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October 25, 1984

Docket Nos. 50-348 & 50-364
(10 CFR 2.206)

Bennett Boskey, Esq.
Volpe, Boskey, and Lyons
World Center Building
918 16th Street, N.W.
Washington, D.C. 20056

Dear Mr. Boskey:

In my letter to you of July 30, 1984, I said your petition under 10 CFR 2.206 on behalf of the Alabama Electric Cooperative would be held in abeyance pending the Commission's action on Alabama Power Company's request for initiation of a declaratory proceeding to resolve differences between the company and the cooperative over the antitrust conditions of the Farley licenses. As you know, the Commission has declined in its order dated September 7, 1984, to initiate a proceeding for declaratory relief. Accordingly, the staff will treat your petition as a request for action under 10 CFR 2.206 and will take appropriate action on the petition within a reasonable time.

A copy of a notice is enclosed that will be sent to the Office of the Federal Register for publication.

Sincerely,

Original Signed by
H. R. Denton

Harold R. Denton, Director
Office of Nuclear Reactor Regulation

Enclosure: as stated

See next page for cc's

Distribution

SBurns chron, OELD
BVogler, OELD
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Handwritten notes:
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DATE 10/18/84:	:10/18/84	:10/18/84	:10/19/84	:10/19/84	:10/19/84	:10/19/84

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FROM: Bennett Boskey & D. Biard MacGuineas Volpe, Boskey and Lyons	ACTION CONTROL		DATES	CONTROL NO.
	COMPL DEADLINE	7/25/84		14591
	INTERIM REPLY	8/13/84		DATE OF DOCUMENT
	FINAL REPLY	10/30/84		6/29/84
TO: Richard DeYoung	FILE LOCATION		PREPARE FOR SIGNATURE OF:	
				<input type="checkbox"/> CHAIRMAN
				<input type="checkbox"/> EXECUTIVE DIRECTOR
				OTHER: Denton

DESCRIPTION LETTER MEMO OTHER

2.206 - Alabama Elect requests take appropr Alabama Power Co. in licenses for operatio Nuclear Plant, Units

P-428
Karen Bowman

If this does not close out green ticket request completion deadline be extended until 4/30/85.

S. Reeves
27396

ASSIGNED TO	DATE
Cunningham, ELD	7/3/84
Eisenhut	7/16/84
Lainas	7/17
Varga	7/17

VOLPE, BOSKEY AND LYONS

WORLD CENTER BUILDING
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WASHINGTON, D. C. 20006

(202) 737-6580

JOSEPH VOLPE, JR.
BENNETT BOSKEY
ELLIS LYONS
EDWARD A. GROOBERT
D. BIARD MACGUINEAS
EDWIN E. HUDDLESON, III
EVA F. SHERMAN
PATRICIA A. MAYER

June 29, 1984

Mr. Richard C. DeYoung
Director
Office of Inspection and
Enforcement
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Mr. DeYoung:

As counsel for Alabama Electric Cooperative, Inc., we are filing herewith the Cooperative's request that you take appropriate action against Alabama Power Company in connection with Alabama Power Company's licenses for the operation of the Farley Nuclear Plant, Units 1 and 2.

If there is any additional information which you would regard as helpful in connection with this matter, please let us know and it will be promptly furnished.

Sincerely yours,

VOLPE, BOSKEY AND LYONS

By:

Bennett Boskey

Bennett Boskey

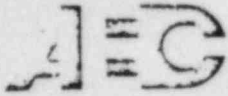
D. Biard MacGuineas

D. Biard MacGuineas

3407020296

Enclosure

cc: (with enclosure)
Joseph M. Farley
President, Alabama Power Company
Robert A. Buettner, Esq.



June 29, 1984

Mr. Richard C. DeYoung
Director
Office of Inspection and
Enforcement
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Mr. DeYoung:

Alabama Electric Cooperative, Inc. (AEC), pursuant to Section 2.206 of the Commission's Rules of Practice, requests the Director, Office of Inspection and Enforcement, to take appropriate action against Alabama Power Company (APCo) in connection with APCo's licenses for the operation of Farley Nuclear Plant, Units 1 and 2, based on APCo's willful and continuing violation of Antitrust License Condition No. 2. Under the circumstances set forth below, it is submitted that appropriate action should include (1) suspending APCo's licenses to operate Farley Nuclear Plant unless, within the period fixed by you for APCo's response, APCo has discontinued all such violations and has demonstrated that it has brought itself into full compliance with said Condition No. 2; and (2) imposing upon APCo the maximum civil penalty provided by law.

All licenses issued to APCo for the Farley Nuclear Plant, Units 1 and 2, are subject to Antitrust License Condition No. 2, which provides:

"2. Licensee shall offer to sell to AEC an undivided ownership interest in Units 1 and 2 of the Farley Nuclear Plant. The percentage of ownership interest to be so offered shall be an amount based on the relative sizes of the respective peak loads of AEC and the Licensee

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(excluding from the Licensee's peak load that amount imposed by members of AEC upon the electric system of the Licensee) occurring in 1976. The price to be paid by AEC for its proportionate share of Units 1 and 2, determined in accordance with the foregoing formula, will be established by the parties through good faith negotiations. The price shall be sufficient to fairly reimburse Licensee for the proportionate share of its total costs related to the Units 1 and 2 including, but not limited to, all costs of construction, installation, ownership and licensing, as of a date, to be agreed to by the two parties, which fairly accommodates both their respective interests. The offer by Licensee to sell an undivided ownership interest in Units 1 and 2 may be conditioned, at Licensee's option, on the agreement by AEC to waive any right of partition of the Farley plant and to avoid interference in the day-to-day operation of the plant." [1/]

The intent of this License Condition was explicated at length in ALAB-646, 13 NRC at 1102-1108. This condition has been final and binding on APCo since August 10, 1981. However, in the nearly three years since that date, it is the submission of AEC that APCo has made no good faith effort whatsoever to comply with this License Condition; that APCo instead has refused to negotiate a reasonable ownership agreement with AEC; and to the extent APCo has been willing to discuss the matter at all, APCo has proposed highly irrational, bizarre and unreasonable terms and conditions with respect to AEC's ownership rights such that APCo's position clearly evidences bad faith and a deliberate

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practice and course of conduct of refusing to comply with the License Condition required by this Commission.^{2/}

On July 17, 1981, AEC by letter requested APCo to furnish detailed cost information on the Farley Units to enable meaningful discussions to get under way. On July 23, 1981, APCo by letter refused to initiate discussions and, by its silence on the subject, refused to furnish the requested cost data. After a renewed request by AEC in October, 1981, APCo responded that the cost data would be forwarded later; implicit in this response was the incredible claim that APCo did not then have cost data for its nuclear units currently available. APCo also took the position that AEC would have to pay replacement cost to APCo for the amount of capacity represented by AEC's share of the nuclear units. Some data was furnished by APCo in November 1981; however, it required a number of clarifications and explanation due to its barebones nature. This was requested by letter from counsel for AEC to counsel for APCo, January 6, 1982. A partial response was received from APCo in February 1982.

The foot-dragging and bad faith tenor of APCo's approach to discussions regarding its compliance with its License Condition may be gleaned from passages from its letter of May 6, 1982, written at the time that AEC was still trying to get reasonably detailed cost data from the Company:

"As you are aware, the sale of plant as required by this license condition will result in the need to replace the capacity sold with capacity costing in the thousands of dollars per kilowatt. This additional cost must then be recovered in our rates to our customers. We would be interested in getting

^{2/} 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.

your views as to how the price of the capacity to be sold to AEC should be established in view of the additional cost burden which the sale will impose on customers.

"2. We would also be interested in your views as to provisions to be included in any agreement for sale dealing with how such sale could be reversed at a later date should Alabama Power's appeal of the decision requiring imposition of the condition be successful."

* * *

"As you are aware, the Appeal Board order penalizes the retail and other wholesale consumers of Alabama Power by accepting AEC's argument and requiring a sale which would allocate part of the Farley Plant to AEC's customers which the plant was not designed to serve. This was done not only by including in the calculation loads of AEC which were never intended to be served by the Farley Plant, i.e., the 'on system' customers, but also, by allocating the plant on the basis of the non-coincident peak load of AEC rather than the coincident peak demand of Alabama Power's customers."

AEC's response dated June 4, 1982 to these alleged APCo concerns constitutes TAB A hereto.

Some cost data was furnished by APCo in June and July of 1982, and some time was required to attempt to resolve inconsistencies and discrepancies among the data. A meeting on May 24, 1983, was scheduled by telephone. On April 29, 1983, prior to that meeting, APCo submitted an outline of conditions of sale. APCo's letter expressed inter alia the following positions:

"As you are aware, APCO continues to disagree with the necessity for any license conditions to be imposed, and with the propriety of the conditions imposed, particularly the one requiring forced sale of the plant to AEC."

* * *

"This outline is subject to revision during negotiations to reflect matters not heretofore recognized as problems associated with the proposed joint ownership arrangement."

* * *

"Fees for operating and maintaining the plant, shall be \$1.0 million per year, escalated each

year based on an acceptable Government index. A fee shall also be assessed equal to 15% of AEC's pro rata share of all direct and indirect expenditures associated with the making of any capital improvements. A fee equal to ten percent (10%) of AEC's pro rata share of the annual fuel costs shall also be assessed. These fees have been set on the assumption that APCO will have no responsibility to AEC for any loss associated with the plant, arising out of operations, maintenance, making of improvements or nuclear fuel acquisition activities."

* * *

"Provision will be included to exclude liability on the part of APCO for losses or costs to AEC for conduct of APCO, its agents, contractors or employees even though such conduct is alleged or determined to be willful, wanton, reckless or merely negligent."

* * *

"AEC shall be responsible for a pro rata share of all fines or penalties of any nature, under any law or regulation, associated with the operation, maintenance or decommissioning of the plant, including those imposed by NRC, EPA, other federal, state or local regulatory bodies, or by federal, state or local courts."

* * *

"REA shall guarantee the contingent liabilities of AEC associated with its ownership interest in the nuclear plant and its responsibility for payment of costs and expenses under the Operating Agreement."

* * *

"AEC's obligations under the Agreement shall be secured by a second mortgage on AEC's system.

"We would note further that in view of our offer made in this letter, we are hereby withdrawing our offer made in 1974 to negotiate the sale of unit power to AEC from the nuclear plant."

Apart from other highly unreasonable terms and conditions which APCo has been proposing, it is also clear that APCo's proposal for pricing AEC's share of the Farley Units demonstrates by itself APCo's bad faith and unreasonableness. It will be recalled that the license conditions require an

offer to sell at the cost of the plant to be determined by AEC's (not APCo's) cost of financing. ALAB-646 specifically rejected a unit power sale because inter alia it "includes a rate of return [profit] on the owner's [APCo's] investment," thereby depriving AEC of "the benefits of the advantageous financing otherwise available to it for the capital costs attributable to it [AEC's] share of the plant." 13 NRC at 1104.

APCo's pricing proposals are contained in Exhibit I to the Company's letter of April 29, 1983 [TAB B], APCo's data responses of June 10, 1983 [TAB C], APCo's proposed Purchase And Ownership Agreement (April 11, 1984) [TAB E], and APCo's proposed Operating Agreement (June 1, 1984) [TAB F]. AEC's response of June 24, 1983, to some of the objectionable aspects of APCo's June 1983 proposals is attached as TAB D. In its proposals APCo attempts to extract from AEC an approximate 100% profit for APCo above APCo's (unverified) book cost. From this aspect of APCo's position, it is evident that APCo remains blatantly contemptuous of its obligation to adhere to the terms of the licenses granted to it by this Commission. APCo's techniques for attempting to extract windfall profits in violation of its license requirements include:

- (1) attempting to charge AEC partially on the basis of replacement value of the Plant (i.e., charging AEC appreciation on a Plant which was depreciating during the period during which APCo has unlawfully denied AEC ownership access);

- (2) attempting to charge a fictitious "incremental gross AFUDC" (\$393 million for the Plant) which denies AEC its own cost-of-money benefits, which violates the Uniform System of Accounts, and which would profit APCo for APCo's continued refusal to grant ownership access for a decade and a half;

- (3) attempting to charge an incremental \$70 million for the Plant for "ownership risk" on the irrelevant claim that utilities building nuclear plants today have higher equity costs than existed at the time the Farley Units were built;

(4) attempting to include an income tax factor of \$246 million for the Plant (based in large part on the profit APCo seeks to make from AEC) without showing or even claiming that APCo will actually suffer any income tax payment because of the sale, and without recognition that if any adverse income tax effect were to result, it would be solely the result of APCo's management's deliberate decision to unlawfully withhold ownership access from AEC and therefore must be borne by APCo stockholders;

(5) attempts to collect an "entitlement fee" (\$170 million above Plant cost) as an arbitrary profit, contrary to the license conditions;

(6) attempts to receive \$114 million per Plant for "adverse financial consequences" to compensate for alleged depressed Southern Company stock prices (without regard to whether these so-called "adverse financial consequences" were attributable to the financial community's negative opinion as to APCo's management, or a variety of other possible causes);

(7) attempts to receive substantial profits from AEC over and above APCo's actual costs from the sale of nuclear fuel rights, and for the operation of the facility.

Apart from such unreasonable and unwarranted components in its pricing proposals, APCo has also proposed a percentage ownership for AEC which is contrary to the formula developed in ALAB-646 (see 13 NRC at 1107-1108) and which attempts to deprive AEC of AEC's fair share of the Farley Units. As AEC responded on June 24, 1983 [TAB D]:

"1. We must first disagree with the ownership percentage (5.95%) suggested by APCo. The 243.9 MW AEC on-system peak and the 40 MW deduction for industrial and Florida load were provided by AEC. However, we estimate the load contributed by AEC's off-system members to be higher than what you have

utilized. In any case, it appears that your 184.0 MW estimate is at the delivered level. If this is true, losses must be added to your estimate to obtain a generation level number consistent with the generation level on-system load. Further we cannot accept your subtraction of SEPA preference customer demand from the off-system component. ALAB-646 makes clear that the proper measure is the peak load, or demand, of AEC and off-system members -- not merely the increment of demand furnished by APCo. As the Board said (13 NRC at 1108)

'AEC suggests instead that the ratio should be pegged to the load of AEC's on-system and off-system members and of the applicant at the time of their respective peak loads. [Emphasis in original.]

"We agree with this position of AEC. Basing the allocation formula on the time of applicant's peak demand skews the result in its favor. A more equitable division of ownership would result if the shares were to be determined by the respective peak demands of AEC and the applicant occurring during 1976. The license condition we impose is based accordingly.'

There is simply no rational basis for APCo to deduct the SEPA increment from the peak load measure.

"Finally, we note that the Company used 5880.5 MW as the measure of its peak load, July 26, 1976 at 1:00 p.m. However, this is not consistent with Company representations made elsewhere. The Company's 1976 Form 1 and rate case historical data for July 1976 indicates that the Company's peak occurred on July 14, 1976 with the hour ending at 4:00 p.m. The rate case data also indicates a greater contribution by AEC members than the 173.3 MW shown in your June 10, 1983 data. We also believe that this number does not include losses, but is measured at the delivered level.

"The Company's computation of AEC's load component is clearly defective as noted above, and the better measure is the 410.9 MW furnished to you in my letter of June 4, 1982. While the Company has had this measure for over a year it has never taken issue with it. Even this measure understates the load component AEC is entitled to,

since it sums AEC's peak and the demands on the off-system members coincident to AEC's peak. Under the Antitrust License Conditions, AEC is entitled to a measure that sums AEC's peak and the non-coincident peaks of each off-system member. Thus, the 410.9 MW measure understates AEC's actual load component under the ALAB-646 formula."

Properly computed (based on AEC's and its off-system members' peak load), AEC's ownership share is 6.7%. While APCo has subsequently accepted some corrections which would bring its figure above the 5.95% it initially proposed, it has steadfastly refused to accept the correct 6.7% figure.

Other contract terms insisted upon by APCo which evidence and confirm APCo's bad faith and refusal to comply with its NRC licenses are found in correspondence from APCo, positions stated by APCo at negotiation meetings, and in APCo's proposed draft Ownership and Operating Agreements (TABS E and F), which were submitted in response to AEC's proposed Joint Ownership, Operating and Nuclear Fuel Agreement of January 20, 1984 [TAB G]. Among these APCo-proposed unconscionable conditions are:

- (a) APCo's insistence that the Rural Electrification Administration "guarantee" AEC's performance for the life of the agreement. APCo continues to insist on this even though it has been informed that REA could not agree to such a condition. Nor has APCo indicated any basis upon which one might conclude that REA has the statutory authority to take such a position. Indeed, it must have been apparent to APCo from the beginning that there was not the slightest possibility that REA would ever issue such a guaranty. Accordingly, it would be difficult to avoid the conclusion that the proposal was advanced not in good faith but for the purpose of forestalling a contractual arrangement of the type required by the license.

- (b) Though APCo insists that AEC pay in advance for all capital and operating costs (even prior to the determination of the dollar value of those costs), APCo also demands a second mortgage on AEC's entire electric system, while at the same time APCo refuses to make even the barest commitment to operate the Farley Plant in a reasonable manner.
- (c) Not only has APCo refused to agree in any way to assist in the gaining of necessary regulatory approvals for AEC's acquisition of its ownership share, but APCo has informed AEC that APCo fully reserves the right to raise objections thereto.
- (d) APCo refuses to accept any responsibility to AEC for any gross negligence or reckless misconduct by APCo in the operation of the Plant. At the same time, APCo insists that AEC share payment of any fines or penalties incurred by APCo as sole operator of the facility even to the extent that the APCo conduct resulting in such penalties occurred prior to the time when AEC takes title to AEC's share of the Units.
- (e) APCo insists that AEC is fully liable for any "incremental costs" (whatever that may mean) of AEC's joint ownership, and APCo attempts to reserve the right to define solely in its own discretion what such an "incremental cost" is.

A review of APCo's proposed agreements will demonstrate a number of other plainly unreasonable terms and conditions. However, the above examples are sufficient to establish that APCo has not been and is not pursuing compliance with its NRC license obligations in good faith, and that enforcement action by the Commission is promptly required to cure APCo's contemptuous refusal to meet its obligations as an NRC licensee. 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.

Respectfully submitted,

ALABAMA ELECTRIC COOPERATIVE, INC.

By Charles L. Lowman
General Manager

8419

FROM: Bennett Boskey & D. Biard MacGuineas Volpe, Boskey and Lyons	ACTION CONTROL		DATES	CONTROL NO.
	COMPL DEADLINE	7/25/84		14591
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TO: Richard DeYoung	FILE LOCATION		PREPARE FOR SIGNATURE OF: <input type="checkbox"/> CHAIRMAN <input type="checkbox"/> EXECUTIVE DIRECTOR OTHER: Denton	

DESCRIPTION LETTER MEMO REPORT OTHER

2.206 - Alabama Elect requests take appropr Alabama Power Co. in licenses for operatio Nuclear Plant, Units

Naren Bowman P-428

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VOLPE, BOSKEY AND LYONS

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2021 737-6580

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Dear Mr. DeYoung:

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By:

Bennett Boskey

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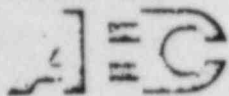
D. Biard MacGuineas

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Enclosure

cc: (with enclosure)
Joseph M. Farley
President, Alabama Power Company
Robert A. Buettner, Esq.

Sub



June 29, 1984

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Director
Office of Inspection and
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U.S. Nuclear Regulatory Commission
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Dear Mr. DeYoung:

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your views as to how the price of the capacity to be sold to AEC should be established in view of the additional cost burden which the sale will impose on customers.

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* * *

"Fees for operating and maintaining the plant, shall be \$1.0 million per year, escalated each

year based on an acceptable Government index. A fee shall also be assessed equal to 15% of AEC's pro rata share of all direct and indirect expenditures associated with the making of any capital improvements. A fee equal to ten percent (10%) of AEC's pro rata share of the annual fuel costs shall also be assessed. These fees have been set on the assumption that APCO will have no responsibility to AEC for any loss associated with the plant, arising out of operations, maintenance, making of improvements or nuclear fuel acquisition activities."

* * *

"Provision will be included to exclude liability on the part of APCO for losses or costs to AEC for conduct of APCO, its agents, contractors or employees even though such conduct is alleged or determined to be willful, wanton, reckless or merely negligent."

* * *

"AEC shall be responsible for a pro rata share of all fines or penalties of any nature, under any law or regulation, associated with the operation, maintenance or decommissioning of the plant, including those imposed by NRC, EPA, other federal, state or local regulatory bodies, or by federal, state or local courts."

* * *

"REA shall guarantee the contingent liabilities of AEC associated with its ownership interest in the nuclear plant and its responsibility for payment of costs and expenses under the Operating Agreement."

* * *

"AEC's obligations under the Agreement shall be secured by a second mortgage on AEC's system.

"We would note further that in view of our offer made in this letter, we are hereby withdrawing our offer made in 1974 to negotiate the sale of unit power to AEC from the nuclear plant."

Apart from other highly unreasonable terms and conditions which APCo has been proposing, it is also clear that APCo's proposal for pricing AEC's share of the Farley Units demonstrates by itself APCo's bad faith and unreasonableness. It will be recalled that the license conditions require an

offer to sell at the cost of the plant to be determined by AEC's (not APCo's) cost of financing. ALAB-646 specifically rejected a unit power sale because inter alia it "includes a rate of return [profit] on the owner's [APCo's] investment," thereby depriving AEC of "the benefits of the advantageous financing otherwise available to it for the capital costs attributable to it [AEC's] share of the plant." 13 NRC at 1104.

APCo's pricing proposals are contained in Exhibit I to the Company's letter of April 29, 1983 [TAB B], APCo's data responses of June 10, 1983 [TAB C], APCo's proposed Purchase And Ownership Agreement (April 11, 1984) [TAB E], and APCo's proposed Operating Agreement (June 1, 1984) [TAB F]. AEC's response of June 24, 1983, to some of the objectionable aspects of APCo's June 1983 proposals is attached as TAB D. In its proposals APCo attempts to extract from AEC an approximate 100% profit for APCo above APCo's (unverified) book cost. From this aspect of APCo's position, it is evident that APCo remains blatantly contemptuous of its obligation to adhere to the terms of the licenses granted to it by this Commission. APCo's techniques for attempting to extract windfall profits in violation of its license requirements include:

- (1) attempting to charge AEC partially on the basis of replacement value of the Plant (i.e., charging AEC appreciation on a Plant which was depreciating during the period during which APCo has unlawfully denied AEC ownership access);

- (2) attempting to charge a fictitious "incremental gross AFUDC" (\$393 million for the Plant) which denies AEC its own cost-of-money benefits, which violates the Uniform System of Accounts, and which would profit APCo for APCo's continued refusal to grant ownership access for a decade and a half;

- (3) attempting to charge an incremental \$70 million for the Plant for "ownership risk" on the irrelevant claim that utilities building nuclear plants today have higher equity costs than existed at the time the Farley Units were built;

(4) attempting to include an income tax factor of \$246 million for the Plant (based in large part on the profit APCo seeks to make from AEC) without showing or even claiming that APCo will actually suffer any income tax payment because of the sale, and without recognition that if any adverse income tax effect were to result, it would be solely the result of APCo's management's deliberate decision to unlawfully withhold ownership access from AEC and therefore must be borne by APCo stockholders;

(5) attempts to collect an "entitlement fee" (\$170 million above Plant cost) as an arbitrary profit, contrary to the license conditions;

(6) attempts to receive \$114 million per Plant for "adverse financial consequences" to compensate for alleged depressed Southern Company stock prices (without regard to whether these so-called "adverse financial consequences" were attributable to the financial community's negative opinion as to APCo's management, or a variety of other possible causes);

(7) attempts to receive substantial profits from AEC over and above APCo's actual costs from the sale of nuclear fuel rights, and for the operation of the facility.

Apart from such unreasonable and unwarranted components in its pricing proposals, APCo has also proposed a percentage ownership for AEC which is contrary to the formula developed in ALAB-646 (see 13 NRC at 1107-1108) and which attempts to deprive AEC of AEC's fair share of the Farley Units. As AEC responded on June 24, 1983 [TAB D]:

"1. We must first disagree with the ownership percentage (5.95%) suggested by APCo. The 243.9 MW AEC on-system peak and the 40 MW deduction for industrial and Florida load were provided by AEC. However, we estimate the load contributed by AEC's off-system members to be higher than what you have

utilized. In any case, it appears that your 184.0 MW estimate is at the delivered level. If this is true, losses must be added to your estimate to obtain a generation level number consistent with the generation level on-system load. Further we cannot accept your subtraction of SEPA preference customer demand from the off-system component. ALAB-646 makes clear that the proper measure is the peak load, or demand, of AEC and off-system members -- not merely the increment of demand furnished by APCo. As the Board said (13 NRC at 1108)

'AEC suggests instead that the ratio should be pegged to the load of AEC's on-system and off-system members and of the applicant at the time of their respective peak loads. [Emphasis in original.]

"We agree with this position of AEC. Basing the allocation formula on the time of applicant's peak demand skews the result in its favor. A more equitable division of ownership would result if the shares were to be determined by the respective peak demands of AEC and the applicant occurring during 1976. The license condition we impose is based accordingly.'

There is simply no rational basis for APCo to deduct the SEPA increment from the peak load measure.

"Finally, we note that the Company used 5880.5 MW as the measure of its peak load, July 26, 1976 at 1:00 p.m. However, this is not consistent with Company representations made elsewhere. The Company's 1976 Form 1 and rate case historical data for July 1976 indicates that the Company's peak occurred on July 14, 1976 with the hour ending at 4:00 p.m. The rate case data also indicates a greater contribution by AEC members than the 173.3 MW shown in your June 10, 1983 data. We also believe that this number does not include losses, but is measured at the delivered level.

"The Company's computation of AEC's load component is clearly defective as noted above, and the better measure is the 410.9 MW furnished to you in my letter of June 4, 1982. While the Company has had this measure for over a year it has never taken issue with it. Even this measure understates the load component AEC is entitled to,

since it sums AEC's peak and the demands on the off-system members coincident to AEC's peak. Under the Antitrust License Conditions, AEC is entitled to a measure that sums AEC's peak and the non-coincident peaks of each off-system member. Thus, the 410.9 MW measure understates AEC's actual load component under the ALAB-646 formula."

Properly computed (based on AEC's and its off-system members' peak load), AEC's ownership share is 6.7%. While APCo has subsequently accepted some corrections which would bring its figure above the 5.95% it initially proposed, it has steadfastly refused to accept the correct 6.7% figure.

Other contract terms insisted upon by APCo which evidence and confirm APCo's bad faith and refusal to comply with its NRC licenses are found in correspondence from APCo, positions stated by APCo at negotiation meetings, and in APCo's proposed draft Ownership and Operating Agreements (TABS E and F), which were submitted in response to AEC's proposed Joint Ownership, Operating and Nuclear Fuel Agreement of January 20, 1984 [TAB G]. Among these APCo-proposed unconscionable conditions are:

- (a) APCo's insistence that the Rural Electrification Administration "guarantee" AEC's performance for the life of the agreement. APCo continues to insist on this even though it has been informed that REA could not agree to such a condition. Nor has APCo indicated any basis upon which one might conclude that REA has the statutory authority to take such a position. Indeed, it must have been apparent to APCo from the beginning that there was not the slightest possibility that REA would ever issue such a guaranty. Accordingly, it would be difficult to avoid the conclusion that the proposal was advanced not in good faith but for the purpose of forestalling a contractual arrangement of the type required by the license.

- (b) Though APCo insists that AEC pay in advance for all capital and operating costs (even prior to the determination of the dollar value of those costs), APCo also demands a second mortgage on AEC's entire electric system, while at the same time APCo refuses to make even the barest commitment to operate the Farley Plant in a reasonable manner.
- (c) Not only has APCo refused to agree in any way to assist in the gaining of necessary regulatory approvals for AEC's acquisition of its ownership share, but APCo has informed AEC that APCo fully reserves the right to raise objections thereto.
- (d) APCo refuses to accept any responsibility to AEC for any gross negligence or reckless misconduct by APCo in the operation of the Plant. At the same time, APCo insists that AEC share payment of any fines or penalties incurred by APCo as sole operator of the facility even to the extent that the APCo conduct resulting in such penalties occurred prior to the time when AEC takes title to AEC's share of the Units.
- (e) APCo insists that AEC is fully liable for any "incremental costs" (whatever that may mean) of AEC's joint ownership, and APCo attempts to reserve the right to define solely in its own discretion what such an "incremental cost" is.

A review of APCo's proposed agreements will demonstrate a number of other plainly unreasonable terms and conditions. However, the above examples are sufficient to establish that APCo has not been and is not pursuing compliance with its NRC license obligations in good faith, and that enforcement action by the Commission is promptly required to cure APCo's contemptuous refusal to meet its obligations as an NRC licensee. 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.

Respectfully submitted,

ALABAMA ELECTRIC COOPERATIVE, INC.

By Charles L. Lowman
General Manager