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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Before the Commission

In the Matter of)
ALABAMA POWER COMPANY) Docket Nos. 50-348A
(Joseph M. Farley) and 50-364A:
Plant, Units 1 and 2) OL Nos. NPF-2 and NPF-8

ALABAMA ELECTRIC COOPERATIVE, INC.'S
RESPONSE URGING REJECTION OF ALABAMA POWER
COMPANY'S PETITION FOR A DECLARATORY ORDER

This response is filed by Alabama Electric Cooperative, Inc. (AEC) pursuant to the Commission's order of July 9, 1984. In that order the Commission noted (1) that on June 29, 1984 AEC had filed a petition and request under 10 CFR §2.206 with the Director of the Commission's Office of Inspection and Enforcement, to enforce an antitrust license condition in Alabama Power Company's (APCo) operating licenses for the Joseph M. Farley Nuclear Plant, and (2) that four days later, on July 3, 1984 APCo filed a petition for a declaratory order allegedly to clarify its obligation under the license condition. The Commission's order requested AEC and any other interested parties to file with the Commission by July 20, 1984 their views on the choice of procedure.

AEC regards the choice as clear. For a variety of reasons, the Commission should reject APCo's self-styled petition for a declaratory order and should direct that the enforcement

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proceeding initiated by AEC's formal request shall move ahead with the maximum practicable speed.

APCo has lodged with the Commissioners and with the Commission's staff a petition of a type which is clearly not provided for in the Commission's regulations and which is not even contemplated by the Commission's regulations. As the matter appears to AEC, the obvious purposes of APCo's petition and of APCo's intensive ex parte lobbying^{1/} for its acceptance are: (1) to prolong further -- and, indeed, for as long as possible -- APCo's three-year long refusal to comply with the NRC Antitrust License Condition requiring APCo to grant AEC ownership access to the Farley Nuclear Units; and (2) to sidetrack the enforcement proceeding which, four days prior to the lodging of APCo's petition, was initiated by the filing of AEC's formal request for enforcement of the Antitrust License Condition. APCo's petition requests the Commission to suspend the pending 10 CFR §2.206 enforcement proceeding and to substitute therefor an uncharted type of proceeding of Rube Goldbergian complexity and stages, and of undetermined legality which would plainly be open to question. Looked at objectively, it appears that APCo is seeking to invent a procedure which will circumvent or evade or put

^{1/} See Memorandum For Files, From Nunzio J. Palladino, regarding Meeting [on June 26, 1984] With Representatives of Alabama Power Company ("Chairman's Memorandum").

off into the indefinite future the whole subject of penalties and other remedies which might otherwise have concrete, present impact as a result of APCO's continuing violation of Antitrust License Condition No. 2. In other words, APCo is seeking to sidestep the prescribed procedure governing license enforcement in order to find a haven for continued penalty-free non-compliance with its responsibilities as a licensee.

Background

The history of APCo's long-lasting refusal (now extending well over a decade) to grant AEC ownership access to the Farley Nuclear Units on reasonable terms and APCo's steadfast refusal to comply with the Antitrust License Condition No. 2 since the Condition became effective on August 10, 1981, is summarized in ALAB-646, 13 NRC 1027 at 1081-1086, 1102-1108 (1981), and in AEC's June 29, 1984, request to the Director, Office of Inspection and Enforcement, for enforcement of the License Condition.

At a meeting on June 20, 1984, between representatives of AEC and APCo, the long intransigence of APCo remained unbroken, and it was made clear to APCo that AEC would have to take steps in the near future to seek assistance from the NRC Enforcement Office with respect to APCo's continuing insistence on positions in conflict with APCo's obligations under the governing License Condition. The next day, counsel

for APCo, Robert A. Buettner,^{2/} telephoned AEC's Montgomery, Alabama counsel, J. Theodore Jackson, and inquired further regarding AEC's intentions to seek NRC assistance as to APCo's compliance with the License Condition, and specifically as to the contemplated timing of any such remedial relief AEC was considering seeking. The message obviously got through to APCo, since at the ex parte meeting which APCo representatives had with Chairman Palladino on June 26, they told the Chairman (p. 1, ¶2 of the Chairman's Memorandum) that "AEC informed Alabama Power that AEC is contemplating an enforcement petition and may file a paper with the NRC this week."

At the June 20 meeting, the parties scheduled the next negotiating session for July 9, 1984. However, after service of AEC's request for enforcement, APCo on July 2, 1984, cancelled the scheduled meeting, thereby unilaterally precluding any further voluntary negotiations leading to APCo's compliance.

On June 26, 1984, APCo counsel and other representatives met with Chairman Palladino, after previously meeting with other Commissioners and NRC personnel, in an ex parte effort by APCo to persuade the NRC officials that the AEC/APCo inability to achieve an agreement for AEC's purchase of an ownership interest in the Farley Units was in essence due to "differences of interpretation of the license condition" (Chairman's Memorandum, supra) -- rather than being due to APCo's refusal to negotiate in good faith and to comply

^{2/} Identified as Robert A. Brettner in the Chairman's Memorandum, supra.

with the terms of the License Condition. The APCo representatives attempted to persuade the Commission to accept a novel preemptive procedure invented by APCo. It was a procedure well designed to ensure that no sense of imminence in the form of penalties or remedies would overhang APCo and hence that APCo's non-compliance might be continued and prolonged without the threat of any immediate adverse impact on APCo.

As already stated, on June 29, 1984, AEC filed its petition and request for enforcement of the Antitrust License Condition, and on July 3, 1984, APCo lodged its "Petition for a Declaratory Order". Then APCo filed a follow-up letter dated July 5, 1984, seeking to suspend any action on AEC's request for enforcement in a further effort to delay and prolong compliance. Also on July 5, 1984, counsel for APCo wrote the NRC Commissioners in an apparent effort to persuade the Commission to refuse to furnish to AEC counsel copies of notes or memoranda or transcripts made, or being made, of any of the ex parte meetings which APCo representatives had initiated and had held with NRC Commissioners and personnel, which materials AEC counsel had requested by letter of July 2, 1984.^{3/}

^{3/} The fact that APCo is so eager to persuade the Commissioners not to make such disclosures to AEC regarding APCo's ex parte efforts underscores the reasons why, in the interests of fairness, such disclosures ought to be made. AEC reserves the right to file supplemental views after receiving from the Commission the information requested in our letter of July 2, 1984.

APCo's Petition Is Without Merit
And Should Be Dismissed Forthwith

APCo's petition for a declaratory order is simply an attempt to impede and delay the NRC Staff and Commission in considering and taking effective action on AEC's earlier-filed request for enforcement action with respect to APCo's three-year long refusal to undertake good faith compliance with the Antitrust License Condition imposed on APCo as a result of its anticompetitive activities "condemned by Section 105c [of the Atomic Energy Act] and the antitrust laws referred to therein." ALAB-646, 13 NRC at 1086. After the lengthy statutory NRC antitrust review, the Appeal Board^{4/} (13 NRC at 1084 and 1085) determined, inter alia:

"Mr. Farley's last statement is even more revealing when considered in the context of the 1969 statement in which the policy of the company is expressed as being 'unalterably opposed

4/ In the Matter of Alabama Power Company, ALAB-646, 13 NRC 1027 (1981), Commission review denied, 14 NRC 795 (1981), affirmed Alabama Power Co. v. Nuclear Regulatory Com'n, 692 F.2d 1362 (11th Cir. 1982), rehearing and rehearing en banc denied 698 F.2d 1238 (1983), certiorari denied ___ U.S. ___, 104 S.Ct. 72 (1983).

APCo's numerous requests for stay of the effectiveness of this ownership access License Condition were denied successively by the Commission (14 NRC 795, October 22, 1981), by the Eleventh Circuit (orders issued January 20, 1982, and March 4, 1983), and by Justice Powell acting as Circuit Justice (order issued April 6, 1983). Thus, at all times since August 10, 1981, APCo has had an affirmative obligation to comply with Antitrust License Condition No. 2.

to sharing in the ownership of the plant with AEC or with any one or more of the cooperatives.' Viewed in that light, it becomes clear that the company had a position: to resist to the last selling an ownership share of the plant to AEC [footnotes omitted]."

* * *

"we have no hesitancy in concluding that the applicant's actions in denying AEC a joint ownership share in Farley constituted anti-competitive behavior. The evidence leaves no doubt in our minds that the actions of the applicant in this regard were deliberately directed toward avoiding sharing in the ownership of the plant. . . ."

APCo's latest effort, to delay and sidetrack action on AEC's enforcement request, is yet another phase of the same on-going policy and practice of anticompetitive behavior--condemned in the Appeal Board's findings quoted above.

The Commission has a prescribed regular and normal procedure (10 CFR Part 2, Subpart B, §§2.200-2.206) for compelling licensee adherence to the licensee's legal obligations under the Act and under outstanding licenses. It is a well established procedure which rests firmly on a base set forth in the statute and the regulations. APCo is urging that this procedure be set aside and bypassed, and that instead the Commission should improvise with an undelineated, untested, complicated procedure which in all probability would tie up the issue of APCo's non-compliance in a procedural quagmire of predictably lengthy duration.

APCo concedes that there is nothing in the Commission's regulations authorizing APCo's proposed "declaratory" ruling

proceeding. See covering letter from Harold F. Reis to the Commission, dated July 3, 1984. APCo also has recognized that its proposed procedure is so questionable that it would have to undergo "review to determine whether or not it is legal." Chairman's Memorandum, supra, at p. 2. Indeed, that review of the legality of APCo's proposed procedure, itself, is likely to become a full-blown adversarial proceeding with the potential for consuming much time that could otherwise more usefully be devoted to moving ahead expeditiously with the enforcement proceeding. This is particularly likely here where APCo has engaged in what appears to have been a massive ex parte lobbying effort on behalf of the adoption of its invented procedure. Thus, the conclusion seems justified that APCo's real intent -- in contrast to its pious protestations -- is to delay for as long as possible any definitive resolution of APCo's non-compliance with APCo's license obligations.

APCo (Petition, p. 6) cites Kansas Gas and Electric Company (Wolf Creek I) CLI-77-1, 5 NRC 1 (1977), as precedent for APCo's proposed declaratory order procedure. However, that Memorandum and Order, which came up to the Commission through the Appeal Board, is of no help to APCo's position. It dealt with the resolution of a legal issue regarding the scope of NRC regulatory authority under a regulation which had been issued by the Commission itself, 5 NRC at 2, 3, 4 and 6. In APCo's case here, on the other hand, there is

need to determine the factual matters of whether APCo

- (1) has refused to "offer to sell to AEC an undivided ownership interest in Units 1 and 2 of the Farley Nuclear Plant" (13 NRC at 1112);
- (2) has insisted on pricing, terms and conditions which will "deprive AEC of its normal financing advantages in connection with the power it would obtain from the Farley plant" (13 NRC at 1105);
- (3) has rejected an allocation basis for AEC percentage share that is "pegged to the load^[5/] of AEC's on-system and off-system members . . . [emphasis added]" (13 NRC at 1108) -- not the load of AEC alone as claimed in APCo's Petition (p. 12);
- (4) has refused to convey an interest in the amount of land required to be conveyed by the Rural Electrification Administration (REA) for loan guarantee

[5/] "LOAD The amount of electric power delivered or required at any specified point or points on a system. Load originates primarily at the power consuming equipment of the customers. See DEMAND."

* * *

"DEMAND The rate at which electric energy is delivered to or by a system, part of a system, or a piece of equipment expressed kilowatts, kilovoltamperes or other suitable unit at a given instant or averaged over any designated period of time. The primary source of "Demand" is the power-consuming equipment of the customers. See LOAD."

Edison Electric Institute, Statistical Committee, Glossary of Electric Utility Terms, at 49 and 24 (EEI, reprinted 8/83).

purposes, i.e., the land "necessary for the operation of the units including the land surrounding intake structures";^{6/}

- (5) has demanded a second trust security interest in AEC's entire generation and transmission system while requiring that all capital and operating payments for AEC's share of the Farley facility be made in advance; and
- (6) has insisted on numerous other terms and conditions -- including price -- some of which are described in AEC's request for enforcement, so burdensome, onerous, unreasonable, and so beyond normal industry practice (as evidenced by the multitude of joint ownership agreements for nuclear units on file with the Commission) as to manifest, beyond a reasonable doubt, bad faith on the part of APCo in its years of negotiations with AEC.

Here the facts, as documented by APCo's own written statements of its positions, conclusively evidence continuing violations of the Condition of its licenses. These violations clearly warrant the application of 10 CFR Part 2, Subpart B -- "the usual procedure", as noted by the Commission in its July 10, 1984 order. The present case is remote from Kansas Gas, supra, where legal and

^{6/} Letter from Charles R. Lowman to Jesse S. Vogtle, October 31, 1983.

jurisdictional matters were at issue and the only question was whether they were best resolved by licensing boards familiar with the background of the matter or by an opinion of the General Counsel, whose office would ultimately have to advise the Commission in the exercise of its review functions after the licensing hearings. 5 NRC at 4-5.

APCo's strong desire to avoid a Section 2.206 proceeding manifests its hope that APCo can evade the potential imposition of remedial measures at the foot of the proceeding. The potential of those remedial measures is in fact the only inducement which can be expected to persuade APCo to abandon its continuing policy of refusing to comply with its Antitrust License Condition. Accordingly, quite understandably, APCo is enthusiastic about substituting an informal non-adjudicatory procedure of questionable legal validity for the Commission's prescribed enforcement procedure.

The track record of APCo in this proceeding (which long antedates the incumbencies of the present members of this Commission) makes clear what a keen propensity APCo has shown for protracting the litigation and for putting off into the indefinite future the sale to AEC of a pro rata interest in the Farley Nuclear Plant. At least since 1971, APCo has known fully of AEC's desire to have ownership participation, but APCo adamantly refused AEC such access. In June 1972 the Commission noticed the antitrust review for hearing; after extensive prehearing stages, including the disposition of

lengthy motions made by APCo, the evidentiary hearing began in December 1974. After over 160 days of formal evidentiary hearings, many of them attributable to APCo's long-drawn-out examination of witnesses, the Licensing Board rendered a decision in April 1977 (5 NRC 804). This decision found an extensive history of anticompetitive conduct by APCo directed at AEC, and found that issuance of an unconditional license would create or maintain a situation inconsistent with the antitrust laws. This was followed by a further hearing and by a Licensing Board decision in June 1977 on remedy (5 NRC 1481). Primarily as a result of the APCo litigation strategy, there had by then been amassed an evidentiary record of nearly 27,000 pages of transcript plus hundreds of exhibits; this is the record that went on to the Appeal Board, with the resulting Appeal Board decision issued on June 30, 1981 (13 NRC 1027) which became the final action of the Commission. Although APCo never obtained a stay and hence Antitrust License Condition No. 2 has been binding on APCo since August 10, 1981 (see note 4, supra), APCo's protracted litigation against the License Condition was carried on until the Supreme Court denied APCo's petition for certiorari in October 1983.

What APCo now is seeking is a means of staving off the Commission's prescribed enforcement procedure while APCo institutes a new phase of litigation which will involve a collateral attack on the already-adjudicated Antitrust License Condition No. 2 in the guise of "interpretative" quibbling.

The whole record of APCo's litigatory habits in this proceeding should alert the Commission to the fact that expeditiousness is not APCo's objective; that the novel and untested type of procedure which APCo has now proposed and has so avidly promoted in its ex parte sessions with Commissioners would open up possibilities for extensive litigation delays, and all the while the enforcement proceeding, which is the only realistic way of bringing about compliance by APCo, would be stayed. In other words, as APCo would have it, successive proceedings would take the place of a straightforward enforcement proceeding.

The threat by APCo that "enforcement action could entail 5-10 years of fighting" (see Chairman's Memorandum, supra, at p. 1) should be recognized for what it is -- another in the long series of efforts by APCo to stonewall AEC.^{7/} The Commission has measures at hand to prevent APCo from making good any such threat.

We do urge that in the enforcement proceeding the Commission should take effective steps to achieve a prompt resolution of the issue of APCo's non-compliance. For example, the 20-day response periods provided for in 10 CFR §§2.201(a)

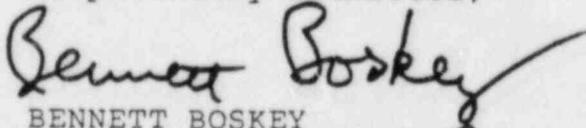
^{7/} APCo's threat of ten more years of litigation brings us back to the sentence at the end (pp. 10-11) of AEC's enforcement petition: "In the absence of enforcement action by the Commission, there is a high probability that, because of the course APCo is pursuing, the Farley Units will serve out their useful operational life before some reasonable agreement can be arrived at with APCo."

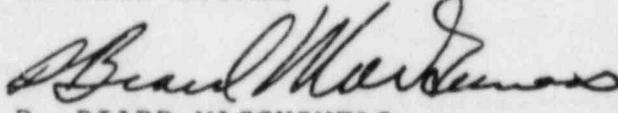
and 2.02(a)(2) could be reduced, at least in the absence of objection from the parties. The great bulk of the documents evidencing the AEC/APCo negotiations have already been submitted as attachments to AEC's request for enforcement and APCo's Petition; any remaining correspondence could be submitted in a few days time. Since that correspondence constitutes the principal record of the parties' negotiations, a stipulated record should be readily achievable. That, coupled with an abbreviated briefing schedule, should enable a prompt resolution of the matter, provided all parties proceed in good faith.

CONCLUSION

For the reasons summarized in this response, the APCo petition for a declaratory order should be denied and the Commission should take steps to achieve a prompt resolution of the issues as to APCo's non-compliance which have been presented by AEC's petition for enforcement.

Respectfully submitted,


BENNETT BOSKEY


D. BIARD MACGUINEAS

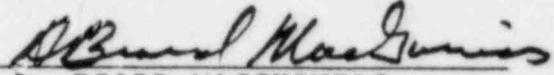
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July 18, 1984

CERTIFICATE OF SERVICE

It is hereby certified that service has been made by mailing or delivering copies of Alabama Electric Cooperative, Inc.'s Response Urging Rejection Of Alabama Power Company's Petition For A Declaratory Order to the following on the 18th day of July, 1984.


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