Central Files

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
CONSUMERS POWER COMPANY	)	Docket Nos. 50-329A
	)	50-330A
(Midland Plant, Units 1 and 2)	)	
	)	

REPLY OF AEC REGULATORY STAFF TO
APPLICANT'S ANSWER TO NOTICE OF HEARING

Pursuant to the provisions of 10 CFR, Part 2, §2.706 of the Commission's Rules of Practice, the AEC Regulatory Staff (Staff) hereby replies to the answer to Notice of Hearing filed by Consumers Power Company (applicant).

1. In the first part of its answer the applicant maintains that its activities under the permits in question would not create or maintain (emphasis added) a situation inconsistent with the antitrust laws and that the legislative history of the Atomic Energy Act, as amended, (Act) demonstrates that Congress intended the Commission to consider the implications, from the standpoint of the antitrust laws and policies of only the construction and operation of the proposed facilities. Applicant contends that the licenses in question are not concerned with its overall activities as a utility and that such activities are beyond the reach of the Act.

The Staff does not agree with the applicant's interpretation of the Act and its legislative history. However, this issue as well as whether the applicant's activities under the licenses in question will create or

maintain a situation that is inconsistent with the antitrust laws will be addressed and resolved at the forthcoming hearings on this matter. The primary purpose of the hearing herein is set forth on page 3 of the Notice.

> "The issue to be considered at the hearing is whether the activities under the permits in question would create or maintain a situation that is inconsistent with the antitrust laws---. In its initial decision, the Board will decide those matters relevant to that issue which are in controversy among the parties (Notice of Antitrust Hearing on Application for Construction Permits, page 3, April 11, 1972.)"

2. In the second part of its answer the applicant opposes the Commission's appointment of an Atomic Safety and Licensing Appeal Board. Applicant maintains that the issues involved in this matter are so fundamental and novel that they require a full review by the Commission itself. The Staff agrees that there are fundamental issues involved in the proceeding and that questions of first impression for the AEC will be presented. The staff submits, however, that the Commission's Rules of Practice applicable to proceedings subject to Appeal Board review are fully adequate in these circumstances. Those rules (10 CFR Part 2 §§2.785 and 2.786) make provision for review and final decision by the Commission when it determines that major or novel questions of policy, law or procedure have been erroneously decided in the proceedings below. Implicit

in these rules provisions is the assumption that the Appeal Board may be called upon to deal with questions which are fundamental, or novel or both; and the explicit is the consequent review role marked out for the Commission itself.

Applicant's motion in this respect should, accordingly, be denied.

3. In the third part of its Answer, the applicant opposes the designation of Dr. Leonard W. Weiss as a member of the hearing board and moves the Commission to reconsider its selection of Dr. Weiss because of his alleged prejudgment of the law and facts herein and his prior relationship with the U. S. Department of Justice.

In support of its motion, the applicant cites the fact that Dr. Weiss testified as one of the Antitrust Division's chief economic witnesses in a proceeding before the Securities and Exchange Commission entitled American Electric Power Company Inc., (AEP) (SEC. file No. 70-4956) and that the issues in the AEP proceeding and the instant matter are the same. In addition, applicant refers to a paper Dr. Weiss presented and discussed at a meeting sponsored by the Brookings Institute. Quotes from this paper are used by the applicant to show Dr. Weiss' purported prejudgment and bias herein.

A considerable amount of the applicant's allegations against Dr. Weiss relate to his professional relationship with the Department of Justice; and the proper response to these charges rests with the Department. The staff has been informed by the Department that it intends to file an affidavit concerning Dr. Weiss.

The staff supports the Commission's appointment of Dr. Weiss to the Board and opposes the applicant's motion for reconsideration on the ground of disqualifying bias. Dr. Weiss appears well qualified to serve on the Board. His educational background, professional experience and expertise in this area evidence his qualifications. Because of his background and because he is an expert, the Department of Justice engaged Dr. Weiss as a special economic consultant and advisor. As such, Dr. Weiss testified in the aforementioned AEP proceeding as an expert economic witness and not as an employee of the Antitrust Division.

Similarly, at the meeting sponsored by the Brookings Institute, where Dr. Weiss presented his paper on "Antitrust in the Electric Power Industry," he was there as an economic authority and expert, not as an "ally" of the Department of Justice.

Dr. Weiss' economic expertise, his studies of the electric power industry, and his participation as an expert in an unrelated legal proceeding involving the power industry, do not constitute, singly or in combination, disqualifying bias and prejudgment in this matter. If the case is otherwise, and we submit that it is not, then every judge and every hearing examiner who has ever heard a case would be barred from hearing another case involving similar issues. Patently, all men who have reflected on controversial matters have ideas and conceptions of those matters; but this does not mean they are incapable of rendering an impartial judgment. (2 Davis, Administrative Law Treatise, Chapter 12, §12.01)

The opinion of the Supreme Court in Federal Trade Commission v. Cement Institute, 333 U. S. 683, (1948) considered this question. In this matter, the FTC issued a cease and desist order against the use of a multiple basing-point system in the selling of cement. Before instituting the legal proceeding, the FTC made several reports to the Congress and the President stating that, on the basis of their investigations, the basing-point system was a clear violation of the Sherman Act. The cement companies contended that because of the FTC's previous statements it was biased, prejudiced and had prejudged the issues. The Court, in response to this allegation, agreed that an opinion had been formed by the FTC as a result of its investigations, but that this previously formed opinion did not disqualify the FTC. The Court said there was no indication that the minds of the FTC Commissioners were "irrevocably closed" and that judges frequently try the same case more than once and decide identical issues each time. (333 U. S. at 700, 703). See also McKay v. Alexander, 268 F.2d 35 (9th Cir. 1959).

Within the framework of these guiding concepts the staff submits, Dr. Weiss is not properly subject to disqualification on the grounds of bias and prejudgment of the matters in issue. He remains what he was when appointed -- an economic expert who is exceptionally well qualified to serve on this Board.

Respectfully submitted,

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Dated at Bethesda, Maryland
this 24th day of May, 1972.