in October 1969 filed application to the Atomic Energy Commission (now the "NRC") for authority to construct a nuclear plant in Houston County, Alabama. This proposal for a generating unit of over 800 megawatts was viewed as the most efficient way for APCO, a privately-financed, investor-owned utility, to serve its customers pursuant to regulation by the Alabama Public Service Commission ("APSC").*

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* APSC, by order of August 27, 1969 (at the foot of a public hearing in APSC Docket No. 1624), issued a certificate of convenience and necessity calling for the construction of the plant. The order is discussed in the testimony of Joseph M. Farley, APCO President, before the Atomic Safety and Licensing Board ("LB"). See Direct Testimony and Exhibits of APCO (Farley Testimony, Vol. I) ("APPX JMF-A (Farley)") at 329-339. The APSC hearing considered the future power requirements of APCO's service area and APCO's need for new capacity to meet such requirements. APPX JMF-A (Farley) at 334-337.

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APCO began physical construction in September 1970, over a decade ago, as the sole proprietor of this plant.*

Subsequently, in December 1970, the Act was amended so that antitrust review under section 105(c) of the Act (42 U.S.C. § 2135(c)) was made applicable to APCO's nuclear plant. The Department of Justice advised the Commission on August 16, 1971 that a hearing on antitrust issues should be held. On June 28, 1972, a Notice of Antitrust Hearing on the Farley Plant application was issued and an Atomic Safety and Licensing Board ("LB") was appointed to conduct evidentiary proceedings involving the Department of Justice, the NRC Staff, and APCO. Alabama Electric Cooperative, Inc. ("AEC"), a non-profit generation and transmission cooperative, financed mainly through the Rural Electrification Administration ("REA"), and an association known as the Municipal Electric Authority of Alabama ("MEUA"), made up of twelve municipal distributors that utilize tax exempt bonds to finance capital investment in the electric business, were permitted to intervene.

Although APCO tried by motion and argument to limit the scope of the proceeding before the LB, the hearing was wide-ranging in scope, and APCO was confronted with scores of allegations of conduct allegedly subject to review under section 105(c). Over APCO objections, the LB accepted evidence of APCO activities as far back as the early 1900's. Over 29,000 pages of live testimony and hundreds of exhibits were presented; evidentiary proceedings were not concluded until May 1977. Judging

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* APCO filed application for a construction permit for a second identical unit in June 1970. The APSC issued a supplemental order in Docket No. 16204, in September 1970, wherein a certificate of convenience and necessity for Unit 2 was issued. Commercial operations at Unit 1 began in December 1977.

APCO's conduct under section 105(c),* the LB determined that the activities under the licenses for the Farley Plant, Units 1 and 2, "would create or maintain a situation inconsistent with the antitrust laws and the policies underlying those laws." (Alabama Power Company I and II, 5 NRC 804, 813; 5 NRC 1482 (1977).) The LB found APCO had engaged in five instances of conduct inconsistent with the antitrust laws with respect to AEC. No anticompetitive situation was found created or maintained with respect to MEUA (Id. at 961, 1484.) Subsequent to these findings, in the remedy phase of the proceeding, after evaluating the legislative history of section 105(c) and after factoring in certain "public interest" considerations, such as the APSC's determination of the need for power in Alabama and the fact that none of the alleged anticompetitive conduct had occurred since 1972, the LB imposed six remedial conditions on APCO's operating licenses. (5 NRC at 1491, 1501-1509). These conditions forced APCO, among other things, to offer to sell AEC unit power** from the Farley Plant, to provide certain bulk power supply and transmission services to AEC.

All parties to the LB decision appealed to the ALAB. The ALAB did not conduct evidentiary hearings but, in an opinion rendered June 30, 1981, (ALAB-646), made separate and different findings on particular issues of fact based on its view of the record including testimony rejected by the ASLB. Relying in great degree on its legal and factual

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* Section 105(c) requires consideration of a number of antitrust statutes. At issue here are the application of legal standards under Section 2 of the Sherman Act (15 U.S.C. § 2) and, in one instance, section 5 of the Federal Trade Commission Act (15 U.S.C.§ 45).

** "Unit power" is a method by which bulk power from a particular generating unit is sold at a rate based solely upon the cost of power from such unit, thereby making the cost of power from that unit to the purchaser the same as the cost of power to the owner. The cost of power varies among generating units on APCO's system.

analysis in Midland (Consumers Power Co., 6 NRC 892 (1977)), and Davis-Besse, (Toledo Edison Co., 10 NRC 265 (1979)), and incorporating certain parts of these opinions by reference, ALAB-646 found additional anticompetitive conduct by APCO, and substituted eight new license conditions, including forcing APCO to offer to enter a joint ownership arrangement tantamount to a partnership with AEC in the Farley Plant.

Assignments of Error

The ALAB has formulated or perpetuated conclusions of law and findings of fact which contradict recent judicial decisions and, in many cases, the findings and conclusions of the LB. We mention but a few.*

1. In contravention of section 105(c), the ALAB refused to limit the scope of the antitrust review to conduct of APCO which would demonstrate that its activities under the license would create or maintain a situation inconsistent with the antitrust laws, preferring to ignore the admonition of the NRC that the matters of inquiry have a "substantial connection with the nuclear facility." (Louisiana Power & Light Co. 6 AEC 619, 621 (1973); ALAB-646 at 22-26; Brief I at 44-50.) The ALAB erroneously concluded that marketing and pricing activities engaged in by APCO as far back as 1941, 1946, 1950 and 1962-1963 are to be used to find that APCO's activities under the license sought will create or maintain "a situation inconsistent with the antitrust laws" (ALAB-646 at 91-93, 86 n.155; 5 NRC at 942-45.)

2. The ALAB erred in its designation of the relevant product and geographic markets for inquiry in this proceeding.

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* This list, because of space limits, is not exhaustive. The substantial errors of the ALAB were raised before the ALAB in Exceptions to Initial Decisions, dated July 14, 1977; Alabama Power Company dated November 14, 1977 ("Brief I"); and Applicant's Answering Brief dated April 14, 1978 ("Brief II").

a. The ALAB erroneously reversed the LB and held that the alleged "coordination services" market constituted a relevant market (ALAB-646 at 30-32, 37-43) notwithstanding the uncontroverted evidence that the services identified in such market were not substitutable one for the other (5 NRC at 886 n.202) and did not constitute a package of services which has commercial reality for AEC (Brief II at 23-38). It relied on its determination in its Midland decision in finding such a market and in so doing ignored the legal and factual distinctions between the Midland and the instant case. (ALAB-646 at 44-50; Brief II 23-38.)

b. The ALAB erroneously ruled in effect that the pooling practices engaged in by the affiliates of The Southern Company under the Public Utility Holding Company Act (15 U.S.C. § 79 et seq.) mandate a finding of a coordination services market (ALAB-646 at 40-42), even though such practices are applicable only to the affiliates of such company. (See 26 S.E.C. 464 (1947); Applicant's Exhibit ("APPX") JMF-73.)

c. Contrary to the LB, the ALAB erroneously concluded that retail power sales constituted a relevant product market for purposes of this proceeding. (ALAB-646 at 57-68; Brief II at 38-44.)

d. The ALAB erroneously concluded that the relevant geographic market was central and southern Alabama. (ALAB-646 at 30, 54, 69-93; Brief I at 40.)

3. The ALAB erroneously concluded that APCO had monopoly power, i.e., the power to control prices or exclude competitors, in the alleged relevant markets.

a. Contrary to judicial authority, the ALAB erroneously failed to consider that state and federal regulation including, without limitation, the Federal Power Act, as amended by the Public Utility Regulatory Policies

Act of 1978, the Public Utility Holding Company Act, and applicable Alabama statutes, prevented APCO from possessing monopoly power in any relevant market, preferring instead the erroneous view that this argument was merely a "back door" plea for implied antitrust immunity. (ALAB-646 at 16-19; Brief I at 4-20.)

b. Even though the record clearly shows that AEC owns and controls approximately 1,000 miles of transmission lines, has interconnections with Georgia Power Company and lines traversing the transmission system of Gulf Power Company in northwest Florida and other lines in close proximity to the transmission system of utilities operating in Mississippi, the ALAB erroneously held that APCO had control over transmission lines so as to possess monopoly power in the coordination services, wholesale and retail markets. (ALAB-646 at 77; Brief I at 29; Brief II at 4-8.)

c. The ALAB erroneously ruled that APCO possessed monopoly power, based upon its predominant share of sales in its own service area (ALAB-646 at 74, 80-83) and its predominant control of generation and transmission (ALAB-646 at 75-80).

4. Contrary to judicial authority, the ALAB made or perpetuated erroneous findings that Applicant abused its alleged monopoly power by erroneously evaluating APCO's conduct against the standard applicable to dominant, unregulated enterprises, thereby ignoring the economic and regulatory factors applicable to a regulated natural monopoly.

a. The ALAB rejected the sworn testimony of Mr. Farley* and

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* The LB, which observed Mr. Farley's testimony during ten days of searching cross-examination by other parties and which itself inquired of him while he was on the witness stand stated, "We find all of his testimony to be credible." 5 NRC at 915.

concluded that APCO denied AEC ownership in the Farley Plant in a manner inconsistent with the antitrust laws (ALAB-646 at 100-112), and ruled further that APCO should now (more than a decade after its application to the NRC) provide ownership access to AEC as a remedy for such alleged inconsistency. (Id. at 149.)

b. The ALAB erroneously rejected uncontroverted evidence that rate decreases put into effect by APCO to electric cooperative borrowers from REA in the 1940's and 1950's came about as the result of requests by, and negotiations with, the Rural Electrification Administration in conformity with established REA policy (Id. at 93-100; Brief II at 69-70) and erroneously utilized such conformity to federal policy in finding a reasonable probability, decades later, that APCO's activities under a license for a nuclear plant would constitute an abuse of its alleged monopoly power. (ALAB-646 at 99.)

c. The ALAB erred in finding that APCO engaged in anticompetitive conduct in 1970 by accepting a contract term tendered by Southeastern Power Administration (a federal agency) which provided that APCO would furnish transmission services at a set (low) rate only during such time as the recipients of the service were purchasing supplemental power supply requirements from APCO. (ALAB-646 at 86 n.155, 90-91; Brief I at 58-63.)

d. The ALAB erred in affirming the LB finding that APCO engaged in anticompetitive conduct through its participation with other entities in forming the Southeastern Electric Reliability Council and its alleged refusal to offer fair interconnection and coordination with AEC between 1967 and 1972. (ALAB-646 at 86 n.155, 90-91; Brief I at 63-74.)

e. The ALAB erred in affirming the LB in its finding that APCO engaged in anticompetitive conduct by entering into contracts with municipal and electric distribution systems which had the effect of preventing such systems from obtaining alternative sources of power. (ALAB-646 at 86 n.155, 90-91; Brief I at 53-58.)

5. The ALAB erred by imposing license conditions on APCO without a proper finding of whether they are necessary to protect the public interest, what relationship they have to activities of APCO under the license which will allegedly create or maintain a situation inconsistent with the antitrust laws, and otherwise without a proper finding of liability. (ALAB-646 at 136-45.)

a. The ALAB erroneously held that APCO should be required to engage in wheeling for and at the request of "any municipally owned distribution system" (Id. at A-4) contrary to its own findings.* (Id. at 118, 124, 126-27, 132.)

b. The ALAB erred in finding that APCO should be required to share the ownership of its Farley Plant with AEC in order to enable AEC to maximize its use of the tax immunities and subsidized capital arrangements it has available through REA to strengthen AEC as a competitor to APCO. (ALAB-646 at 148-153.)

c. The ALAB erred in ruling that section 1 of the Act is to be used in conjunction with section 105(c) of the Act to enable and encourage AEC to use REA loans to compete with APCO in violation of the

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* The record reflects that there are many municipally owned distribution systems located in Alabama, as well as many more in bordering states. The only municipally owned distribution systems which intervened in this proceeding were the 12 members of MEUA.

Rural Electrification Act of 1936 by forcing APCO to sell and convey to AEC a part interest in the Farley Plant. (Id. at 148-53; Brief I at 24.)

The Commission Should Grant Review of the Decision Below

Commission review of ALAB-646 would establish definitive NRC standards in a legal context where the Commission has not yet spoken. Acceptance of this petition would be the first time the Commission has undertaken review of a completed antitrust proceeding under section 105(c).

NRC antitrust policy has heretofore been set by the ALAB.* In its most recent statement of that policy (ALAB-646 issued June 30, 1981), the ALAB has ignored crucial 1980 antitrust decisions and recent scholarly articles on the application of antitrust laws to regulated businesses such as electric utilities.** These authorities have emphasized, as has APCO throughout this proceeding, that a regulated industry is subject to a qualified application of the antitrust laws. Commission review is necessary to correct these glaring deficiencies in ALAB adjudication.

Should this Commission itself fail to review ALAB-646, 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. Investor-owned utilities will assume that application for NRC licensing

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* This policy is expressed in Midland, supra (1977), Davis-Besse, supra (1979), and now in ALAB-646.

** Almeda Mall, Inc. v. Houston Lighting & Power Co., 615 F.2d 343 (5th Cir.), cert. denied, 101 S. Ct. 208 (1980); Mid-Texas Communications Systems, Inc. v. A.T. & T., 615 F.2d 1372 (5th Cir.), cert. denied sub. nom., Woodlands Telecommunications Corp. v. Southwestern Bell Telephone Co., 101 S. Ct. 286 (1980); American Electric Power Co., Proc. File No. 3-1476 (S.E.C. July 21, 1978); Landes and Posner, "Market Power in Antitrust Cases," 94 Harv. L. Rev. 937, 975-976 (1981).

will subject them to, among other things, extensive and unlimited anti-trust review by NRC employees who have been left free to apply procedural and evidentiary standards substantially less stringent than those available in federal district courts, and with the likely imposition of harsh and far-reaching remedies having little or no relationship to the proposed nuclear plant. Section 105(c) has been improperly applied up to this time in order to restructure the electric industry by displacing service from investor-owned utilities with service from government-subsidized municipals and cooperatives. The resulting loss of load and revenues presents a substantial disincentive to privately-financed investor-owned utilities contemplating nuclear generation as a means of providing service in their respective markets.

Under these circumstances, the Commission's failure to review ALAB-646 and to set NRC policy will undermine the utilization of nuclear power, and America's pursuit of energy independence.

Respectfully submitted,

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