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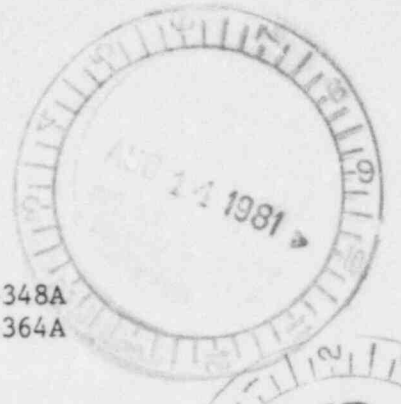

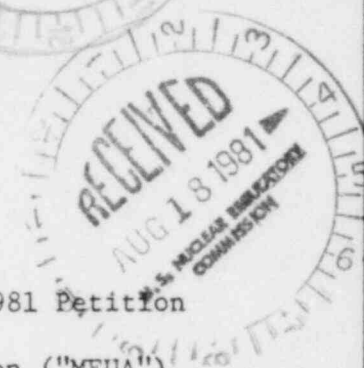

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Before The Commission

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

ALABAMA POWER COMPANY'S ANSWER TO
THE MUNICIPAL ELECTRIC UTILITY
ASSOCIATION'S PETITION FOR REVIEW

Piggybacking on Alabama Power Company's ("APCO") July 27, 1981 Petition for Review of ALAB-646, the Municipal Electric Utility Association ("MEUA") has filed a belated* petition of its own. Unlike APCO's review petition, however, MEUA would have the Nuclear Regulatory Commission ("NRC" or "Commission") ignore the record of the past ten years, including MEUA's failures of proof below, assess the impact of Alabama legislation approved in May 1981, over four years after the close of the record, and after operating licenses have been issued for the entire Joseph M. Farley Nuclear Plant, Units 1 and 2 ("Farley Plant"), and remand for further proceedings.** According to MEUA, the new Alabama legislation conclusively proves that, contrary to the record and the findings made below, MEUA is now a "potential competitor" of APCO at the wholesale level. MEUA in effect

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* Petition for Review Submitted By the Municipal Electric Utility Association of Alabama, p. 1, n.*, July 27, 1981 ("Petition").

** MEUA's request for a remand is not properly at issue, and should not be considered at this time. Under the Rules of Practice of the Commission, the issue raised before the Commission by the filing of a petition for review is whether it should review certain assignments of error raised by a party to the proceedings below. 10 C.F.R. § 2.786.

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claims that this new legislation somehow alters the determinations below that MEUA (1) has not evidenced probable de novo entry into the wholesale market, and (2) does not have an influence on existing competition.* MEUA claims these conclusions must be reconsidered, and it should be granted ownership in the Farley Plant. The MEUA Petition also alleges a "denial of due process" with which the ALAB correctly dealt below. MEUA's Petition is so devoid of merit that even Alabama Electric Cooperative, Inc. ("AEC"), MEUA's traditional ally, has opposed the Petition. See AEC's Opposition to MEUA's Petition, Aug. 3, 1981. APCO urges the Commission to refuse review of the errors alleged by MEUA's Petition.

THE RECENT DEVELOPMENTS IN MEUA'S PETITION DO NOT CHANGE MEUA'S STATUS IN THE ALLEGED WHOLESALE MARKET, AND ALSO OCCURRED TOO LATE IN TIME TO OCCASION NRC REVIEW

1. MEUA Is Neither A Competitor Nor Potential Competitor Of APCO In Wholesale Market

Contrary to the first assignment of error asserted in its petition, MEUA is not a competitor of APCO in the alleged wholesale market. MEUA is not a legal entity empowered to engage in electric supply business, but is an association of twelve municipal electric retail distributors.

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* APCO is surprised that "potential competition" is even an issue in MEUA's Petition since these tests for "potential competition" are extracted from merger cases arising under Section 7 of the Clayton Act. See United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973). The antitrust review in this proceeding does not involve a merger, but is concerned almost exclusively with the issue of monopolization under Section 2 of the Sherman Act. Under Section 7 of the Clayton Act, where an acquiring firm is a potential competitor in the relevant market, the acquisition may be foreclosed because its consummation reduces the number of competing firms. "Potential competition" is completely inapposite for analyzing the antitrust consequences of issuing an operating license for the Farley Plant. Section 7 of the Clayton Act would be applied less irrationally by examining the anticompetitive consequences of joint ownership of the Farley Plant between APCO and other generating entities.

Alabama Power Company I, 5 NRC 804, 827 (1977); Applicant's Exhibit ("APPX") 29; Brief of APCO filed April 14, 1978 ("Brief II") at 49-51; ALAB-646 at 122-125, 126-129. Even now, four years after the close of the record, neither MEUA nor its members have attempted to engage in the business of sale of electric power at wholesale. Members of MEUA have been purchasing wholesale power for more than 40 years from APCO at rates regulated by the Alabama Public Service Commission ("APSC") or Federal Energy Regulatory Commission ("FERC"). None of them has thought seriously about building generating facilities during that period. Brief of APCO filed November 14, 1977 ("Brief I") at 21-24, Brief II 45-51. These twelve retail distributors bought their wholesale power from APCO, AEC, and the Southeastern Power Administration ("SEPA"), a federal electric power marketing agency. The purchases from SEPA have been facilitated through use of APCO's transmission lines (wheeling) and through APCO providing the additional or supplemental power required by SEPA to make power marketable to MEUA members.*

The evidence shows that it was not probable that MEUA members would make de novo entry into the wholesale power supply business. No factual

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* The ALAB faulted APCO for a provision in its contract to wheel SEPA power known as Section 4.2. ALAB-646 at 86, n.155, 90-91. However, the ALAB failed to recognize the underlying economic justification and business purpose associated with Section 4.2. See Brief I, 58-63. Unlike the situation in Otter Tail Power Co. v. United States, 410 U.S. 366 (1973), APCO has never refused to sell wholesale power to the members of MEUA and, unlike the situation in Otter Tail, APCO has never refused to provide transmission services (wheeling) to the members of MEUA where an identifiable source of power (such as the SEPA power) was identified and made available to them. Even though the SEPA sales displaced wholesale sales by APCO, and even though APCO's cooperation in "firming-up" the SEPA capacity was required in order for SEPA to make such sales, APCO accommodated such transaction through its system. See Brief I at 30-32.

developments since the close of the record (including those after issuance of the operating license) indicate that MEUA has gained that capability. MEUA argued below that if given access to the Farley Plant, if given access to APCO's transmission and if provided with various supplemental and back-up services, its members would enter the wholesale market, as sellers, instead of purchasing wholesale power from others. This, it labeled "potential competition."

Not surprisingly the Licensing Board ("LB") found this argument to be circular and that these contingencies preclude finding MEUA to be a potential competitor. One Board member remarked on MEUA's failure to show likelihood of de novo entry as follows:

> [W]e've asked you specifically, concretely to tell us likely potential entrants. And every time we ask you we get a circular answer; if we had access to a one - or two - billion dollar plant we could do all kinds of things. And we say set that aside and tell us what you did before it was there, and we don't seem to get much factual data. (Tr. 27029)

MEUA showed nothing that would indicate probable de novo entry into the wholesale market. Indeed, counsel for MEUA acknowledged that, in MEUA's view, the purchase of an ownership interest in the Farley Plant was a "sine qua non" of MEUA's entering the wholesale market (Tr. 27022). This assertion simply does not comply with the requirements of Falstaff, supra, and the LB refused to allow MEUA to rely on this assertion to find the creation of an anticompetitive situation by issuance of an operating license for the Farley Plant. Four years later, the ALAB affirmed this determination:

> Like the Licensing Board, we are left unmoved by this reasoning. . . . In terms of potential competition, we believe MEUA's capability to enter the market must be assessed without regard to the Farley facility and the record indicates that without access to Farley, MEUA does not have the capability

> to enter the wholesale market. We simply cannot accept MEUA's argument that if it is granted access to Farley, it could compete in the wholesale market - and that therefore it is a potential competitor in the market and is entitled to such access. ALAB-646 at 123-124. (Emphasis supplied)

MEUA now points to Alabama legislation passed in May 1981 as requiring reversal of the lower boards' findings.* Simply stated, that legislation permits the creation of a new entity, the Alabama Municipal Electric Authority ("Authority"), which would be separate and distinct from MEUA and its members.** This new entity, if created, would have the right to own generation facilities for the purpose of selling power at wholesale only to certain municipal electric distributors including, possibly, the members of MEUA. The fact that MEUA members were active in the legislative effort to create the Authority does not change the antitrust conclusion that de novo market entry is not probable. Political lobbying is not a substitute for the requisite economic enterprise.

The Act provides that the Authority authorized to be created can enter into wholesale power sales arrangements only with its municipal members, and that no wholesale power contracts can be entered into by such Authority until the contractual arrangements are approved by the APSC. If such contracts for wholesale supply to those municipal distributors which are members of MEUA and which might become members of the Authority are

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* NRC should not feel constrained to examine the material attached to MEUA's petition (without conformity with NRC Rules of Practice, 10 C.F.R. § 2.786(b)(4)(ii)) relating to events occurring after the record has been closed and the licenses issued. See infra.

** The Authority contemplated by the Act is not a party to this proceeding and, to date, has not been created. It is too late for such a non-entity to intervene and seek antitrust conditions in the Farley license.

approved by the APSC, it is clear that such Act does not contemplate competition for such loads. By providing for 50 year all-requirements contracts between municipal distributors and the Authority, the Act contemplates the potential transfer of electric suppliers and the foreclosure of competition from alternate electric suppliers.*

In its petition, MEUA merely repeats to the Commission that it continues to seek ownership in the APCO electric system as the sine qua non to becoming a market participant; see MEUA Petition at Appendix B; see also ALAB-646 at 121. The complex July 7, 1981 proposal attached by MEUA to its Petition demonstrates that not only does joint ownership in the Farley Plant remain a sine qua non to MEUA members becoming wholesale suppliers but joint ownership in most of APCO's other facilities is also necessary to its plan. The July 7, 1981 proposal of MEUA called for the sale of 20% of Farley Unit 2 and the sale or transfer to MEUA, or an Authority yet to be created, of interests in the Miller, Barry, Gaston and Gorgas Plants (all large coal-fired steam plants). In addition to the inclusion in such proposal of offers to purchase significant coal-fired steam plants of APCO, such proposal also called for APCO to sell

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* The 50 year contracts envisioned in Section 17 of the Act should be contrasted with the short-term (5 year) requirements contracts used by APCO which the LB and ALAB erroneously found to be anticompetitive, 5 NRC 931, 932; ALAB-646 86, even though, as explained on the record, these five year contracts were reasonable and justified as measures to validate reasonable APCO planning needs. See Brief I 53-58. As was the case with the 35 and 40 year all-requirements contracts used by AEC, the effect of these contracts is to eliminate competition for those loads during the term of the contract. By contrast, the five year requirements contracts allegedly imposed by APCO on MEUA members and AEC were deemed anticompetitive by the LB and ALAB Boards below. 5 NRC 931, 932, ALAB-646 at 86. APCO reiterates that, as a matter of sound public policy, public interest or fundamental fairness, this Commission should not ignore the restructuring of the electric utility industry occasioned by the Boards' refusal to condemn these blatantly anticompetitive practices.

to MEUA portions of its transmission system. There is no evidence whatsoever of de novo market entry or participation by MEUA.

The July 7, 1981 proposal further contemplated that the Authority would contract with APCO to operate and maintain such plants and facilities after the transaction is consummated. The only contribution that would come from the Authority would be capital which it would raise through the issuance and sale of tax exempt revenue bonds. No efficiencies or economies in the electric power supply business would be expected to be created by such ownership participation. The Authority is nothing but a potential investor, and not a potential competitor.

2. The Facts Raised In The MEUA Petition Occurred Too Late

MEUA, on the basis of events arising four years after the record has been closed, and after the operating licenses for the Farley Plant have been issued, requests the NRC to extend in perpetuity those proceedings. As pointed out above, such facts add nothing to the position of MEUA as a competitor in any wholesale market. Beyond that, however, there is a more fundamental question of whether the NRC should consider any such proffered facts, and if it has the discretion to do so, whether such discretion should be exercised in favor of engaging in a perpetual antitrust policing function. The Commission's own Rules of Practice contemplate review only of facts raised below and included in the record. 10 C.F.R. 2.786(b)(4)(ii). As the ALAB recently noted in Diablo Canyon, sound administrative policy would exclude the new facts raised in MEUA's petition:

> The Supreme Court cogently explained in ICC v. Jersey City, 322 U.S. 503, 514 (1944): "Administrative consideration of evidence--particularly where the evidence is taken by an examiner, his report submitted to the parties, and a hearing held on their exceptions to it--always creates a gap

> between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening." Accord, United States v. ICC, 396 U.S. 491, 521 (1970).

Pacific Gas & Electric Co. (Diablo Canyon Nuclear Plant Units 1 and 2), ALAB-644 (June 16, 1981), 2 Nuclear Reg. Rep. (CCH) ¶ 30,598.66 n.409.

In its South Texas opinion, the NRC considered in detail the scope of its antitrust responsibilities. Houston Lighting & Power Co. (South Texas Project, Unit Nos. 1 and 2) 5 NRC 1303 (1977). Among other things, it recognized that Congress did not intend for it to possess "a broad, ongoing police power in the antitrust area." 5 NRC at 1317. MEUA had every opportunity in this proceeding to prove its case on potential competition and failed. It argues today that a new Alabama statute has been enacted which cures all of its failure of proof below. Tomorrow, there may be a new subsidy available to MEUA which it will urge as a basis for reopening the record to show its potential as a competitor. Unless the Commission now desires to become an antitrust "policeman", MEUA's request for review must be rejected.

NO DENIAL OF DUE PROCESS

MEUA's second assignment of error is likewise without merit and serves as no basis for Commission review. In a single paragraph, it attempts to argue that the ALAB's consideration of MEUA's offer of proof at the remedy phase of this bifurcated proceeding denied it due process.

In the liability phase, the LB held that APCO had not engaged in

conduct "inconsistent with the antitrust laws" with respect to MEUA or its members. Alabama Power Company I, supra. Subsequently, during the remedy phase, MEUA was granted, and accepted, the opportunity to make an offer of proof as to what its witnesses would say would be required to remedy any situation which it contended was inconsistent with such laws. (Tr. 27,189, 27,437-44). Its offer of proof included only a discussion of the financial benefits flowing from its ownership in APCO's generation facilities; i.e., an offer of proof relating to remedies for anticompetitive activities in the wholesale market or coordination services market.

While the ALAB reversed the LB with respect to its conclusions as to the scope and importance of the retail electric market in this proceeding and MEUA's role in that market, it did uphold the LB in determining that MEUA's offer of proof was insufficient to demonstrate that it should receive ownership access to the Farley Plant. ALAB-646 at 159-163. The ALAB, in prescribing a remedy for MEUA, was consistent with its determination of liability since both liability and remedy related to the posture of MEUA in the retail market. See ALAB-646 at 162.* MEUA's offer of proof had nothing to do with such findings by the ALAB relating to the retail market. Rather, it related solely to MEUA's posture (or lack thereof) in the wholesale market and the coordination services market, where the ALAB found no liability.

The ALAB specifically reviewed the content of MEUA's offer of proof and found it would not alter the competitive status of MEUA (or its members)

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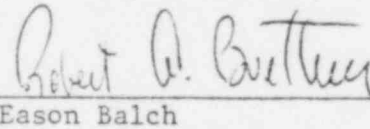
* APCO has simultaneously complained that the findings of the ALAB relating to the retail market and the necessity for any remedy for MEUA or its members, is clearly erroneous. The point addressed here is solely that MEUA's offer of proof had nothing to do with the ALAB's new findings, thus, was not deserving of additional consideration.

in any relevant market in such a way that ownership would be warranted. In fact, the ALAB specifically found that remedies for any inconsistencies that it found to exist "can be accomplished without awarding the municipals the right to purchase a share of the Farley Plant." ALAB-646 at 163. Contrary to the claim in the MEUA petition, the ALAB discussed in specific terms why ownership access is not warranted for MEUA and its members. See Id. at 161-163. The ALAB provided more than a "bald statement" that the offer of proof was unconvincing on the matter of ownership by MEUA. It explained that ownership was unnecessary to remedy the alleged inconsistencies under section 105(c) by APCO with respect to MEUA or its members. Id.

MEUA's request, for review seeking a remand to reopen the remedy phase of this proceeding, offered erroneously under the guise of a claim of denial of due process, should be rejected.

For the foregoing reasons, APCO respectfully requests MEUA's Petition for Review be denied.

Respectfully submitted,



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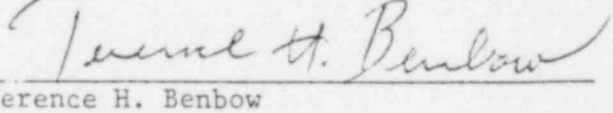

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August 11, 81

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Answer to the Municipal Electric Utility Association's Petition for Review on behalf of Alabama Power Company has been served on the following parties to the agency proceeding by United States mail, postage prepaid, this 11th day of August, 1981.

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