

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

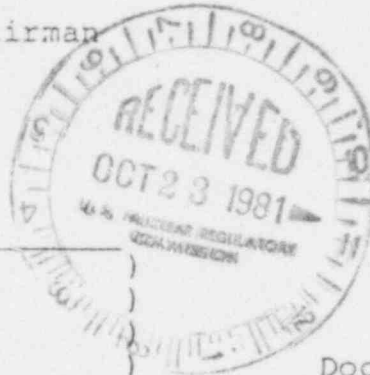
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COMMISSIONERS:

'81 OCT 22 P4:02

Nunzio J. Palladino, Chairman  
Victor Gilinsky  
Peter A. Bradford  
John F. Ahearne  
Thomas M. Roberts

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BRANCH



In the Matter of

ALABAMA POWER COMPANY

(Joseph M. Farley Nuclear Plant  
Units 1 and 2)

Docket Nos. 50-348A  
50-364A

SERVED OCT 22 1981

MEMORANDUM AND ORDER

CLI-81-27

The Commission has determined to grant neither Alabama Power Company's (APCO) nor Municipal Electric Utility Association's (MEUA) petition for review of the Atomic Safety and Licensing Appeal Board's decision of June 30, 1981 (ALAB-646) in the captioned case.

APCO has sought review of the Appeal Board's decision in the United States Court of Appeals for the Fifth Circuit <sup>1/</sup> and on July 22, 1981 moved the Commission to stay during the pendency of litigation the effectiveness of certain remedial antitrust

1/ Alabama Power Co. v. Nuclear Regulatory Commission and United States, Nos. 80-7547 and 80-7580. Alabama Electric Cooperative (AEC) and MEUA have intervened in that proceeding.

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conditions imposed on APCO's licenses to operate the Farley nuclear units.

Commission regulations and precedent establish the agency law governing decisions on stays and comport with judicial case law. Section 2.788 of the Commission's regulations sets out the following factors to be considered in reviewing a request for a stay:

- (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. <sup>2/</sup>

The burden of persuasion on these factors rests on the moving party. <sup>3/</sup> While no single factor is dispositive, the most crucial is whether irreparable injury will be incurred by the movant absent a stay. <sup>4/</sup> To meet the standard of making a strong showing that it is likely to prevail on the merits of its appeal, the

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<sup>2/</sup> 10 CFR 2.788 codifies the criteria established by Virginia Petroleum Jobbers Ass'n v. F.P.C., 295 F.2d 921, 925 (D.C. Cir. 1958).

<sup>3/</sup> Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, 8 NRC 253, 270 (1978).

<sup>4/</sup> Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-437, 6 NRC 630, 632 (1977), citing Permian Basin Area Rate Cases, 390 U.S. 747, 773 (1968).

movant must do more than merely establish possible grounds for appeal. <sup>5/</sup> In addition, an "overwhelming showing of likelihood of success on the merits" is necessary to obtain a stay where the showing on the other three factors is weak. <sup>6/</sup> Moreover, 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." <sup>7/</sup>

On consideration of APCO's motion and the responses in opposition to it filed by the other four parties to this proceeding, <sup>8/</sup> the Commission has determined that APCO's request does not merit the grant of the extraordinary relief requested. <sup>9/</sup>

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- <sup>5/</sup> The Toledo Edison Company, et al. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), LBP-77-7, 5 NRC 452 (1977), citing Environmental Defense Fund, Inc. v. Froehlke, 348 F.Supp. 338, 366 (W.D. Mo. 1972), aff'd 477 F.2d 1033 (8th Cir. 1973).
- <sup>6/</sup> Florida Power and Light Company (St. Lucie Nuclear Power Plant, Unit 2), ALAB-404, 5 NRC 1185, 1186-89 and ALAB-415, 5 NRC 1435, 1437, (1977).
- <sup>7/</sup> Toledo Edison Company (Davis-Besse Nuclear Power Station, Unit No. 1), ALAB-385, 5 NRC 621, 626 (1977).
- <sup>8/</sup> In addition to APCO, MEUA and AEC, parties in the proceeding were the Department of Justice (Department) and the Nuclear Regulatory Commission staff (Staff).
- <sup>9/</sup> APCO requested oral argument on both its stay request and on its petition for review. As the Commission perceives no need for oral argument on either of these motions and the question of whether to hold oral argument is entirely a matter of Commission discretion, APCO's requests are denied.

Accordingly, the application for a stay is denied.

Commissioner Bradford dissents in part from this order. His separate view is attached.

For the Commission



*Samuel J. Chilk*  
SAMUEL J. CHILK  
Secretary of the Commission

Dated at Washington, D.C.

the 22nd day of October , 1981.

SEPARATE VIEWS OF COMMISSIONER BRADFORD

I agree with the result of the Commission's decision as to Alabama Power Company. However, I would take review of that portion of the Appeal Board's decision that finds that MEUA is not a potential wholesale competitor.