

12522

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

ATOMIC SAFETY AND LICENSING BOARD

'92 JAN 24 AIO:16

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. James H. Carpenter
Dr. Peter A. Morris

OFFICE OF SECRETARY
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C.

SERVED JAN 24 1992

In the Matter of

ALABAMA POWER COMPANY

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

Docket No. 50-348-CivP
50-364-CivP

ASLBP No. 91-626-02-CivP

January 23, 1992

MEMORANDUM AND ORDER

(Ruling on Staff Motion for Extension of Time
to Submit Prefiled Rebuttal Testimony)

The evidentiary hearing in this civil penalty proceeding is now scheduled to begin on February 11, 1992, with the expectation that it will be concluded by March 6, 1992. After that date, a number of the witnesses for licensee Alabama Power Company (licensee or APCo) will be unavailable due to their needed involvement in a scheduled eight-week refueling outage at APCo's Farley facility. On the afternoon of January 21, 1992, the Board and APCo counsel received telefaxed copies of an NRC staff "Motion for Extension of Time to File Rebuttal Testimony and Request for Expedited Consideration." In this motion, the staff asks for additional time to file its written testimony in rebuttal to APCo's direct written testimony. The staff also states that favorable action on its extension request will

D502

require that we postpone the start of the hearing until after the refueling outage. The licensee opposes the staff's request in all respects.

We afforded each litigant an opportunity to present arguments regarding the pending motion during a telephone conference conducted on the morning of January 22, 1992. After carefully considering the positions of the parties, we grant the staff's motion, but establish a schedule for filing and hearing its rebuttal testimony that will not require deferring the start of the hearing.

The existing January 31 filing date for the staff's rebuttal testimony was proposed by the parties and adopted by the Board in its October 29, 1991 prehearing conference order. In its extension motion, the staff requested an additional three weeks to submit this presentation; however, during the January 22 telephone conference it stated it could complete its rebuttal testimony with a two-week extension of time, up to and including February 14, 1992. The staff contends it needs the additional time because the licensee's January 17, 1992 prefiled direct testimony is so voluminous and is presented in such a manner that finding and addressing the points raised by the licensee will require substantially more time than the staff anticipated when it agreed to the original schedule. In the staff's view, the requested extension is vital to its efforts to

provide the Board with a full and complete record upon which to make a determination regarding the propriety of the civil penalty at issue in this proceeding.

As the staff recognizes, if we grant its extension request, we also will need to postpone the hearing. According to the staff, it cannot participate in the hearing and simultaneously prepare the rebuttal testimony because many of the same personnel would be needed for both tasks. If, however, the Board postpones the February 11 hearing date to provide the additional time staff maintains is necessary to prepare its testimony as well as to allow the licensee to assess the testimony for cross-examination purposes, this would effectively preclude completing the hearing prior to the March 6, 1992 reactor outage. Hence, the hearing would have to be deferred until after the completion of the refueling outage in mid-May 1992 (or later). The staff maintains that this should not dissuade the Board from granting its request, labeling the delay a cost the licensee must assume for its insistence that the hearing not be conducted during the outage. The staff also asserts that any delay caused by the grant of its motion will not unduly prejudice APCo because, in contrast to a licensing case in which delay may preclude operation, deferral of the hearing here does not cause APCo to forego any benefit.

As was reflected in the comments of its counsel during the telephone conference, APCo strongly opposes the staff's motion. APCo declares that the extensive discovery conducted by the parties precludes any staff claim that "surprise" justifies an extension of the filing date for the rebuttal testimony. APCo essentially claims that the staff has failed to provide any convincing reason for an extension of the filing date to which it previously agreed. APCo also disputes the staff's assertion that it suffers no prejudice by delaying the hearing, declaring that so long as the staff's improperly imposed civil penalty remains extant, its reputation continues to be unjustly impugned. The licensee concludes that the staff should be required to comply with the existing filing schedule and that the hearing should go forward as planned.

We share the staff's concern that it have an adequate opportunity to present a full and complete record upon which we can base our decision. At the same time, we are mindful of APCo's desire to move this proceeding forward as it attempts to rid itself of the financial burden, as well as the purported stigma, of what it perceives is an unjust monetary penalty. Accordingly, during the telephone conference we suggested that one alternative to the staff's extension request would be to begin the evidentiary hearing on February 11, but have it encompass only the parties'

direct testimony and cross-examination regarding that testimony. The staff would be authorized to submit its rebuttal testimony after the parties had completed presentation and cross-examination regarding all direct testimony. Subsequently, in late-May after the completion of the scheduled outage, the hearing would be reconvened to permit licensee cross-examination of the staff's rebuttal testimony. The staff did not object to this scheme. The licensee, while maintaining that no change in the present schedule is warranted, indicated that this suggestion was preferable to deferring the hearing in toto until after the outage.

In the circumstances, we find that the staff's concerns about its opportunity for adequate record development as well as the equities inherent in the positions of the parties are best accommodated by adopting this proposal. Although this schedule provides the staff with a somewhat extended opportunity to file its rebuttal testimony, the licensee also will enjoy an extended period in which to prepare its cross-examination of that testimony. In addition, as we indicated during the telephone conference, the licensee is free to request an opportunity to submit appropriate surrebuttal testimony in response to the staff's rebuttal testimony. Finally, while this schedule might engender some delay in the issuance of our final decision,

we anticipate that the parties, having access to the direct testimony and cross-examination on that testimony, will use the time during the outage to work on their proposed findings. This should permit us to adopt a shorter schedule for submitting those findings at the conclusion of the hearing, thereby mitigating any delay arising from the bifurcated hearing.

Accordingly, it is this twenty-third day of January 1992, ORDERED that:

1. The staff's motion for extension of time to file rebuttal testimony is granted in that its testimony shall be filed within twenty-one days of the conclusion of the initial portion of the evidentiary hearing regarding the parties' direct testimony. The hearing will begin, as now scheduled, on February 11, 1992, at 9:00 a.m. in the Commission's hearing room, Fifth Floor, West Tower, East-West Towers Building, 4350 East-West Highway, Bethesda, Maryland. An order specifying the date upon which the staff's rebuttal testimony must be filed will be entered following the conclusion of the first portion of the hearing on the parties' direct testimony.

2. The staff's rebuttal testimony must be complete as filed. Revisions to that testimony, other than to make typographical or other nonsubstantive corrections, will not be permitted after the testimony is submitted.

3. The Board will entertain a licensee request to submit surrebuttal testimony relating to the staff's rebuttal testimony. An order specifying the date upon which such a request must be submitted will be entered following the conclusion of the first portion of the hearing on the parties' direct testimony.

4. The second phase of the hearing to permit introduction of and cross-examination regarding the staff's rebuttal testimony (and any licensee surrebuttal testimony) will begin on May 18, 1992, at 9:00 a.m. in the Commission's hearing room, Fifth Floor, West Tower, East-West Towers Building, 4350 East-West Highway, Bethesda, Maryland, and

will continue each week day (holidays excepted) until concluded.

THE ATOMIC SAFETY
AND LICENSING BOARD*

G. Paul Bollwerk, III
G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

James H. Carpenter
James H. Carpenter
ADMINISTRATIVE JUDGE

Bethesda, Maryland

January 23, 1992

* Judge Morris concurs in this Memorandum and Order, but was not available to sign it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

ALABAMA POWER COMPANY

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

Docket No.(s) 50-348/364-CIVP

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB M&O RULING ON STAFF MOTION have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
G. Paul Bollwerk, III, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
James H. Carpenter
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

James Lieberman
Director
Office of Enforcement
Washington, DC, 20555

Administrative Judge
Peter A. Morris
ASLBP
10825 South Glen Road
Potomac, MD 20854

Eugene Holler, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Robert M. Weisman, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Nicholas S. Reynolds, Esq.
Winston & Strawn
1400 L Street, NW.
Washington, DC, 20005

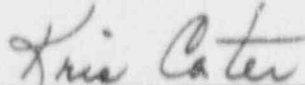
Docket No.(s)50-348/374-CIVP
LB M&O RULING ON STAFF MOTION

James H. Miller, III, Esq.
BALCH & BINGHAM
P.O. Box 306
Birmingham, AL 35201

W. G. Hairston, III
Senior Vice President - Nucl. Op.
Alabama Power Company
40 Inverness Center Pkwy, P.O. Box 1295
Birmingham, AL 35201

Regional Administrator
U.S. Nuclear Regulatory Commission
Region II
101 Marietta Street, Suite 2900
Atlanta, GA 30323

Dated at Rockville, Md. this
24 day of January 1992


Office of the Secretary of the Commission