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)	)	

ANSWER OF THE DEPARTMENT OF JUSTICE IN OPPOSITION TO ALABAMA POWER COMPANY'S "PETITION FOR REVIEW OF ALAB-646"

Pursuant to § 2.786(b) of the Commission's Rules of Practice (10 C.F.R. § 2.786(b)), Alabama Power Company ("APCO") has requested the Commission to review the decision ("ALAB-646") of the Atomic Safety and Licensing Appeal Board ("Appeal Board") in this proceeding. In accordance with 10 C.F.R. § 2.786(b)(3), the United States Department of Justice ("Department") submits this answer opposing APCO's "Petition For Review of ALAB-646." ("Petition")

On June 30, 1981, the Appeal Board issued an order and decision 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 APCO possessed monopoly power in the wholesale market power in central and southern Alabama and controlled access to transmission in its service area; 2) that APCO had misused its monopoly power and transmission dominance to eliminate competition from a competing bulk power producer, the Alabama Electric Cooperative ("AEC"); and, 3) that issuance of an

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unconditioned operating license for the two unit Farley nuclear plant to APCO would "create or maintain a situation inconsistent with the antitrust laws" within the meaning of section 105c of the Atomic Energy Act of 1954 ("Act"). 1/ Although the Appeal Board rejected none of the underlying facts found by the Licensing Board, it held that reconsideration of the issue of whether monopoly power existed in the retail and coordination services markets was necessitated by Licensing Board error in the intepretation of relevant case law and by the Appeal Board's later decisions in Midland, ALAB-452, 6 NRC 892 (1977) and Davis-Besse, ALAB-560, 10 NRC 265 (1979).

Given its finding of monopoly power in all three relevant markets--retail, wholesale, and coordination services--the Appeal Board made two additional findings of anti-competitive conduct. First, the Appeal Board found that certain APCO rate reductions to AEC had been directed at preventing AEC from building competing generating capacity. ALAB-646, 91-100. Second, it found that APCO had consistently refused ownership

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1/ Basing its decision on the voluminous record of testimony and documents which it had received, the Licensing Board found five specific instances where APCO had engaged in conduct, the purpose and effect of which was to restrict competition in its service area. These five instances include APCO's refusal to offer coordination services to AEC, inclusion of contractual provisions in agreements with AEC and the municipal electric distribution systems precluding them from obtaining alternative suppliers, inclusion of clauses in its contracts with various preference customers requiring them to purchase all their additional power needs from APCO, conduct concerning AEC's attempts to provide power to Fort Rucker and exclusion of some smaller utilities from regional coordination. 5 NRC at 916-57.

access to the Farley units in order to preserve its monopoly position in the wholesale and retail power markets. Id. at 100-12.

Upon reviewing the scope of remedial authority vested in the Commission by section 105c, the Appeal Board held that the purposes of the Act could best be served by ordering APCO to grant (1) ownership access to the Farley nuclear units and (2) wheeling access through APCO's lines to AEC and the Municipal Electric Utility Association of Alabama ("MEUA"). Id. at 148.

Review of decisions of the Appeal Board is within the discretion of the Commission. Such discretion, however, has been limited by the Commission's own procedural rules. A petition for review of matters of policy or law will not ordinarily be granted unless it "constitutes an important antitrust question, involves an important procedural issue, or otherwise raises important questions of public policy." 10 C.F.R. §2.786 (b)(4)(i). Petitions for review of questions of fact "will not be granted unless it appears that the Atomic Safety and Licensing 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 C.F.R. §2.786 (b)(4)(ii) (emphasis added). A third-level of review by the Commission itself is not permitted where the Appeal Board has decided factual matters consistent with the Licensing Board's findings. See 42 F.R. 22129 (May 2, 1977). APCO's petition for review fails to

meet the burden set forth in the Rules of Practice as to every "error" alleged.

1. Alleged Error Relating to Scope of Review

APCO asserts that the Appeal Board acted in contravention of section 105(c) of the Act by considering APCO's past conduct. This assertion is clearly rebuted by prior Nuclear Regulatory Commission ("NRC") and Supreme Court precedent. United States v. Swift & Co., 286 U.S. 106, 116 (1932); Kansas Gas & Electric Co. et al. (Wolf Creek Station Unit No. 1), ALAB-279, 1 NRC 559, 568 (1975). Furthermore, APCO's contentions are contradicted by a literal reading of section 105c. A determination that activities would maintain an anticompetitive situation manifestly requires that such an anticompetitive situation have preceded the present one. ALAB-646, 22-26.

APCO's contentions regarding the scope of review in NRC antitrust proceedings are totally contradicted by firmly established precedent. Accordingly, APCO has failed to carry its burden of demonstrating that Commission review is necessitated by the existence of an "important" question of law or policy. 10 C.F.R. §2.786(b)(4)(i).

2. Alleged Error Relating to Product and Geographic Markets

APCO's claim that the Appeal Board erred in its designation of relevant product and geographic markets does not raise any important antitrust question, procedural issue or public policy question and accordingly does not merit Commission consideration.

APCO's primary contention is that case law, including United States v. Grinnell Corp., 2/ precludes the finding that a diverse cluster of non-interchangeable products and services, such as the coordination services in question, can constitute a relevant market. A reading of Grinnell, however, demonstrates that the Appeal Board was entirely correct in reversing the Licensing Board's erroneous interpretation of the cases. As the Appeal Board noted, "interchangeability", as interpreted by Grinnell 3/ and other post-du Pont 4/ case law is often concerned with whether realistic alternatives to a "package of services" exist within a market, given trade and commercial reality. Given this well established interpretation of the law, the Board found, based on its own thorough review of the record, that a coordination services market existed. ALAB-646, 39-54. Although the Appeal Board rejected the Licensing Board's legal analysis, it did not reject any of the

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2/ 236 F. Supp. 244 (D.R.I. 1964), Aff'd except as to decree, 384 U.S. 563 (1966).

3/ As the court stated, "[W]e see no barrier to combining in a single market a number of different products or services where that combination reflects commercial realities." Id. at 572. Using its earlier Midland opinion as a springboard, the Appeal Board concluded, given what it found to be the commercial realities of the electric utility market, that coordination services, while not completely interchangeable under a du Pont standard, all serve to facilitate production of bulk power at lower cost and therefore could be said to comprise a distinct market.

4/ United States v E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956).

Licensing Board's basic findings of fact. These factual findings, which include the applicant's "own admission" (id. at 40-41) are not now open to review. See 10 C.F.R. § 2.786(b)(4)(ii).

Contrary to APCO's assertion, the Appeal Board's finding that retail power sales constitute a relevant market merely confirmed the Licensing Board's finding on this point. 5/In doing so, the Appeal Board confirmed the finding that franchise, individual load, and yardstick competition all exist to some extent in APCO's retail market. These factual findings are not now open to Commission review. See 10 C.F.R. §2.786 (b)(4)(ii).

The Appeal Board reversed the Licensing Board only as to its conclusion that "[c]ompetition between retail distribution systems, if it is of only infra-marginal proportions, is presumably outside of the scope of antitrust remedy." 5 NRC at 889 (emphasis in original). The Appeal Board's view is firmly supported by Otter Tail, 6/ the same case the Licensing Board used to support its contentions. The Licensing Board correctly recognized that both the violations and the remedies at issue in Otter Tail were at the wholesale level. The Licensing Board failed, however, to recognize that Otter Tail was concerned

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5/ As the Licensing Board noted, "retail power clearly is a distinct product market." 5 NRC at 887.

6/ Otter Tail Power Co. v. United States, 410 U.S. 366 (1973), affirming in part and remanding in part, 331 F. Supp. 54 (D. Minn. 1971).

with attempts to monopolize the retail market and that the remedies applied in the case were directed at effectuation of competition as the retail level. Since the Appeal Board correctly applied Otter Tail, APCO's alleged error does not raise an "important" legal question worthy of Commission review. 10 C.F.R. §2.786 (b)(4)(i).

APCO's argument that the south-central Alabama area does not represent a relevant geographic market is both contradicted by substantial evidence in the record and existing case law and NRC precedent. 7/

3. Alleged Errors Relating to Findings of Monopoly Power

APCO's argument that state or federal regulation can somehow immunize its conduct from the reach of the antitrust laws has been firmly rejected by the courts.8/ This proposition is so well established that Commission review of

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7/ Otter Tail, supra; Midland, 6 NRC at 990, quoting United States v. Greater Buffalo Press, 402 U.S. 549, 553 (1971) and United States v. Phillipsburg National Bank, 399 U.S. 350, 360 (1970) ("sub-markets are not a basis for the disregard of a broader line of commerce that has economic significance").

8/ See e.g., Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); City of Mishawaka v. Indiana & Michigan Electric Co., 560 F.2d 1314 (7th Cir. 1977), cert. denied, 436 U.S. 922 (1978).

APCO's allegation would be pointless.9/ APCO's allegations certainly could not be deemed to raise "important" questions of law worthy of review.

4. Alleged Errors Relating to Findings of Anticompetitive Conduct

The Appeal Board's findings that 1) AEC was denied ownership access to the Farley nuclear units and 2) APCO's rate reductions were motivated by an intent to discourage AEC's development of self generation are based on substantial evidence in the record viewed as a whole.

As to the finding of denial of access, the Board expressly based its conclusion upon findings of actual anti-competitive conduct by APCO and its view that, Mr. Farley, under oath, did not deny specific allegations that AEC had been refused ownership access to the Farley Plant. 10/ The Board's conclusion that APCO intended not to make a sale to AEC unless forced to do so is fully supported by the record.

The Appeal Board finding concerning APCO's rate reductions to AEC is also firmly grounded in the record. The timing and

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9/ Applicant's reliance 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 it from possessing monopoly power is completely misplaced. The Appeal Board's conclusion 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), is entirely consistent with Almeda Mall and Mid-Texas.

10/ Id. at 100-12.

pattern of various APCO rate reductions to AEC, when viewed in light of its consistent use of the judicial and administrative process to oppose AEC ownership of generation facilities, provide a more than adequate basis for the finding that APCO both intended to and attempted to forestall AEC from installing its own generating capacity.

APCO's assignments of error designated 4c, 4d, and 4e relate to factual findings of the Licensing Board which were all later affirmed by the Appeal Board. Having been provided two opportunities to make its case, APCO should not now be allowed a third opportunity. See 10 C.F.R. §2.786 (b)(4)(ii).

5. Alleged Error Relating to License Conditions

APCO's assignments of error concerning the remedial measures adopted by the board reflect a misunderstanding of the scope of the Appeal Board's remedial power as well as the purposes of section 105c. By its own terms, section 105c appears to afford the NRC broad discretion to fashion license conditions it deems "appropriate" in light of the situation. The record certainly does not reveal abuse of this discretion.

Contrary to APCO's contentions, the Appeal Board conducted a detailed analysis of the public interest considerations. ALAB-646, 140-56. Its analysis fully complys with the requirements of section 105c(6).

Requiring APCO to provide wheeling and to offer ownership in the Farley units are appropriate conditions in light of the Appeal Board's finding of a situation inconsistent with the

antitrust laws which is grounded upon APCO's transmission dominance and misuse of its monopoly power in generation. Sharing of ownership, as the Appeal Board noted, is necessary to place AEC on a similar competitive footing to APCO in terms of costs and tax advantages. Furthermore, the Appeal Board specifically rejected the Licensing Board's determination that unit sharing of power would be sufficient to eliminate antitrust concerns either now or in the future.

In summary, APCO has failed to sustain its burden under §2.786(b)(4)(i) and (ii). APCO's principal allegations of factual error have been rejected at two levels within the NRC. APCO's other contentions do not raise either important legal questions, procedural issues or policy questions and therefore warrant no further consideration from the Commission. Accordingly, APCO's petition should be denied.

Respectfully submitted,

John Whitler by J.B.

John D. Whitler
Attorney, Energy Section
Antitrust Division

Washington, D.C.
August 11, 1981

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 11th day of August, 1981.

John Whitler by J.B.
John D. Whitler

Secretary
Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing
Appeal Board Panel
Nuclear Regulatory Commission
Washington, D.C. 20555

Michael C. Farrar, Chairman
Atomic Safety and Licensing
Appeal Board
Nuclear Regulatory Commission
Washington, D.C. 20555

Richard S. Salzman, Esq.
Atomic Safety and Licensing
Appeal Board
Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Chase Stephens, Supervisor
Docketing and Service Section
Office of the Secretary of the
Commission
Nuclear Regulatory Commission
Washington, D.C. 20555

Reuben Goldberg, Esq.
Goldberg, Fieldman & Letham, P.C.
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Joseph Rutberg, Esq.
Benjamin H. Volger, Esq.
Michael B. Blume, Esq.
Antitrust Counsel Nuclear
Regulatory Staff
Nuclear Regulatory Commission
Washington, D.C. 20555

S. Eason Balch, Esq.
Robert A. Buettner, Esq.
Balch, Bingham, Baker,
Hawthorn, Williams & Ward
600 North 18th Street
Birmingham, Alabama 35203

Terence H. Benbow, Esq.
Theodore M. Weitz, Esq.
David J. Long, Esq.
Winthrop, Stimson, Putnam
& Roberts
40 Wall Street
New York, New York 10005

Martin G. Malsch, Esq.
Majorie S. Nordlinger, Esq.
Office of General Counsel
Nuclear Regulatory Commission
Washington, D.C. 20555

Bennet Boskey, Esq.
D. Biard MacGuineas, Esq.
Volpe, Boskey and Lyons
918 16th Street, N.W.
Washington, D.C. 20006

David C. Hjelmfelt, Esq.
1967 Sandalwood
Ft. Collins, Colorado 80526

Bruce W. Churchill, Esq.
Shaw, Pittman, Potts & Trowbridge
1800 "M" Street, N.W.
Washington, D.C. 20036

Martin Frederic Evans, Esq.
Debevoise, Plimpton, Lyons & Gates
299 Park Avenue
New York, New York 10171