UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Before The Commission

8/6/81

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

ANSWER OF DEPARTMENT OF JUSTICE IN OPPOSITION TO ALABAMA POWER COMPANY'S APPLICATION FOR AN ORDER STAYING PENDENTE LITE THE EFFECTIVENESS OF ANTITRUST CONDITIONS

Pursuant to 10 C.F.R. § 2.788(d), the United States Department of Justice ("Department") submits this answer opposing Alabama Power Company's ("Applicant") "Application for an Order staying Pendente Lite the Effectiveness of Antitrust Conditions" dated July 22, 1981 ("Application"). For the reasons set forth below, the Department respectfully urges the Commission to deny the Application.

The Atomic Safety and Licensing Appeal Board ("Appeal Board") issued an order and decision, dated June 30, 1981 ("ALAB-646") in the above captioned proceeding which affirmed in part and reversed in part decisions by the Atomic Safety and Licensing Board ("Licensing Board") 5 NRC 804 (1977) and 5 NRC 1482 (1977). The Appeal Board affirmed the Licensing Board's findings: 1) that the Applicant had monopoly power in the wholesale market in central and southern Alabama and controlled access to transmission in its service area; 2) that the Applicant had misused its monopoly power and transmission dominance to eliminate and foreclose competition from a

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competing bulk power producer, the Alabama Electric Cooperative ("AEC"); and 3) that license conditions were necessary in order to prevent the creation or maintenance of a situation inconsistent with the antitrust laws. The Appeal Board reversed the Licensing Board on two issues dealing with relevant markets, finding that the Board below had erred in rejecting a coordination services market and a retail market. The Appeal Board also reversed on two issues dealing with Applicant's conduct, finding that the Applicant had engaged in a series of rate reductions to prevent AEC from building competing generation and that the Applicant had denied AEC reasonable access to the Farley Nuclear Plant. Finally, the Appeal Board ordered additional license conditions appropriate to remedy the situation found to be inconsistent with the antitrust laws.

Applicant filed the subject application seeking a stay of the license conditions ordered by the Appeal Board pending an appeal. Applicant has petitioned the full Commission and the Fifth Circuit Court of Appeals for review of the Appeal Board's decision.

The criteria for granting or denying a stay is set forth in the Commission's Rules and Regulations, 42 C.F.R. § 2.788(e):

> (e) In determining whether to grant or deny an application for a stay, the Commission, Atomic Safety and Licensing Appeal Board, or presiding officer will consider:
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> (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;

(2) Whether the party will be irreparably injured unless a stay is granted;

(3) Whether the granting of a stay would harm other parties; and

(4) Where the public interest lies.

The Appeal Board has stressed that where an Applicant is asking "as a preliminary matter for the full relief to which [it] might be entitled if successful at the conclusion of [its] appeal . . . [it] has a heavy burden indeed to establish a right to it." The Toledo Edison Company & The Cleveland Electric Illuminating Company (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), 5 NRC 621 (1977) (ALAB-385, at 6-7). See also In Re South Carolina Electric and Gas Company (Virgil C. Summer Nuclear Station, Unit 1), NRC Docket No. 50-395 OL, Memorandum and Order dtd June 19, 1981 (CCH Nuclear Regulation Reports ¶30,605.01). Applicant has failed to make the required showing on any of the four criteria and has not met the heavy burden imposed upon a party seeking a stay.

I. APPLICANT HAS NOT MADE A STRONG SHOWING THAT IS LIKELY TO PREVAIL ON THE MERITS

Applicant alleges a mixed bag of legal and factual "errors" committed by the Appeal Board that, in the Applicant's view, make ALAB 646 "fundamentally flawed and thus likely to be reversed." Application, page 3. Applicant asserts that the finding that it has monopoly power is likely to be reversed because it is subject to "pervasive" state and federal regulation . Applicant asserts that the Appeal Board's application of the stricter standard required of one possessing

monopoly power in assessing applicant's conduct is likely to be reversed because it is a regulated utility. Applicant also asserts that the Appeal Board is likely to be reversed because the Appeal Board ignored or misapplied the facts in affirming the Licensing Board's determination that the Applicant had transmission dominance.

Applicant asserts that the license conditions ordered by the Appeal Board that require the Applicant to offer ownership participation to AEC and wheeling to the members of the Municipal Electric Utility Association ("MEUA"), are likely to be reversed because of errors by the Appeal Board in evaluating Applicant's conduct.

Applicants primary argument is that the Appeal Board will be reversed because it failed to take into account the effect of state and federal regulation on Applicant's ability to use its monopoly power. Applicant relys on Almeda Mall, Inc. v. Houston Lighting & Power Co., 615 F. 2d 343 (5th Cir.), cert. denied, 101 S. Ct. 208 (1980), and 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 Company, 101 S. Ct. 286 (1980), to support its assertion that regulation prevents if from possessing monopoly power.

Contrary to Applicant's arguments, the cases cited support affirmance of the Appeal Board decision rather than reversal. Neither case requires, as a matter of law, a finding that the

existence of regulation prevents the exercise of monopoly power. Rather, the cases require only that the regulatory scheme be considered by the trier of fact in assessing a utility's ability to exercise monopoly power. The Licensing Board was certainly mindful of the regulatory scheme under which the Applicant operated. The nature and extent to which the Applicant was regulated was the subject of testimony by Applicant's witnesses and was thoroughly briefed by all parties. The Licensing Board concluded, based on an exhaustive analysis of Applicant's conduct, that the Applicant possessed monopoly power and had used that power to raise prices and exclude competition. The Licensing Board, consistent with Almeda Mall, viewed Applicant's market share as having only "ancillary importance" and made no inferences of monopoly power based on market share alone. 5 NRC 804, 901.

Likewise the Appeal Board's rejection of the Applicant's contention that regulation prevents the exercise of monopoly power is consistent with Almeda Mall and Mid-Texas. The Appeal Board concluded that "the impact 'pervasive regulation' has on its activities is simply another factor which must be assessed in examining applicant's activities for conformance to the antitrust laws." (ALAB-646 at 21). See also Consumers Power Company (Midland Units 1 and 2), 6 NRC 892, 1008. In view of the extensive evidence placed into the record by the Applicant, the Licensing Board's careful analysis of the impact of regulation (5 NRC 804, 882-5), and existing legal precedent in

the courts and in the NRC, 1/ Applicant has not made the requisite strong showing that it is likely to prevail on the merits.

Applicant's other examples of error will likewise fail to be reversed. The standard against which Applicant's conduct is judged is properly that of one having monopoly power. The Licensing Board and the Appeal Board took regulation into account in assessing Applicant's conduct. To the extent that regulation is ineffective, or authority is lacking or not exercised, no argument can be made that the existence of regulation has an effect on Applicant's monopoly power. Accordingly, the standard for judging Applicant's conduct should be no different than the standard applied to a monopolist in an unregulated industry. Neither Almeda Mall, supra, nor City of Groton v. Connecticut Light & Power Co., 497 F. Supp. 1040 (D. Conn. 1980), is to the contrary.

Applicant will not prevail on obtaining reversal of the finding relating to transmission dominance. All of the "facts of record" cited by Applicant (Application at 6) and alleged to have been ignored by the Appeal Board were the subject of extensive testimony during the hearing and were fully briefed by all parties. The Licensing Board's determination of transmission dominance and the Appeal Board's affirmance are fully supported by the record, including testimony from

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1/ F.P.C. v. Conway, 426 U.S. 271 (1976); Gulf States Utilities Co. v. F.P.C., 411 U.S. 747 (1973); Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); Midland, ALAB-452, 6 NRC 892 (1977); Davis-Besse, supra.

Applicant's own witness and affiant in the Application, Elmer Harris.

Nor is Applicant likely to prevail on getting a reversal of the license conditions dealing with ownership participation and wheeling. Applicant's strained and narrow reading of selected portions of the legislative history does not dispose of the overwhelming evidence in the record of its anticompetitive denial of access to the Farley units and the need for a license condition allowing AEC access.

Finally, the license condition dealing with wheeling is clearly justified since Applicant has used its transmission dominance to foreclose competition. In the one instance that it agreed to wheel to municipal systems in its service area Applicant insisted on a restriction in the contract that was anticompetitive thus justifying the need for the license condition.

II. APPLICANT WILL NOT BE IRREPARABLY INJURED IF THE STAY IS DENIED

Applicant's examples of irreparable injury are simply too speculative to rise to the level necessary to tip the "balance of harm" in favor of granting the stay. 2/ Applicant alleges that it will be subjected to "substantial" costs that it may not be able to recoup should it prevail. (Application, page 8). It suggests a vague legal problem with the Farley mortgage, possible denial of part of a retail rate increase, and possible difficulty in obtaining financing if

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2/ In re South Carolina Electric & Gas, supra.

Applicant's lenders perceive Applicant as a greater investment risk because it is subject to competition.

The specter of unrecouped cost as justification for a stay of antitrust license conditions was raised and rejected in Davis-Besse (ALAB-385) 5 NRC 621 (1977). The Appeal Board's reasoning in Davis-Besse is equally applicable here. Planning for the future in the electric utility industry is beset with imprecision. The acts required by the license conditions (i.e., joint ownership, coordination and wheeling) are similar to those engaged in by Applicant and other electric utilities throughout the country. The "risks" of rate increases being denied or financing being difficult exist whether or not the stay is granted. Applicant has not contended that the conditions are impossible of performance, that costly new facilities would have to be constructed or that Applicant would have to provide services without compensation. (ALAB-385, at 10). Applicant has failed to make even a minimal showing of irreparable injury. As the court of appeals stressed in Virginia Petroleum Jobbers Ass'n v. F.P.C., 259 F.2d 921 (D.C. Cir. 1958), "[t]he key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." Id. at 925 (emphasis in original).

III. OTHER PARTIES WILL BE HARMED IF THE STAY IS GRANTED

Granting the stay will result denial of the ordered relief to the AEC and the MEUA for a further indefinite period of

time. This relief was found necessary to remedy an on going situation inconsistent with the antitrust laws. It was ordered only after a long and exhaustive hearing and briefing period and careful deliberation by the Licensing Board and the Appeal Board. Denial of the relief for a further period of time simply allows Applicant's monopoly over generation and transmission to continue while leaving its victims in a disadvantaged competitive posture, still almost totally dependent on Applicant. There is sufficient evidence in the record to support the Licensing Board's and the Appeal Board's findings that past practices of the Applicant have disadvantaged AEC and the municipal systems. The record thus supports a conclusion that the issuance of a stay would have a serious adverse effect on AEC and the municipal systems. Applicants suggestion that AEC could raise its rates or borrow more money (Application, page 9) does not alleviate the harm to AEC from continued denial of ownership in the Farley units.

IV. DENIAL OF THE STAY WOULD BE IN THE PUBLIC INTEREST

Applicant presents no arguments that granting of the stay would be in the public interest. Applicant suggests somewhat obliquely that license condition 2 is deficient because AEC may not be able to pay its pro rata share of the "clean-up" and associated staggering costs should the Farley plant suffer an incident such as that which occurred at Three Mile Island. (Application, page 10). Weighing this highly speculative concern against the public interest in assuring that access to

nuclear facilities be as widespread as possible and in preventing the use of nuclear energy from developing into a private monopoly 3/ clearly dictates that the public interest in this case is better served if the stay is denied. The Farley plant is licensed and in operation. Denial of the stay will have no adverse effect on the plant.

In view of the extremely low probability of Applicant's prevailing on the merits plus the "balance of equities," tipping in favor of denying the stay, 4/ Applicant has failed to meet its "heavy burden" to establish a right to a stay. The Department respectfully urges the Commission to deny the Application.

Respectfully submitted,

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Washington, D.C.
August 6, 1981

3/ Louisiana Power & Light Co. (Waterford Steam Generating Station, Unit 3), 6 AEC 619, 620 (1973).

4/ Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached Answer have been served on the following by United States Mail, postage prepaid, this 6th day of August, 1981.

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