

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

Before the Commission

'84 JUL 24 P5:18

In the Matter of)
ALABAMA POWER COMPANY)
(Joseph M. Farley Plant,)
Units 1 and 2))

Operating Licenses
Nos. NPF-2 and NPF-8

POCKET NUMBER
PROD. & UTIL. PAC.

58-348/364A

REPLY OF ALABAMA POWER COMPANY TO
RESPONSES OF ALABAMA ELECTRIC COOPERATIVE, INC.
AND DEPARTMENT OF JUSTICE

Alabama Power Company ("APCO") submits this reply to the papers submitted by Alabama Electric Cooperative, Inc. ("AEC"), on July 18, 1984, and by the Antitrust Division of the Department of Justice ("Antitrust Division"), on July 20, 1984, in response to the Commission's Order of July 9, 1984. 1/ Both responses underscore two good reasons for adopting the declaratory order procedure suggested by APCO:

(1) There is a substantial disagreement between APCO and AEC over interpretation of the license condition.

1/ AEC appears to have difficulty in separating the issues now raised before the Commission, and which concern only the application of an effective license condition, from the issues that were involved in the antitrust hearing on the merits, a proceeding that has been concluded. APCO does not agree with AEC's characterization of the factual record of dealings between the parties, including the conduct of negotiations pursuant to the license condition; indeed, as Attachment A demonstrates, AEC's description of recent communications is both inaccurate and in violation of a confidentiality agreement between the parties. None of that, however, appears to be relevant to the question now before the Commission.

(2) Prompt and efficient resolution of that dispute is in the public interest.

The only remaining question is whether the declaratory order procedure is likely to lead to a more prompt and efficient resolution of the dispute over interpretation of the condition, as contrasted with an enforcement proceeding under 10 CFR Part 2, Subpart B.

Both respondents oppose the declaratory order alternative, for reasons that are not made very clear. Neither respondent explains why the declaratory order procedure would not work. AEC points to no legal defect in the procedure, and the Antitrust Division's legal criticism is based on a misunderstanding of the relationship between a declaratory proceeding and the enforcement process. 2/ What is clear is that both respondents would prefer to avoid having the Commission address the basic policy questions involved in interpreting the license condition. 3/ We respond, in the following sections, to the specific points raised by AEC and the Antitrust Division.

2/ The Antitrust Division participates in antitrust review proceedings before the NRC in order to give the NRC the benefit of its presumed antitrust expertise. The issue now before the Commission is purely one of administrative procedure and economy, subjects on which the Antitrust Division has no recognized expertise and very limited experience.

3/ The fundamental issue is whether the Commission interprets the license condition to require APCO to sell an interest in the Farley Plant at a price that imposes an economic penalty on APCO's remaining customers. That is a policy choice that should be made by the Commission itself.

1. A Declaratory Proceeding Would Not Involve "Intent," And Thus Could Be Concluded Expeditiously.

The Antitrust Division's objection that a declaratory proceeding would be inadequate to deal with the issues raised by AEC's request for enforcement action is based upon a misunderstanding of the issues that would be addressed in a declaratory order. The papers filed by AEC and APCO present two different issues. The first, raised by APCO, relates to the terms that APCO must offer AEC in order to implement the license condition. This issue involves an interpretation of the license condition. That is all that would be involved in proceedings leading to issuance of a declaratory order, and the issue is subject to prompt resolution based on written submittals by the parties. 4/

The second issue, which was raised by AEC in its enforcement request, concerns the question of whether APCO's conduct of the negotiations to date with AEC constitutes a deliberate violation of the license condition that calls for punitive action by the NRC. This issue of APCO's good faith in the negotiations to date cannot be resolved without first deciding what the license condition means; however, it involves

4/ The Antitrust Division states, in footnote 3 of its Response (p. 5), that "APCO . . . points to no specific ambiguity in the license condition requiring interpretation." APCO's Petition, supported by the appendices thereto, describes four critical issues on which APCO and AEC have reached a stalemate, with each apparently convinced that its position is supported by the license condition. The suggestion that there is no ambiguity in the condition will come as a surprise to any literate person who has undertaken to read it.

far more than that, including inquiry into the subjective state of mind of both parties to the negotiations. Resolution of the first (interpretation) issue by the Commission could remove any need to consider the second issue. At the least, an NRC Staff Director would have the benefit of a definitive interpretation of the condition before deciding whether a charge of violation of the license by APCO is warranted. 5/ Thus, there is an excellent chance that adoption of the declaratory order path will save substantial resources of the Commission and the parties.

An equally good reason for adopting the declaratory procedure is that it will permit the sale of an interest in the Farley Plant to AEC (or a decision by AEC not to buy an interest) to be made in the near future, without awaiting the outcome of a long, drawn out enforcement proceeding. That is an objective that AEC apparently does not share with APCO.

2. An Enforcement Proceeding Would Be Lengthy
And Resource-Consuming.

Both AEC and the Antitrust Division suggest that abbreviated enforcement proceedings could be conducted in lieu of a declaratory proceeding. This suggestion is unrealistic.

First, contrary to the Antitrust Division's understanding, an enforcement proceeding is not the "traditional, familiar" means for resolving disputes over interpretation of a

5/ As APCO emphasized in its Petition, it does not seek to avoid answering for its actions to date, and is confident that the Commission, or its delegate, will find no reason to question APCO's good faith.

broad, non-specific license condition. NRC license conditions usually take the form of extremely specific technical specifications. The enforcement procedures contained in 10 CFR Part 2, Subpart B are designed to enforce compliance with the conditions (and with regulations that protect the public health and safety), as well as to impose sanctions that have the primary purpose of ensuring that corrective action will be taken to prevent recurrent violations. There is no "traditional, familiar" NRC procedure for dealing with an issue of how a cryptic license condition should be interpreted.

Second, because of the structure just described, NRC enforcement proceedings are accusatory in nature and involve the potential imposition of sanctions, including civil penalties and, if AEC has its way, suspension of the licenses for the Farley Plant. If APCO is placed at the risk of punitive sanctions and compelled to defend itself against an NRC accusation that it has violated the license condition, APCO would have no choice but to contest an enforcement order vigorously and to build a full record in defense of its actions. The suggestion that enforcement proceedings could be abbreviated and managed informally comes with poor grace from those who would not be at risk in such a proceeding.

Third, an enforcement proceeding involves three levels of NRC decision-making before the issues would reach the Commission: a decision by a Staff Director, after preliminary investigation, to issue a notice of violation, followed by a

hearing before and initial decision by an Atomic Safety and Licensing Board, which would be subject to review by the Atomic Safety and Licensing Appeal Board. This process is time-consuming. Moreover, a decision by either the Licensing or Appeal Board that is unfavorable to APCO could be deemed to be immediately effective. 6/ It is unfair to subject APCO to this procedural quantlet when the case involves basic policy questions that should be resolved by the Commission itself.

3. The NRC Has Ample Discretion To Decide How Procedurally To Address The Issues Before It.

The Antitrust Division, but not AEC, implies that the NRC's hands may be tied because it has received a request from AEC to commence an enforcement proceeding. It is well settled that even in cases where the relevant statute or regulation requires an opportunity for an adjudicatory hearing in licensing and enforcement actions, the NRC may elect to refer issues material to these proceedings to other, simultaneously pending agency proceedings that have the potential for resolving or simplifying the issues raised. 7/ Here, the action requested by

6/ Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-81-7, 13 NRC 257 (1981); 10 C.F.R. § 2.764.

7/ Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 535 n.13 (1978); Union of Concerned Scientists v. AEC, 499 F.2d 1069 (D.C. Cir. 1974).

AEC -- commencement of an enforcement proceeding -- has been left to the sound discretion of the Commission. 8/ It is inconceivable that a court would brand as arbitrary and capricious a decision by the Commission to defer action on AEC's enforcement request (or to deny it without prejudice to renewal) because the Commission has decided first to issue a declaratory order interpreting the license condition in issue.

CONCLUSION

As demonstrated above, none of AEC's or the Antitrust Division's specific objections to the declaratory order alternative is soundly based.

The essential criticism leveled at the declaratory order procedure suggested by APCO is that it is innovative. It stands to save substantial resources of the Commission and the parties and to provide a resolution of the dispute over interpretation of the license conditions in a context where the focus will be on interpretation of the condition rather than on apportioning responsibility for the current stalemate in negotiations. Against these advantages, no good reason has been suggested for not proceeding along the declaratory order path.

8/ Illinois v. NRC, 591 F.2d 12 (7th Cir. 1979); Porter County Chapter of the Izaak Walton League v. NRC, 606 F.2d 1363 (D.C. Cir. 1979).

Respectfully Submitted,

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July 24, 1984

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ATTACHMENT A



Alabama Power

the southern electric system

July 23, 1984

Mr. Charles R. Lowman
General Manager
Alabama Electric Cooperative, Inc.
P. O. Box 550
Andalusia, Alabama 36420

Dear Charles:

I was disturbed and disappointed when I read Alabama Electric Cooperative's description of our June 20, 1984 meeting in AEC's Response Urging Rejection of Alabama Power Company's Petition for a Declaratory Order. The description of that meeting and subsequent events is not only inaccurate, it violates AEC's agreement as to such meeting.

You will recall that Alabama Power requested the meeting in order to attempt to negotiate the price element of the proposed sale using people who were not "posturing" in front of a large group of representatives. Mr. Vann of your Board of Directors expressed reluctance even to meet unless it were agreed that the substance of the meeting would not be used in later pleadings or legal proceedings. It was Mr. Vann's concern that the Company was trying to "set him up". Based on the characterization of the meeting in your most recent pleading, it appears that the opposite was true.

You characterize that meeting saying "... 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 NRC Enforcement Office...." You imply that you told us of your determination to go to the NRC only after you had heard us on June 20. You will recall, however, that before we even spoke at that meeting, you advised us of your intent to go to Washington the following week to visit NRC officials to file a petition for enforcement.

We take exception not only to AEC's misstatement in that respect but also to your characterization of our position as

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being one of "intransigence." The Company made a price proposal to AEC in April, 1983. AEC has never responded with any figure at which it would purchase an interest in the plant. Rather, it has demanded that the Company agree to a philosophy for calculating a number without ever knowing what the number will be. We asked you for that number during the June 20, 1984 meeting but you told us that AEC did not have that number despite the passage of over 14 months since the Company's initial proposal. You did say, however, that unless AEC received the benefits that it would have obtained through ownership in the plant at whatever that number turned out to be, AEC was prepared to run the full course in litigation. This was your position even if it resulted in substantial cost penalties to APCO and its other customers.

In our meeting, you suggested that we study the situation to determine whether a proposal could be made by the Company (including a proposal dealing with unit power rather than joint ownership) which would result in AEC realizing the benefits as if AEC had invested in the Farley Plant starting in 1971 or 1972. We told you we would look at such a proposal to determine whether anything was possible. When we returned to Birmingham, we determined that our ability to make such a study was limited by our lack of knowledge of what you claim to be the cost penalty which Alabama Power must suffer to satisfy your fixed and unalterable condition.

While talking with Ray Claussen on June 27, 1984, I asked to be transferred to you and I was told you were in Washington. On July 2, 1984, I was on vacation, as was Joe Connor, and I had my secretary tell your secretary that we would be unable to meet on July 9, 1984 but would reschedule a meeting after we got back. I, therefore, must take exception to AEC's characterization in its pleading that the Company unilaterally precluded any further voluntary negotiations.

Please be assured that we are still willing to meet with you and discuss the sale of an interest in the plant. However, it is difficult to envision an agreement being reached when the agreements which we do have with you are not kept. If you will provide us with your initial counter-offer on price and the basis for such counter-offer, we will undertake

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to analyze that price and respond to you as discussed in our
June 20, 1984 meeting.

Sincerely,

Bob
B. J. Crawford

BJC/jw

cc: Mr. James A. Vann
Dixie Electric Cooperative, Inc.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing

- 1) Letter to the Commissioners of this date, and
- 2) Reply of Alabama Power Company to Responses of Alabama Electric Cooperative, Inc. and Department of Justice

in the above-captioned proceeding were served on the following by hand* or by deposit in the United States mail, first class, properly stamped and addressed, on the date shown below:

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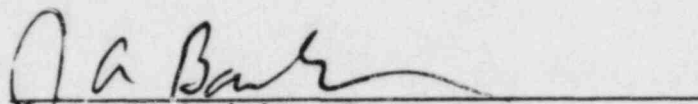
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Dated this 24th day of July, 1984.



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