

UNITED STATES OF AMERICA
BEFORE THE
ATOMIC ENERGY COMMISSION



In the Matter of
CONSUMERS POWER COMPANY
(Midland Plant, Units 1 and 2)

Docket Nos. 50-329A
50-330A

RESPONSE OF THE DEPARTMENT OF JUSTICE
TO THE BOARD'S AUGUST 19, 1974 ORDER

The Department of Justice hereby files this response to the Board's August 19, 1974 Order. In that order, the Board requested the assistance of the parties in making a determination in regard to the appointment of a third board member to fill the vacancy caused by the death of Jerome Garfinkel. Unfortunately, we have found no authority which is dispositive of this question.

Moreover, the AEC Rules of Practice do not clearly resolve the problem. Rule 2,704, section (d) speaks to the question, but only lists several options the Board may follow. The rule states that if a presiding officer becomes unavailable after the hearing has been concluded, the Commission may (1) designate another presiding officer to make the decision, (2) direct the record be certified to the

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Commission or the Atomic Safety and Licensing Appeal Board for decision, or (3) designate another presiding officer. While the meaning of the language of alternative (3) above is not entirely clear, we believe that it may be read to mean that the Board may appoint one of the remaining two members of the Board as the presiding officer and that a two-man board can then proceed to decision. To read that provision otherwise would make it redundant of alternative (1).

Rule 2.721 also is relevant to this determination. Section (b) of that rule states that the Commission may designate an alternate to replace a member of the board who becomes unavailable before the commencement of the proceeding. Section (d) of the rule states that two members of a board constitute a quorum. Since the rules make no provision for the appointment of an alternative to the board after the commencement of the proceeding, but do state that two board members constitute a quorum, they imply that the hearing may properly proceed without the appointment of a third member.

While an opposite reading of the rules can arguably be made, we believe proceeding with a two-man board under these circumstances is consistent with sound public policy. 1/

1/ We express no view as to the appointment of a third member when a vacancy occurs at a somewhat earlier stage of a proceeding.

To appoint a third member to the board is only to invite delay in this crucial proceeding of first impression. A third board member would have to read the entire record in this proceeding which amounts to nearly 10,000 pages of testimony, in addition to numerous exhibits, briefs, board orders, prehearing transcripts, depositions, etc. All of this would have to be done by a board member who would come into the proceeding at this late date totally unfamiliar with the case. The extreme burden this would entail for any new board member could only result in unnecessary delay, which all parties to this proceeding deplore.

In conclusion, (1) the AEC Rules of Practice allow the Board to proceed without the appointment of a third board member, and (2) in order to prevent further delay of this already protracted proceeding, the board should proceed to decision without the appointment of a third member.

Respectfully submitted,

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Date: September 13, 1974

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CERTIFICATE OF SERVICE

I hereby certify that copies of RESPONSE OF THE DEPARTMENT OF JUSTICE TO THE BOARD'S AUGUST 19, 1974 ORDER, dated September 13, 1974, in the above-captioned matter have been served on the following by deposit in the United States mail, first class or air mail, this 13th day of September, 1974:

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