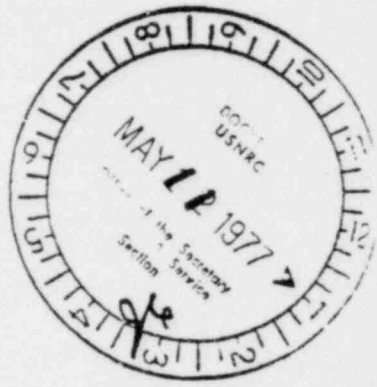
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

5/4/77

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



MOTION AND MEMORANDUM IN SUPPORT OF MOTION OF CONSUMERS POWER COMPANY FOR THE ASSESSMENT OF EXCESS COSTS AGAINST COUNSEL FOR ALL INTERVENORS EXCEPT THE DOW CHEMICAL COMPANY, MYRON M. CHERRY

Consumers Power Company ("Licensee") hereby moves for the assessment of excess costs against Myron M. Cherry, appearing in this proceeding on behalf of all Intervenors except the Dow Chemical Company ("Intervenors"). This motion is based on (1) the fact that Mr. Cherry failed to notify counsel for Licensee (as well as counsel for other parties and the Board itself) that Dr. Richard J. Timm, a witness for Intervenors, would not appear at the hearing on March 21, 1977, as he was scheduled to do, and that Mr. Cherry himself intended to withdraw from further participation in these proceedings on that date; and (2) the fact that Mr. Cherry later reversed his decision and decided to participate in the hearings and produce Dr. Timm as a witness without convincing changes in circumstances to justify the reversal. Mr. Cherry's failure to notify Licensee that Dr. Timm would not appear resulted in Licensee's incurring

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additional and unnecessary costs; Mr. Cherry's reversal of position caused further wasted expenditures due to actions taken by Licensee in reliance on his notice of withdrawal. Licensee believes that there is legal justification for an assessment of costs against Mr. Cherry personally in both the Nuclear Regulatory Commission's Rules of Practice ("Rules of Practice") and federal statutory and judicial precedent.

A. Factual Support For The Assessment Of Costs

The agreed-upon schedule for the week of March 21, 1977 called for Intervenors' witness, Dr. Richard J. Timm, to begin testifying on Monday, March 21, with cross-examination continuing for the remainder of that week. Licensee's counsel therefore arrived at the hearing on March 21 prepared to cross-examine Dr. Timm. Accompanying them were certain of Licensee's experts whose presence was necessary to assist counsel in the cross-examination of witness Timm. Licensee was not informed that Dr. Timm would not appear until the hearing began at 1:30 p.m. on the afternoon of March 21.

Mr. Cherry's statements at the hearing on March 21, 1977 (e.g. Tr. 5009), indicate that he had not intended to produce witness Timm unless a favorable order were forthcoming from either this Licensing Board, the Atomic Safety and Licensing Appeal Board ("Appeal Board") or the Nuclear Regulatory Commission ("Commission") in response to Intervenors' motions for

financial assistance (including the Emergency Motion For Directed Certification). However, Mr. Cherry never informed the parties or the Board that witness Timm would not appear unless such a favorable order were forthcoming, and the parties and the Board were left with the clear understanding that witness Timm would be testifying on March 21st in any event. All appeared on that date prepared to proceed in accordance with the schedule.*/ If indeed witness Timm's appearance was contingent on a favorable order, it was the responsibility of Intervenors' counsel to so inform Licensee, the other parties and the Board.

In any event, when Intervenors' counsel decided that he would not produce witness Timm, or at least when it became clear to him that there was a substantial likelihood that witness Timm would not be presented, it was incumbent on him to inform the parties and the Board. Although Intervenors' counsel had addressed numerous requests for financial assistance to this Board, the Appeal Board and the Commission, the orders denying such financial assistance were issued in ample time for Intervenors' counsel to inform the parties and the Board of any changes in his plans necessitated by those orders. The Commission had clearly decided against financial assistance when it promulgated its

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*The NRC Staff's Answer to the Emergency Motion for Directed Certification supports Licensee's understanding: "Intervenors have never taken the position that, absent financial aid, they would not continue in these proceedings or that Dr. Timm would not appear." (filed 3-18-77, at p. 5) The pleading also cites this Board's February 25, 1977 Order noting that Dr. Timm has not been released to be dealt with as a "free agent." (at pp. 2-3)

regulation regarding "Financial Assistance to Participants in Commission Proceedings" on November 12, 1976. CLI-76-23, NRCI-76/11. Its decision was adhered to in this proceeding in this Board's order of February 25, 1977, denying Intervenors' request for Commission funds. This Board also denied the Intervenors' request to certify or refer the matter in orders dated March 11 and March 16, 1977.

Certainly, by the end of the day on Friday, March 18, 1977, Mr. Cherry could have had no reasonable basis for believing that financial assistance would be provided by the Appeal Board or the Commission prior to Monday's hearing. The Appeal Board ruled against Intervenors on the issue on Friday, March 18, 1977, and transmitted its ruling by telephone on that day.*/ Mr. Cherry indicated that he learned of this decision on Saturday (Tr. 5006), that although he apparently heard of the decision "late Friday night", he "didn't know for a certainty until Saturday morning" (Tr. 5009). Thus, the appropriate tribunal to decide the issue had done so, and Mr. Cherry had notice by Saturday morning at the latest.**/

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*The subsequent written Order was ALAB-382, NRCI-77/3 (March 18, 1977).

**Mr. Cherry's protestation that, subsequent to the ruling of the Appeal Board, he continued to await an order from the Commission (Tr. 4600, 5006, 5010) can be given no credence in light of the Commission's prior orders with regard to financial assistance. In addition, the Commission had indicated the absence of the necessary quorum to decide issues in this proceeding on March 18, 1977. Mr. Cherry could have had no reasonable basis for believing that the Commission would reverse the Appeal Board's ruling by Sunday evening, March 20, in time for witness Timm to arrive at the hearing on Monday.

It was noted by a Board member at the hearing and confirmed by Mr. Cherry that if Dr. Timm had actually been planning to arrive at the hearing on early Monday afternoon from Oregon, he must have been instructed sometime on Sunday, at the latest, to change his plans so as not to arrive. (Tr. 5011-12)

It now seems apparent that Mr. Cherry had informed Dr. Timm early on that he would not be required in Chicago unless financial assistance was forthcoming and that Mr. Cherry must have realized that there was little likelihood that it would be forthcoming in view of the Commission's order of November 12, 1976. It is further apparent that Mr. Cherry had absolutely no hope of receiving a favorable order in time for Monday's hearing after the Friday order of the Appeal Board and that he told Dr. Timm on Saturday or Sunday, at the latest, not to appear. He simply chose not to inform Licensee, the other parties or the Board.

Relying on the appearance of Dr. Timm on Monday, March 21, Licensee's rebuttal witnesses and the experts required for assistance in the cross-examination of Dr. Timm on technical matters were brought in for the hearing. Although some of them were able to proffer further direct testimony later in the week and, consequently, would have had to come to Chicago anyway, Mr. David Lapinski, who was to assist in the cross-examination of Dr. Timm, was brought to Chicago unnecessarily, and Licensee's expenses for his travel should be paid. In addition, Mr. Richard Brzezinski

was compelled to spend an additional two days in Chicago (Monday and Tuesday, March 21 and 22) which he would not have spent if he had only been present to proffer further direct testimony, which he did on Wednesday, March 23.

Licensee also has been damaged by the turnabout of Intervenors' counsel during the week of March 21 on whether he would present Dr. Timm as a witness and on whether Mr. Cherry would continue to participate in the proceedings himself. On March 21, Mr. Cherry announced that he would not participate further in the hearings and that Dr. Timm would not testify. (Tr. 4712) On March 24, after Licensee had taken certain actions in reliance on these representations, Mr. Cherry reversed himself, claiming that he had suddenly been able to locate adequate funds from some unspecified source. (Tr. 4990-95) His responses to questions from the Board with regard to the sudden availability of funds were general and somewhat evasive (Tr. 5007-13) and when viewed in the context of the gamesmanship exercised by Intervenors' counsel with regard to (1) the Timm testimony, (2) his attempts to keep further testimony submitted by Licensee and the Staff out of the record and (3) the issue of financial assistance, were rather unconvincing. As a result of this turnabout, Licensee was damaged in the following ways:

(1) Counsel for Licensee was compelled to spend numerous hours on Monday night, March 21, researching the Board's responsibility as to the Timm 'testimony' if the witness did not appear to present it. Now that it appears that Dr. Timm will be presented,

the time was wasted and counsel's fees should be paid.

(2) Licensee's counsel was required to expend additional unproductive hours at the hearing during the week of March 21st as a result of Mr. Cherry's actions, particularly on Monday, Tuesday, and Thursday, and claim is also made for counsel's fees for this additional hearing time.

(3) Licensee incurred substantial expense in photocopying the proposed testimony of Dr. Timm and the rebuttal testimony so that it could be bound into the record in a special transcript volume. (Special transcript of March 23, 1977) Both the photocopying and the transcript costs should be recovered given the events which followed.

(4) Dr. Robert Ringlee, an outside consultant, who was prepared to go forward during the week of March 21 with both rebuttal testimony and further direct testimony proffered only the further direct testimony in view of Mr. Cherry's decision not to present Dr. Timm as a witness. He will now have to be brought back to the hearings to present his rebuttal testimony, should witness Timm eventually testify. In addition to his travel expenses, Dr. Ringlee's fees for the extra time should be paid

because of his status as an outside consultant.

The fees incurred by Licensee in the preparation of this motion, including expenses for counsel's time, should also be recovered for they are a direct result of the objectionable conduct of Intervenors' counsel. An exhibit is attached detailing the amounts by which Licensee was damaged by Mr. Cherry's conduct (Exhibit A).

B. Legal Precedent For The Assessment Of Excess Costs Against Counsel

The authority of this Board to assess excess costs against counsel is principally based on its plenary power under the Rules of Practice to regulate the conduct of licensing proceedings and of the participants in them. Infra. This authority is supported by the broad delegation of power to licensing boards to discipline attorneys. 10 C.F.R. §2.713. These powers, both separately and in combination, enable this Board to act favorably on Licensee's motion for the assessment of excess costs against counsel.

In any hearing governed by the Rules of Practice, a presiding officer has a "duty" to take appropriate action to avoid delay, and to maintain order." §2.718 (emphasis supplied). Most importantly, "[h]e has all powers necessary to those ends..." Ibid. (emphasis supplied). Specifically, under this section the presiding officer is authorized to "regulate the course of the hearing and the conduct of the participants." §2.718(e). This power must be exercised in view of the Commission's

established policy that "proceedings [should] be conducted expeditiously"; it is a matter of "fairness to all parties" as well as "the obligation of administrative agencies to conduct their functions with efficiency and economy." Appendix A to Rules of Practice. The importance of this policy is underscored by the further mandate that a board use its powers under §2.718 to assure "that the hearing process for the resolution of controverted matters is conducted as expeditiously as possible...." Rules of Practice, App. A §V.

In accordance with these mandates and delegated powers, licensing boards should, if feasible, seek to prevent delay and inefficiency in proceedings, or at the very least, take action to assure that if they occur, they will not recur. The imposition of sanctions is a proper method of providing such assurance and one that is well within the powers of a licensing board. Even without the guidance of the Rules of Practice, this Board's inherent authority would be analogous to that of a court. As to this judicial authority, it has been generally found: "The inherent power of a court to manage its affairs necessarily includes the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it." Flaska v. Little River Marine Construction Co., 389 F.2d 885, 888 (5th Cir. 1968).

Under the Rules of Practice, presiding officers are authorized to impose the far more severe sanction of suspending from participation in a proceeding an attorney who "engages

in dilatory tactics or disorderly or contemptuous conduct." §2.713(c)(4). This power has been utilized with discretion, principally resulting in mere censure. However, one Appeal Board faced with a violation of §2.713(c) has imposed another sanction not specifically provided for in the Rules, striking a brief containing disrespectful comments addressed to the Chairman of the Licensing Board. Louisiana Power & Light Co., (Waterford Steam Electric Station, Unit No. 3) ALAB-121, RAI-73-5, pp. 319-321 (May 1, 1973).

Not relying on §2.713, but based on circumstances very similar to those presented in this proceeding, another Appeal Board found that "it might well be justified in dismissing the intervenors' appeal", although it chose not to do so in that instance, but warned against any repetition of the occurrence. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B) ALAB-337, NRCI-76/7, pp. 7-9, at p. 9. (July 7, 1976). In that proceeding, counsel's failure to inform the other parties and the Board that he would not appear for oral argument, causing inconvenience and additional expense to the parties and the Board, was found to be "unprofessional and discourteous in the extreme." Ibid., p. 8. Given a board's power to impose such severe sanctions as suspension of an attorney from participation in proceedings or dismissal of a party's appeal, this Board surely has the authority in these circumstances to assess excess costs against counsel.

It is appropriate for a licensing board to look to federal judicial precedent in determining the type of sanction it should impose upon an attorney engaged in unprofessional conduct. The Rules of Practice state, in the section relating to appearance and practice in adjudicatory proceedings:

> An attorney shall conform to the standards of conduct required in the courts of the United States. 10 C.F.R. §2.713(b) (emphasis supplied).

The propriety of a board's reference to judicial precedent has been supported by a Licensing Board finding, on a City's motion for attorney disqualification under Rule 2.713(b), that: "To the extent that a court would order disqualification upon a finding that the City's allegations were supported by the evidence, the Commission by its own rule should do no less." The Toledo Edison Company and The Cleveland Electric Illuminating Company (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), The Cleveland Electric Illuminating Company, et al. (Perry Nuclear Power Plant, Units 1 and 2), LBP-76-11, NRCI-76/3, pp. 223-276, 230 (March 19, 1976).

Reference should also be made to federal statutory authority. The U.S. Judicial Code, governing proceedings in the federal courts, expressly provides for the assessment of costs against attorneys who have expanded the proceedings and thereby caused unnecessary expense:

> Any attorney or other person admitted to con-

> duct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs. 28. U.S.C. §1927 (emphasis supplied)

Section 1927 of the Judicial Code provides for relief when there has been "a serious and studied disregard for the orderly processes of justice." Kiefel v. Las Vegas Hacienda, Inc., 404 F.2d 1163 (7th Cir. 1968), cert. denied, 395 U.S. 908, rehearing denied, 395 U.S. 987 (1969). This provision has been interpreted as allowing for the assessment of costs against counsel in circumstances similar to those occurring in this proceeding. In Bardin v. Mondon, 298 F.2d 235 (2d Cir. 1961), an attorney arrived at a scheduled trial unprepared to proceed, although ample notice had been given him. The Court found it appropriate, in line with the judicial policy of prompt disposition of cases, "to require counsel himself to pay for the inconveniences caused by his own dilatory conduct." 298 F.2d at 238. Counsel had "so multiplied the proceedings as to increase costs vexatiously," thus meeting the standards set out in §1927. Ibid.

Excess costs were assessed in another similar situation in which it was found that an attorney had failed to meet his responsibility to the court without good cause. Schneider v. American Export Lines, Inc., 293 F. Supp. 117 (S.D.N.Y. 1968). Plaintiff's attorney had been notified numerous times that the case was coming up for trial, and he was finally given three days' notice of the actual trial commencement date. The

attorneys arrived, the jury was impanelled, and plaintiff's counsel then requested a continuance because neither the plaintiff nor his witnesses were in court. The court found that the plaintiff himself was not at fault, but that counsel's 'mistake' was "incredible and inexcusable", had "caused needless inconvenience and expense to the defendant and the public," and assessed defendant's additional expenses resulting from the continuance to plaintiff's attorney. 293 F. Supp. at 118.

Expenses have also been held properly imposed on counsel based on an attorney's failure to appear at a deposition, Louver Drape, Inc. v. M. Klahr, Inc., 1967 Trade Cas. ¶72,296 at 84,736 (S.D.N.Y. 1967), and when an attorney prolonged a deposition by excessively cross-examining witnesses and directing his own witnesses not to answer a substantial number of questions Toledo Metal Wheel Co. v. Foyer Brothers & Co., 223 F. 350 (6th Cir. 1915). Various cases applying §1927 also find that negligent conduct or conduct that involves "mere unintentional discourtesy to a court," may not be sufficient for the sanction of cost assessment to be applied. United States v. Ross, 535 F.2d 346 (6th Cir. 1976); cf. Kiefel, supra. However, counsel's behavior in this proceeding has certainly gone far beyond negligence; it has met even the stricter standard of reckless disregard of the duty owed to a tribunal. Ross, supra.

The excess costs which Licensee has incurred, and which it is entitled to recover, have been generally described supra, and a more precise delineation is attached as Exhibit A to this

motion and memorandum. It should be noted that a portion of Licensee's attorneys' fees in this case has directly resulted from this instance of Intervenors' counsel's irresponsible conduct. Licensee's additional fees for attorneys' time, directly resulting from the behavior of Intervenors' counsel, may be recovered in these circumstances, as is demonstrated by the cases setting out the standards for the provision of costs under 28 U.S.C. §1927.*/ The portion recoverable in Schneider, supra, in which plaintiff failed to appear for trial after being given three days' notice by the court, was held to cover the time spent by counsel preparing for trial during that three day notice period. In Kiefel, supra, an additional proceeding had been required by counsel's improper conduct, and the fees for attorney's time spent on that proceeding were part of the taxable costs. See also 1507 Corporation v. Henderson, 447 F.2d 540 (7th Cir. 1971).

The conduct of Intervenors' counsel in this proceeding has wasted large amounts of Licensee's attorney's time, most notably by requiring (1) legal research on the consequences of a decision later retracted without good cause; (2) the expenditure of inordinate time at hearing discussing the issue of Intervenors' participation, including Mr. Cherry's reversal of decision and (3) the preparation of this motion and memorandum to recover all other excess costs. (see pages 5, 6, supra)

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*This is an exception to the general "American Rule" disallowing the inclusion of attorneys' fees in otherwise allowable costs without express statutory provision. Alyeska Pipeline Service Co. v. Wilderness Society 421 U.S. 240 (1975).

C. Conclusion

This Board should assess Licensee's excess costs, as described herein, to Intervenors' counsel personally, not only as a sanction for previous conduct, but to assure that similar conduct does not recur in this proceeding or others in the future. The equities require that substantial expenses attributable only to the irresponsible conduct of one individual should be borne by that individual. This Board is the only appropriate forum to provide relief, and it has the authority to do so based on its duty to regulate these proceedings, its power to discipline attorneys, and analogous federal statutory and judicial precedent.

Respectfully submitted,

David J. Rosso

David J. Rosso

R. Rex Renfrow III

R. Rex Renfrow III

Martha E. Gibbs

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May 4, 1977

EXHIBIT A

SPECIFIC COSTS INCURRED AS A RESULT OF THE BEHAVIOR OF INTERVENORS' COUNSEL

A. ADDITIONAL TIME SPENT BY COUNSEL FOR LICENSEE

1. Attorneys' time spent on research regarding the Board's responsibility as to the Timm "testimony" - March 21, 1976:

2-1/2 hours by Caryl A. Bartelman,
4-1/4 hours by Martha E. Gibbs, and
1-1/4 hours by David J. Rosso.*

TOTAL COST: $393.75

2. Attorneys' time spent at the hearing in discussions of the Board's responsibility as to the Timm "testimony", discussions of alternative schedules, and speeches by Mr. Cherry on the availability of funds (week of March 21, 1976 only):

Monday, March 21, 1977 (Transcript pp. 4593-4673 = 148.8 minutes).**

2-1/2 hours each by David J. Rosso,
R. Rex Renfrow III, and Caryl A. Bartelman

TOTAL COST: $455.00

Tuesday, March 22, 1977 (Transcript pp. 4676-4732 = 104.16 minutes)

1-3/4 hours each by David J. Rosso,
R. Rex Renfrow III, and Caryl A. Bartelman

TOTAL COST: $318.50

Thursday, March 24, 1977 (Transcript pp. 4990-5063, 5155-60, 5176-88, 5195-214 = 203 minutes)

3-1/4 hours each by David J. Rosso,
R. Rex Renfrow III, and Caryl A. Bartelman

TOTAL COST: $591.50

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*All attorneys are billed by the approximate quarter hour.
**Time is computed based on the hearing day of February 15, 1977, which consisted of 169 minutes and 91 transcript pages, thus 1.86 minutes per transcript page.

3. Preparation of Motion for Recovery of Excess Costs

2 hours by David J. Rosso,
1 hours by R. Rex Renfrow III,
5 hours by Martha E. Gibbs,
28 hours by Caryl A. Bartelman

TOTAL COST: $1,569.00

B. ADDITIONAL PHOTOCOPYING AND TRANSCRIPT EXPENSES

1. Photocopying of 14 copies of testimony of:

Richard J. Timm	121 pp.
David A. Lapinski	26 pp.
Robert P. Wilkinson	24 pp.
Robert J. Ringlee	17 pp.
Richard F. Brzezinski	7 pp.
W. Howard Cook	15 pp.
Daniel M. Noble	15 pp.
Gordon L. Heins	2 pp.
Walter R. Boris	31 pp.
Arnold H. Meltz	6 pp.
Sidney E. Feld	9 pp.
Walter J. Gundersen	7 pp.
	280 pp.

3,920 pp. at Isham, Lincoln & Beale Cost of 6 c page = $235.20

2. Cost of special transcript volume of March 23, 1977: (Not yet billed, but based on cost, per Ace-Federal Reporters, Inc., of $0.30/page)

$4.80

C. ADDITIONAL EXPENSES INCURRED BY LICENSEE'S OUTSIDE CONSULTANT:

1. Travel expenses of Dr. Robert Ringlee

a. Airfare	$162.00
b. Incidentials	33.45

2. Unnecessary time spent in Chicago by Dr. Ringlee: One 8 hour day 600.00

TOTAL $795.45

D. ADDITIONAL EXPENSES INCURRED BY CONSUMERS POWER COMPANY PERSONNEL:

1. Travel expenses of David A. Lapinski (No airfare expense included as Mr. Lapinski was enroute to vacation)

a. Hotel - March 21 and March 22 at $44.32/day	$ 88.64
b. Meals - March 21	14.75
Meals - March 22	16.81
c. Miscellaneous expenses	
March 21	14.38
March 22	12.38
TOTAL	$146.96

2. Expenses of Richard F. Brzezinski for Monday and Tuesday, March 21 and 22, 1977.

a. Hotel - March 21 and March 22 at $44.32/day	$ 88.64
b. Meals and Miscellaneous	
March 21	5.45
March 22	10.90
TOTAL	$104.99

TOTAL EXCESS COSTS INCURRED: $4,615.15

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the enclosed "Motion and Memorandum In Support of Motion of Consumers Power Company For the Assessment of Excess Costs Against Counsel For All Intervenors Except The Dow Chemical Company, Myron M. Cherry" dated May 4, 1977, have been served upon the following by deposit in the U.S. Mail, first class, postage prepaid, this 4th day of May, 1977.

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May 4, 1977