

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 & 2)

ANSWER OF DEPARTMENT OF JUSTICE
OPPOSING PETITION FOR REVIEW SUBMITTED BY
THE MUNICIPAL ELECTRIC UTILITY ASSOCIATION OF ALABAMA

Pursuant to 10 C.F.R. § 2.786, the United States Department of Justice ("Department") submits this answer in opposition to the "Petition for Review Submitted by Municipal Electric Utility Association of Alabama" ("Petition"). For the reasons set forth below, the Department respectfully requests that the Commission deny the Petition.

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 Municipal Electric Utility Association of Alabama ("MEUA") is petitioning for review of that part of the Appeal Board decision affirming the Licensing Board's finding that MEUA, and its individual members, were neither actual nor potential competitors in the relevant wholesale market in

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central and southern Alabama, and therefore not entitled to relief under Section 105(c)(6) in the form of ownership participation in the Farley Nuclear Plant. MEUA alleges that recent state legislation allowing MEUA to participate in joint generation and transmission projects constitutes a significant new fact that clearly makes MEUA and its members competitors in the wholesale market. MEUA also seeks a remand so that the Licensing Board might consider this new evidence and correct what MEUA alleges was an erroneous denial of due process as a result of MEUA's exclusion from the relief phase (Phase II) of the hearing.

Review of decisions of the Atomic Safety and Licensing Board is within the discretion of the Commission. A petition for review of matters on 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 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 C.F.R. § 2.786(b)(4)(ii). It is the latter criteria that is controlling in the instant petition for review.

The Department has taken the position throughout this proceeding that the members of MEUA were potential competitors,

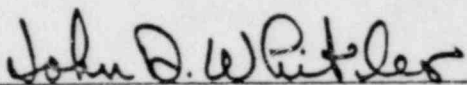
of the Applicant and entitled to relief consistent with NRC authority to eliminate Applicant's monopoly power in central and southern Alabama. See Brief of Department of Justice in Support of Exceptions to the Initial Decision, 53-63 (November 14, 1977). Neither the Licensing Board nor the Appeal Board, however, viewed the facts of record as sufficient to qualify MEUA or its members as potential competitors. While the Department believes the facts of record do provide adequate support for a finding that the members of MEUA were potential competitors, nonetheless, the issue has been decided adversely to our position on two levels within the Nuclear Regulatory Commission. In accordance with Commission policy as stated at 42 F.R. 22129 (May 2, 1977), the MEUA is not entitled to a third review of factual matters by the Commission itself.

Should the Commission nonetheless grant the MEUA Petition and subsequently determine that the Appeal Board's order limiting relief was clearly erroneous, the Department opposes a remand as wholly unnecessary and contrary to the public interest. The record is adequate for a finding by the Commission that the members of MEUA are potential competitors of the Applicant, have been denied access to the Farley plant and are entitled to ownership participation. 1/ A remand is therefore not necessary.

1/ The state legislation cited by MEUA does not, in the Department's view, constitute a significant new fact warranting reversal and remand. Under previous Alabama law it was unclear whether MEUA could enter into joint venture arrangements. It has always been clear, however, that MEUA's members could participate as individuals in joint venture arrangements with the same effect as provided for in the new legislation.

For the reasons set forth above the Department respectfully requests the Commission to deny MEUA's Petition.

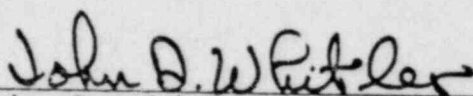
Respectfully submitted


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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.


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