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ADJUDICATORY ISSUE

June 27, 1983

(NEGATIVE CONSENT)

SECY-83-255

For: The Commissioners
From: Herzel H. E. Plaine
General Counsel

Information in this record was deleted
in accordance with the Freedom of Information
Act, exemptions 5
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Attachment

September 10, 1981



SECY-81-532

ADJUDICATORY ISSUE

(Affirmation)

For: The Commissioners

From: James A. Fitzgerald
Assistant General Counsel

Subject: REVIEW OF ALAB-646, IN THE MATTER OF ALABAMA POWER
CO. (ANTITRUST), AND ALABAMA POWER COMPANY'S
APPLICATION FOR STAY PENDENTE LITE

Facility: Joseph M. Farley Nuclear Plant, Units 1 and 2

Purpose: *Ex. 5* To recommend that

Review Time
Expires: September 30, 1981, as extended

Discussion:

I. Introduction

This paper focuses on two separate matters for decision with respect to antitrust conditions ordered by the Appeal Board in ALAB-646 (June 20, 1981) on Alabama Power Company's (APCO) license for the Joseph M. Farley Nuclear Plant. The Commission must, as usual, decide whether review of the decision is warranted -- here

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review is sought by two of five parties. 1/ Also pending is APCO's motion for a stay of the effectiveness of the antitrust conditions while ALAB-646 is being litigated. 2/

Because the background of Farley is lengthy -- going back to 1971, the record voluminous, 3/ and the questions for decision inter-related, we believe the review and stay questions are best addressed in one paper. After presenting the background common to both questions and highlighting those areas where ALAB-646 disagreed with the decision below (Part II), we turn to the issues presented by the petitions for review (Part III). In brief, APCO's allegations of error lie in five key areas: (1) scope of Commission antitrust review pursuant to section 105c of the Atomic Energy Act; (2) designation of relevant product and geographic markets; (3) findings of monopoly power; (4) findings of anticompetitive conduct; and (5) appropriateness of license conditions. MEUA claims a finding that it is not a competitor in the wholesale for resale market is erroneous, and that a denial of due process occurred when the Licensing Board excluded it from the remedy phase of the evidentiary hearing. 4/ [We conclude that

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- 1/ The applicant Alabama Power Company and an intervenor, Municipal Electric Utility Assn (MEUA), seek review, the former complaining of the license conditions, the latter complaining that they don't go far enough. Another intervenor Alabama Electric Cooperative (AEC), the Department of Justice (DOJ) and the NRC staff (Staff) all oppose review. All five parties had appealed from the decision of the Licensing Board. See ALAB-646, slip op. at 8, for description of size and activities of the parties.
 - 2/ As the Solicitor's memorandum of July 29, 1981 (SECY-81-461) advised, APCO has sought review of ALAB-646 in the 5th Circuit Court of Appeals, and has moved the Commission for a stay during the pendency of litigation.
 - 3/ The Appeal Board decision and pleadings related to both review and stay questions have already been provided to Commissioners. ALAB-646 alone is 164 pages and there are easily again that many pages of pleadings pending. To keep this paper physically manageable we have arranged with SECY to provide separately any additional copies the Commissioners may request.
 - 4/ MEUA incorporates a request to consider new information in a reopening of the remedy phase of the hearing. It appears that this matter could have been raised before the Appeal Board (see 10 CFR 2.786(b)(4)(iii)), but in any event is inconsequential.

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recommended. 5/ Accordingly, is

In Part IV, APCO's application for a stay is discussed.

II. Background

A. Relevant Chronology

<u>Date</u>	<u>Event</u>
October 10, 1969	APCO's application to construct 860 megawatt nuclear reactor at Farley
June 26, 1970	Amendment to application to permit construction of a second reactor at same location
December, 1970	Atomic Energy Act amended to provide prelicensing antitrust review
August 6, 1971	Attorney General's statutory advice letter recommends hearing
September 2, 1971	AEC petitioned for leave to intervene
February 23, 1972	MEUA petitioned for leave to intervene
June 28, 1972	Commission issued notice of antitrust hearing and appointed a Board
July 21, 1972 - September, 1973	Prehearing conferences on scope, issues; commencement of discovery

5/ See 10 CFR 2.786b(4) set forth in relevant part infra in section IVB.

August 15, 1972	Construction permit issued subject to outcome of antitrust proceeding. Permits recited that they were granted without prejudice to any subsequent licensing action, specifically including imposition of antitrust conditions
May 23, 1974	Board granted APCO's motion to bifurcate hearing; phase one was to determine whether issuance of the license would create or maintain a situation inconsistent with the antitrust laws with phase two to determine remedies, if necessary
December 4, 1974 - April 26, 1976	Evidentiary hearing on phase one
November 22, 1976	Oral argument
April 8, 1977	Licensing Board decision finding a situation inconsistent with antitrust laws, LBP-77-24, 5 NRC 804. The Board urged the parties to try to reach a settlement in lieu of proceeding with phase two and to report on whether they had been successful in doing so.
April 22, 1977	Parties reported failure to reach settlement
May 9-17, 1977	Evidentiary hearing on phase 2, excluding MEUA based on Licensing Board's finding that MEUA was not a competitor in the wholesale market, and that retail competition where MEUA was a competitor was so inframarginal as not to invoke antitrust protection
June 24, 1977	Licensing Board decision on license conditions. LBP-77-41, 5 NRC, 1482, most notably requiring unit power <u>6/</u> for AEC
July, 1977-1978	Appeals and cross-appeals taken by all parties; briefs and reply briefs filed
December, 1977	Commercial operations began
March, 1979	Oral argument before Appeal Board

6/ Unit power is a percentage of the output of the plant, as opposed to participation in ownership of the facility.

June 30, 1981	Appeal Board Decision, ALAB-646
June 30, 1981	APCO filed petition for review in 5th Circuit at Atlanta
July 22, 1981	APCO timely filed <u>7/</u> application for a stay <u>pendente lite</u>
July 27, 1981	APCO and MEUA filed petitions for review
July 30 - August 11, 1981	The parties filed responses to review and stay requests.

B. The Appeal Board's Decision

ALAB-646 reviews in painstaking detail a two-phase Licensing Board decision in what is only the third fully litigated antitrust proceeding in AEC-NRC history. 8/ The Appeal Board divided its opinion into six parts: 1. Background and Summary, 2. Applicant's Arguments Against Antitrust Scrutiny, 3. Relevant Markets, 4. Monopoly Power, 5. Monopolization, 6. Remedy. Under those headings we sketch the 164-page decision in broad outline, noting particularly any major Appeal Board disagreement with the Licensing Board.

7/ APCO requested and the Commission granted in part an extension of time in which to file application for stay and petition for review. In light of exceptional circumstances where a quorum of the ALAB-646 Appeal Board was no longer in the Commission's employ, the Commission considered it proper for APCO to file its stay-related motions with the Commission.

8/ The two previous decisions were: Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-452, 6 NRC 892 (1977) and Toledo Edison (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), 10 NRC 265 (1979). In each case, the Commission declined to review the Appeal Board decision.

III. Petitions for Review of ALAB-646 12/

A. Catalogue of Pleadings with respect to Commission Review

1. Alabama Power's Petition for Review and Request for Oral Argument, July 27, 1981.
2. Municipal Electric Utility Association's Petition for Review, July 27, 1981.
3. Alabama Electric Cooperative's Opposition to Alabama Power Company's Petition for Review, July 31, 1981.
4. Alabama Electric Cooperative's Opposition to the Municipal Electric Utility Association's Petition for Review, August 3, 1981.
5. Answer of the Department of Justice in Opposition to Alabama Power Company's Petition for Review of ALAB-646, August 11, 1981.
6. Answer of Department of Justice Opposing Petition for Review Submitted by the Municipal Electric Utility Association of Alabama, August 11, 1981.
7. Answer of the NRC Staff in Opposition to Petition for Commission Review by Alabama Power Company, August 11, 1981.
8. Answer of the NRC Staff in Opposition to Petition for Commission Review by Municipal Electric Utility Association, August 11, 1981.
9. Opposition of Municipal Electric Utility Association of Alabama to Alabama Power Company's Petition for Review, August 11, 1981.
10. Alabama Power Company's Answer to the Municipal Electric Utility Association's Petition for Review,

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C. Issues Presented for Commission Review,
Positions of the Parties and Suggested
Resolution

The parties' positions on the five areas in which APCO alleges error in the Appeal Board decision and on the two main points made by MEUA in its petition for review are set forth below.

1. Scope of antitrust review

APCO raised the so-called "nexus" issue, alleging that the Appeal Board erred in refusing to limit the scope of the antitrust review to matters that have a substantial connection with the nuclear facility. In particular APCO challenged the Appeal Board's right to consider past conduct, specifically APCO's pricing and marketing activities going "as far back as 1941, 1946, 1950 and 1962-1963" in finding that APCO's activities under the license will create or maintain a situation inconsistent with the anti-trust laws.

AEC argues that adoption of APCO's reading, giving section 105c a forward thrust only, would render that section meaningless, and that Wolf Creek (ALAB-279, 1 NRC 559 (1975)) settled the issue of the Commission's ability to consider past conduct contrary to APCO's position. MEUA notes that even APCO concedes that it is a "natural monopoly" and thus, it is irrelevant whether the Appeal Board limited its examination to the present market context or considered APCO's "well documented history of exclusionary and anticompetitive activities." Moreover, the issue does not meet criteria for review.

OGC concludes that

2. Designation of relevant geographic and product markets

APCO asserts error in the Appeal Board's designation of the relevant product and geographic markets, particularly in "reversing" the Licensing Board with respect to coordination services and retail power sales market. APCO also alleged error in the finding that the relevant market was in central and southern Alabama.

AEC contends that the Appeal Board did not reject the underlying facts found by the Licensing Board but rather used them to reach

different conclusions. It said that the Licensing Board had recognized the importance of the cluster of product factors that the Appeal Board designated as a coordination services market, but its misreading of Grinnell led it to a wrong conclusion on the market. In like fashion, misreadings of the law led the Licensing Board to reject a retail market. MEUA states that the Appeal Board's findings on market designations are fully supported by the record and are not clearly erroneous.

It is likely that

Accordingly, in our view

3. Findings of monopoly power

APCO alleges error in the Appeal Board's finding of monopoly power principally because APCO is subject to pervasive regulation. The gist of the argument is: because APCO cannot set prices it cannot be considered to possess monopoly power. APCO additionally asserts that the Appeal Board erred in finding that APCO had control of transmission in the face of a record showing that AEC owns 1,000 miles of transmission lines, has interconnections with Georgia Power and has lines close to other systems. APCO claims, moreover, that the Appeal Board wrongly found monopoly power based on predominant market share of sales and control of generation and transmission.

AEC quotes the Appeal Board in reference to the "pervasive regulation" argument, calling APCO's position "timeworn and discredited" and noting further that both boards rejected APCO's view that as a factual matter it cannot have monopoly power. AEC cites extensively to the record showing the Licensing Board's thorough consideration of the transmission control issue. As a factual finding held by both Boards, it is not subject to review. MEUA asserts that the Appeal Board's conclusion that APCO has monopoly power in the relevant markets today is plainly correct and amply supported by the record. Full consideration was given to APCO's legal arguments. No important questions are raised.

4. Findings of anticompetitive conduct

APCO argues that the Appeal Board erred in rejecting testimony by Mr. Farley that had been accepted by the Licensing Board and some "uncontroverted evidence" that the allegedly anticompetitive rate decreases came about as a result of requests by the Rural Electrification Administration (REA), and further erred in affirming a variety of factual findings by the Licensing Board. APCO claims that error resulted from use of the wrong standard, i.e. that applicable to dominant unregulated enterprises.

AEC asserts that the Appeal Board did not reject Mr. Farley's testimony, but rather based its finding of APCO's anticompetitive refusal on Mr. Farley's testimony viewed against the record of APCO's conduct. AEC argues that the Appeal Board gave detailed consideration to the record in reaching its conclusions on the low anticompetitive rate question, and in its affirmances of factual findings of the Licensing Board. AEC says APCO's raising the issue of the correct standard is the argument, in another guise, that regulated industry cannot monopolize. MEUA believes the Appeal Board properly considered the law and the facts and that no important issues are raised.

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OGC concludes that

5. Appropriateness of license conditions

APCO alleges that the Appeal Board erred by imposing license conditions without proper findings of liability and without determining whether the conditions are necessary to protect the public interest and have a nexus to the license. Specifically, APCO says it is wrong to hold that APCO should be required to wheel for any municipally owned distribution system when only MEUA

intervened and there are other municipals that are not members of MEUA. And it is also wrong and in contravention of the Rural Electrification Act of 1936 to require APCO to share Farley with AEC in order to enable AEC to maximize its use of tax immunities and subsidized capital arrangements available through REA.

AEC contends that APCO's complaints relative to the license conditions are based on mischaracterizations of the Appeal Board's articulated grounds for imposing the conditions, contain serious errors of law and raise no matters warranting review. No important antitrust or public policy question has been raised. "The shallowness of APCO's claims of error with respect to remedy is typified by its complaint that the Appeal Board took into consideration the directive of Section 1 of the Atomic Energy Act in its remedial determination." APCO had criticized the Appeal Board's consideration of the aim of the Atomic Energy Act to use atomic energy so as to "strengthen free competition in private enterprise" in reaching its conclusions. MEUA says that the Appeal Board properly found that the conditions it imposed are required "as a minimum" to achieve the purposes of the Atomic Energy Act, and with one exception -- the exclusion of MEUA from the remedial portion -- had before it a more than adequate basis for finding liability on the part of APCO.

OGC concludes that

ex. 5
review of the record

In our

6. MEUA's allegation of error in not finding that it is a competitor at wholesale

MEUA bases its appeal of the Appeal Board's affirmance of the Licensing Board's finding that MEUA is not an actual or potential competitor at wholesale on a recent factual development, the establishment of an Alabama Municipal Electric Authority for the express purpose of permitting municipals jointly to acquire funds and operate generation facilities. MEUA claims that this development warrants reopening and further alleges that it could not have brought this matter before the Appeal Board because the statute authorizing the Authority was not passed until May 18, 1981.

APCO argues that the recent developments relied on by MEUA do not change MEUA's status in the alleged wholesale market and in any event occurred too late for consideration in this proceeding.

AEC asserts that MEUA has no legal or equitable basis for urging Commission review or reopening on the basis of the new developments it alleged inasmuch as MEUA had six weeks to bring the matter to the attention of the Appeal Board before ALAB-646 issued. In any event, the new development has no impact on the factual findings of both Boards which are entirely consistent on this point.