

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
CONSUMERS POWER COMPANY) AEC Docket No. 50-329A
(Midland Plant, Units 1 and 2)) 50-330A

RESPONSE OF AEC REGULATORY STAFF AND THE JOINT INTERVENORS
TO THE BOARD'S AUGUST 19, 1974 ORDER

In an Order dated August 19, 1974, the presiding Atomic Safety and Licensing Board (Board) requested the parties to this proceeding to submit to it briefs on the question of whether the two remaining members of the Board should render the initial decision or should a third member of the Board be appointed. The question is raised as a result of the death of the Chairman of the Board after the closing of the hearing record.

The essential issue raised by the Board's question is whether, under the circumstances of this proceeding, a quorum of two members of a licensing board may render an initial decision. In our view, the issue must be resolved in the affirmative.

Section 191a of the Atomic Energy Act of 1954, as amended (Act), authorizes the establishment of licensing boards "each comprised of three members, one of whom shall be qualified in the conduct of administrative proceedings and two of whom shall have technical or other qualifications as the Commission deems appropriate to the issues to be decided." This statutory authorization is implemented in the provisions of 10 CFR § 2.721(a).

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Although there is no provision made under the Act establishing a quorum rule in situations where one member of a licensing board becomes unavailable, 10 CFR § 2.721(d) does establish such a rule. A full discussion of the genesis of this quorum rule, its validity, and its applicability is found in a recent Memorandum of an Atomic Safety and Licensing Appeal Board.^{1/} That discussion is relevant to the issue raised by this Board and should be taken into account in the Board's resolution of this matter.

Although the matter of the validity of the quorum rule is established, the factual circumstances of this proceeding present a matter of first impression with respect to the application of that rule. ALAB-222, referred to above, deals with factual circumstances not present in this proceeding. Here we have a circumstance in which the Chairman of the Board became unavailable after the hearing record was closed. We have found no applicable law directly on point with respect to such a circumstance. Nevertheless, we believe that ALAB-222 is suitable for application in this proceeding.

Section 191a of the Act and the implementary regulations in 10 CFR § 2.721(a) require that one member of any licensing board be qualified in the conduct of administrative proceedings. In practice, this member is designated as the chairman. The Chairman of this Board, who met the

^{1/} In the Matter of Commonwealth Edison Company and Northern Indiana Public Service Company, Docket Nos. 50-295, 50-304 and 50-267, ALAB-222, August 6, 1974, 8-11.

aforementioned requirement, has become unavailable. If none of the remaining members of the Board was qualified in the conduct of administrative proceedings, then, by the terms of 10 CFR § 2.721(d), the quorum rule would be inapplicable and a new member, who was so qualified, must be designated.

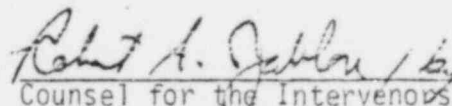
Under the circumstances of this proceeding both of the remaining two members of the Board are qualified in the conduct of administrative proceedings. In accordance with the authority delegated under 10 CFR § 2.721, either could be designated as the Chairman of this Board. Such action would establish a valid quorum for purposes of rendering an initial decision in this proceeding.

As a practical matter, there are sound reasons why the two-man Board, following the quorum rule, should proceed to render the initial decision rather than to proceed only after the appointment of a third member. The appointment of a third member to the Board at this late stage in the proceeding can only result in further delay in an already lengthy proceeding. To fully participate in the rendering of the initial decision, the third member would have to become familiar with a record amounting to nearly 10,000 pages of transcript in addition to numerous exhibits, briefs, orders, depositions, and related material. Such a monumental task would impose a tremendous burden on the new member as well as defeating the purpose of bringing this proceeding to a timely end.

Accordingly, and for the reasons set forth above, we urge the Board to proceed as a two-member Board, following the Commission's quorum rule, and to render the initial decision in this proceeding, recognizing that following such a course of action will require the formal designation of a Chairman by the Chairman of the Atomic Safety and Licensing Board Panel.

Respectfully submitted,


Robert J. Verdisco
Counsel for AEC Regulatory Staff


Robert A. Jablon / s. R.J.V.
Counsel for the Intervenors

Dated at Bethesda, Maryland
this 13th day of September 1974.

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CERTIFICATE OF SERVICE

I hereby certify that copies of RESPONSE OF AEC REGULATORY STAFF AND THE JOINT INTERVENORS TO THE BOARD'S AUGUST 19, 1974 ORDER, dated September 13, 1974, in the captioned matter, have been served upon the following by deposit in the United States mail, first class or air mail, this 13th day of September 1974:

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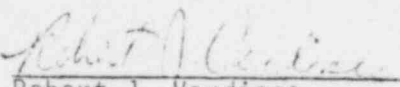
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