DD-86-07

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION
Harold R. Denton, Director

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

(2.206)

DIRECTOR'S DECISION UNDER 10 C.F.R. 2.206

I. INTRODUCTION

On June 29, 1984, the Alabama Electric Cooperative, Inc., (AEC) petitioned the Nuclear Regulatory Commission (NRC) pursuant to 10 C.F.R. § 2.206 to enforce Antitrust License Condition No. 2 which is now incorporated in the Joseph M. Farley Nuclear Plant Units 1 and 2 (Farley) licenses. Subsequently, the Alabama Power Company (APCo) requested the NRC to hold in abeyance action on AEC's petition for enforcement and institute proceedings leading to the issuance of a declaratory order clarifying the obligation of APCo under the antitrust license conditions contained in the Farley licenses.

In an Order, dated July 10, 1984, the Commission requested AEC and other interested parties to file with the Commission their views on the choice of procedure the NRC should follow. The Department of Justice (Department) and AEC opposed APCo's petition for proceedings leading to a declaratory order. The Commission decided to follow the usual procedures in 10 C.F.R. § 2.206 for evaluation of such petitions and referred AEC's petition for enforcement to the Director of Nuclear

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Reactor Regulation for evaluation. Subsequently, APCo responded to AEC's petition for enforcement of license conditions and AEC in turn provided further information in support of its petition. After reviewing the information submitted by the parties, the NRC staff had several meetings with all the parties, both separately and jointly, in an effort to resolve these issues. There was also one meeting with representatives of the Federal Energy Regulatory Commission to obtain information regarding the regulatory treatment of "Allowance for Funds Used During Construction (AFUDC)." While the meetings were most helpful in leading to an understanding of the positions of the parties and in narrowing the issues, the parties have now advised the NRC staff that they were unable to reach a settlement of all the issues. Accordingly, for the reasons set forth below, I have determined to grant AEC's petition in part, and to deny it in part.

II. BACKGROUND

On August 16, 1971, the Attorney General, pursuant to Section 105c of the Atomic Energy Act, as amended, advised that a hearing should be held to consider whether the activities of Alabama Power Company under the Farley licenses would tend to create or maintain a situation inconsistent with the antitrust laws. Following a notice of the Attorney General's advice in the Federal Register, AEC and the Municipal Electric Utility Association of Alabama (MEUA) petitioned to intervene in the antitrust proceedings. The petitions were granted and hearings commenced in December 1974. In addition to APCo, AEC and MEUA, the Department of Justice and the NRC staff participated.

The Licensing Board found that APCo's activities under the nuclear plant license would maintain a situation inconsistent with the antitrust laws. As a remedy, the Board imposed certain conditions on APCo's licenses. The most relevant to the issues now before me was a requirement that APCo offer to sell unit power to AEC from the Farley Plant. 1/

All parties appealed the Licensing Board's decision to the NRC's Atomic Safety and Licensing Appeal Board (Appeal Board). The Appeal Board affirmed in large part the Board's findings, but found that in order to remedy the situation inconsistent with the antitrust laws APCo should offer AEC ownership participation in the Farley Plant instead of unit power. 2/

The following findings of the Appeal Board are particularly relevant to the enforcement issues posed in this case:

> In a unit power arrangement, the purchaser is charged for all the owner's cost of providing that power, including the costs of capital, of construction, and of fuel and operation. Where the owner is a private utility such as the applicant here, the charge to the purchaser includes a rate of return on the owner's investment. This means that were AEC to purchase power from the applicant on a unit power basis, it would lose the benefits of the advantageous financing otherwise available to it for the capital costs attributable to its share of the plant. Due to its cheaper capital costs, primarily through the availability of low-cost loans, AEC could save approximately 7 mills per KWH through ownership access to Farley as opposed to unit power access. It also has certain tax advantages over investor-owned utilities (Footnotes omitted). 3/

1/ Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2) LBP-77-41, 5 NRC 1482, 1507, (1977).

2/ ALAB-646, 13 NRC 1027, 1103 (1981).

3/ Id. at 1104.

> AEC accepts that "participation should be on the basis of the proportion of AEC's on- and off-system wholesale loads in central and southern Alabama to the total loads of both parties in such area." However, it points out that the peak demands for each of AEC's on-system and off-system members and for applicant do not occur simultaneously. The result of the Licensing Board's allocation formula, says AEC, enables the applicant to retain a disproportionate share of the facility. 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 (Footnotes omitted).
>
> 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.[4/] The license condition we impose is based accordingly.

The Appeal Board ordered 8 conditions to be made a part of the Farley licenses. Condition No. 2 is the one in contention and it states as follows:

> 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 (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.

4/ Id. at 1108.

The Appeal Board issued its decision on June 30, 1981. The Commission declined to review the decision, and APCo's petition for a stay was denied on August 10, 1981. The U.S. Court of Appeals affirmed the decision, and certiorari was denied by the Supreme Court. [5/] Farley 1 began commercial operation on December 1, 1977, Farley 2 on July 30, 1981.

AEC's petition alleges fourteen instances by which APCo's proposal for the sale of a portion of Farley Unit 1 and 2 is in violation of its license requirements. The first seven amount to allegations that APCo is attempting to extract "windfall" profits from the sale of the plant. The remaining allegations concerns other terms and conditions requested by APCo. These allegations are:

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;

5/ Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-646, 13 NRC 1027 (1981), aff'd, Alabama Power Co. v. NRC, 692 F.2d 1362 (11th Cir. 1982), cert. denied, 104 S.Ct. 72 (1983).

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); and

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

8. 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.

9. 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.

10. 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.

11. 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.

12. 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.

13. 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.

14. 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.

In reviewing this matter, I have considered whether the offer made by APCo to sell a portion of Farley Units 1 and 2 to AEC was in conformance with the License Conditions attached to the License for these units. This determination included an analysis as to whether the terms offered by APCo are reasonable and in fact a good faith effort to comply with its license. Based upon my review, I have decided to grant in part and deny in part AEC's petition. Those matters subject to

enforcement [6/] are set forth in the accompanying Notice of Violation (Attachment A) and those matters not subject to enforcement [7/] and for which AEC's petition is denied are set forth in this Director's Decision under 10 C.F.R. § 2.206.

III. DIRECTOR'S DECISION UNDER 10 C.F.R. 2.206

A. Those matters in which the Director has determined that there is no basis for enforcement action.

1. In alleged violation 10, AEC alleges that APCo has refused to agree to assist AEC in gaining necessary regulatory approvals for AEC's acquisition of its ownership share and that APCo reserves the right to raise objections to such ownership acquisition. [8/] APCo denies that it has refused to assist AEC in the gaining of necessary regulatory approvals for AEC's ownership acquisition in the Farley plant. [9/] Staff has found no indication that APCo has, or intends to, refuse to provide the necessary information and regulatory filings required for AEC to obtain an ownership interest in the Farley plant. Staff

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6/ Alleged violations 1 through 7, 8, 9, 12, and 13.

7/ Alleged violations 10, 11 and 14.

8/ Letter with attachments from Charles R. Lowman, General Manager of Alabama Electric Cooperative, Inc. June 29, 1984, to Richard C. DeYoung, Director, Office of Inspection & Enforcement, U.S. Nuclear Regulatory Commission, at 10. Hereafter, "Lowman Letter."

9/ Letter, J. A. Bouknight, Jr., Newman and Holtzinger, P.C., October 15, 1984, to Harold R. Denton, Director, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, at 50-51. Hereafter, "Bouknight Letter".

does not believe that regulatory action is needed to state that APCo, as part of a settlement agreement, need not waive its right to comment as it sees fit in regulatory or other proceedings, so long as APCo does not withhold or refuse to file the necessary documents and information.

2. In allegation 11, AEC alleges that APCo has refused to accept any responsibility to AEC for any "gross negligence or reckless misconduct" by APCo in the operation of the plant. 10/ APCo responds that its 94% interest in the plant and its $1.5 billion equity investment is the best evidence of APCo's commitment to operate the plant in a reasonable and conscientious manner. 11/ APCo claims further that it is unreasonable for AEC to expect APCo to assume sole operating responsibility on a non-profit basis, while remaining fully liable to AEC for unintentional as well as willful misconduct.

Staff believes that if APCo is required to operate AEC's portion of the plant at cost, without profit or special management fee, as the license condition requires, then no regulatory action by NRC is needed to state that APCo is not liable to AEC for any unintentional conduct on APCo's part.

10/ Lowman Letter, at 10.

11/ Bouknight Letter, at 49.

3. In allegation 14, AEC maintains that APCo has derived a percentage ownership for AEC which does not conform to the license condition. 12/ APCo claims that its method of calculating the ownership share to which AEC is entitled is consistent with the license condition. 13/

The controversy stems from whether the load of AEC's off-system members that was furnished in 1976 by the Southeastern Power Administration (SEPA) should properly be considered as AEC's load in 1976. The license condition states:

> 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 (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 above license condition does not indicate whether the load supplied by SEPA in 1976 to AEC's members should be considered also as AEC's load. The Appeal Board's decision states:

> ". . . 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." 14/

12/ Lowman Letter, at 7-9.

13/ Bouknight Letter, at 41-43.

14/ ALAB-646, 13 NRC 1027, 1108 (1981).

This clearly indicates that AEC's peak load is to be based on the coincident peak demand of its members, but does not indicate whether the raw loads of the members are to be used, or the loads net of those supplied by SEPA.

The NRC staff believes that the loads net of those supplied by SEPA is the most reasonable interpretation. The license condition pertains to AEC's ownership share in the nuclear plant, suggesting that AEC's load responsibility is the relevant factor. The NRC staff believes that since the SEPA-supplied power was and is contractually committed to AEC's members, rather than to AEC, then AEC's load responsibility was the coincident sum of its members' native loads less the SEPA supplied power.

The license condition refers to the peak load of AEC. Also, in its decision the Appeal Board stated:

> 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 (emphasis added). [15]

The license condition specifies one exception to the peak loads of AEC and APCo by stating:

> ". . . (excluding from the Licensee's peak load that amount imposed by the members of AEC upon the electric system of the Licensee) occurring in 1976."

15/ Id.

In this instance, the Appeal Board recognized that the load supplied by APCo should not be credited to APCo. No such exception was specified regarding the SEPA supplied load.

IV. CONCLUSION

For the reasons set forth above, I have declined to initiate enforcement action on allegations 10, 11 and 14 of AEC's petition. However, with respect to the remaining allegations, I have granted AEC's petition. Therefore, I am initiating enforcement action to require APCo's compliance with License Condition Number 2.

As indicated above, I am issuing a Notice of Violation pursuant to 10 C.F.R. § 2.201 concurrently with this decision. The Notice of Violation, appended hereto as Attachment A, requires APCo to respond to the alleged violations and to take timely steps to achieve compliance. If APCo's response to the Notice of Violation or its corrective action is unsatisfactory, I will consider whether other enforcement action, such as the issuance of orders or the imposition of civil penalties, is appropriate. A copy of this decision will be filed with the Office of the Secretary of the Commission for the Commission's review in accordance with 10 C.F.R. § 2.206(c).

Harold R. Denton, Director
Office of Nuclear Reactor
Regulation

Dated at Bethesda, Maryland,
this 16th day of June, 1986.