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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

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Docket Nos. 50-329  
50-330

NRC STAFF'S MOTION FOR DIRECTED  
CERTIFICATION

On March 25, 1977, the NRC Staff filed a "Motion for Censure of Myron M. Cherry" with the Atomic Safety and Licensing Board (Licensing Board). That motion was prompted by Mr. Cherry's unwarranted personal attacks upon Staff counsel during the course of this proceeding. The Licensing Board did not rule on the Staff's motion. On April 29, 1977 Dr. Lawrence R. Quarles, a member of the Appeal Board Panel, believed it necessary to respond to Mr. Cherry's ungrounded charges concerning the conduct of ECCS Hearing Board members.<sup>1/</sup> As a result of continued conduct which failed to conform to the standards of ethical conduct required of attorneys practicing before United States' courts and agencies,<sup>2/</sup> the Staff renewed its Motion for Censure orally before the Licensing Board on two occasions (Tr. 5220-5224; Tr. 5849) and called attention to the Licensing Board's duty to rule on May 20, 1977 in the "NRC Staff's Response to Intervenors' Motion to Strike Certain Pleadings."

1/ Consumers Power Company (Midland Units 1 and 2), ALAB-395 5 NRC (April 29, 1977), Slip Op. p. 31: Dr. Quarles, a member of the ECCS Hearing Board, recused himself as a member of the Midland Appeal Board and published a statement calling Mr. Cherry's statements "wholly false."  
2/ See 10 CFR 2.713(b) and Code of Professional Responsibility Disciplinary Rule 7-106(C) and 8-102(B).

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As of this date, the Licensing Board has yet to rule on the Staff's motions. Failure to rule has in effect denied the Staff relief, and the unwarranted personal attacks have intensified and continued. Consequently, the Staff is requesting that this Appeal Board invoke its authority under 10 CFR 2.718(i) and direct certification of the ruling on the Staff's censure motion. Without certification unusual delay will continue and the Staff and other parties will encounter further unusual expenses, and the public interest will suffer.

1. Failure to rule has in effect denied the Staff's motion.

When a moving party demonstrates its entitlement to some immediate relief, the failure to rule is tantamount to denial of that relief.<sup>3/</sup>

This Board recognized this principle in Detroit Edison Company (Greenwood Energy Center, Units 2 and 3), ALAB-376, 5 NRC 426, 428 (February 22, 1977) in discussion of a postponed ruling on an intervention petition. Very recently the Appeal Board applied this principle in the context of the failure of a local zoning board to rule on whether to authorize the construction of cooling towers.<sup>4/</sup>

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<sup>3/</sup> Environmental Defense Fund v. Hardin, 428 F.2d 1093 (D. C. Cir. 1970).

<sup>4/</sup> In the Matter of Consolidated Edison Co. (Indian Point 2), ALAB-399, \_\_\_\_\_ NRC \_\_\_\_\_ (May 20, 1977), Slip op. 30.)

The Administrative Procedure Act imposes a duty on administrative decision makers to decide issues presented to them within a reasonable time.<sup>6/</sup>

Reviewing authorities have a duty to compel agency action unlawfully withheld or unreasonably delayed and can require a schedule for the orderly, expeditious resolution of matters in which there has been a failure to rule.<sup>7/</sup>

When administrative inaction has precisely the same impact on the rights of the parties as denial of relief, a tribunal cannot preclude review by casting its decision in the form of inaction rather than in the form of an order denying relief.<sup>8/</sup>

In this case failure to rule on the Staff's motion for censure has prejudiced the Staff and continues to prejudice the Staff. Since the Staff first filed its motion, the conduct of Intervenor's counsel about which the Staff complains has become more egregious.<sup>9/</sup> Unwarranted personal attacks have been made against virtually every Staff lawyer who has made an appearance in this case. The charges and innuendos go far beyond the limits of vigorous advocacy, and the failure of the Licensing Board to censure Intervenor's Counsel is prejudicial to the rights of individual Staff Counsel to be able to practice before this agency without continuing unwarranted attacks on their integrity. Chief Justice Marshall once observed:

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<sup>6/</sup> 5 USC §55(b) See Nader v. FCC, 520 F.2d 182, 206 (D.C. Cir. 1975)(<sup>1</sup>).  
<sup>7/</sup> Nader v. FCC, supra., p. 206. See also Bankers Life & Cas. Co. v. Callaway, 530 F.2d 625, 631 (5th Cir. 1976); Environmental Defense Fund v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970).

<sup>8/</sup> EDF v. Hardin, supra. at 1099.

<sup>9/</sup> See Intervenor's Motion for Investigation of Improprieties Occasioned by the Regulatory Staff and in Particular by their Lawyers, James Tourtellotte and Milton Grossman" and "Motion Pursuant to 10 C.F.R. 2.713 and 10 C.F.R. 2.718 to Take Appropriate Sanctions and Actions Against James Tourtellotte and Milton Grossman, and the Regulatory Staff".

...(I)t is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the bench should be preserved. For these objects, some controlling power, some discretion ought to reside in the Court. This discretion ought to be exercised with great 9/ moderation and judgment; but it must be exercised....

2. The Appeal Board Should Direct Certification of this Issue

Because the Licensing Board's inaction has caused--and continues to cause--extraordinary harm to the Staff's legitimate interests and to the public interest, we are obliged to apply to this Board for an extraordinary remedy--directed certification of the censure motion pursuant to 10 CFR §2.718(i).<sup>10/</sup> Just recently, the Appeal Board stated it had undertaken discretionary interlocutory review "... where the ruling either (1) threatened the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affected the basic structure of the proceeding in a pervasive or unusual manner."<sup>11/</sup> The Staff submits that both elements are present here. As demonstrated earlier, the Licensing Board has had ample opportunity to consider this question which is not one involving a "garden-variety" evidentiary matter.<sup>12/</sup>

<sup>9/</sup> Ex parte Burr, 22 U.S. 529, 9 Wheat (1824).

<sup>10/</sup> Public Service Co. of New Hampshire (Seabrook Units 1 & 2), ALAB-271, 1 NRC 478, 482-83 (1975).

<sup>11/</sup> Public Service Company of Indiana, Inc., ALAB-405, 5 NRC \_\_\_\_, Slip. Op., p. 5 (May 31, 1977). See also, Consumers Power Co. (Midland 1 & 2), ALAB-395 (April 29, 1977); Puerto Rico Water Resources Authority (North Coast Unit 1), ALAB-361, NRCI-76/12 (Dec. 28, 1976); Toledo Edison Co. (Davis-Besse), ALAB-300, 2 NRC 752, 759 (1975) Seabrook, supra., p. 483.

<sup>12/</sup> Long Island Lighting Co. (Jamesport Units 1 & 2), ALAB-353, NRCI-76/10 381 (Oct. 10, 1976).

As this Board noted previously in this case,<sup>13/</sup> the record was reopened in November 1976 and now exceeds 5000 pages. While scheduling delays have contributed in part to the length of time required to reach an initial decision on whether to suspend construction pending the hearings on remand, no small measure of the delay is directly attributable to the disruptive tactics of Intervenor's counsel which affect the basic structure of the proceeding. The public interest suffers because the good name of attorneys and other hearing participants are called repeatedly into question, forcing denials and explanations which should not have been necessary had Intervenors' counsel acted in accordance with the standards of conduct expected of attorneys. Unusual expense and delay are suffered by the Staff and the other parties to this proceeding every time they are forced to digress from the issues to answer yet another unsubstantiated charge concerning personal propriety. No one can be expected to stand idly by while his good name is attacked with reckless abandon. Unless there is a prompt and decisive ruling on the propriety of such conduct, it is evident that there will be more such conduct and that more and more of the time and resources of the parties will have to be expended in responding. Moreover, there will be further injury--intangible but important--to the dignity and rationality of the adjudicative process itself.

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<sup>13/</sup> In the Matter of Consumers Power Co. (Midland Units 1 & 2), ALAB-395 (April 29, 1977).

3. The Censure Motion is Within the Board's Power to Act

It is proper for a tribunal to censure counsel for manifestly improper conduct.<sup>14/</sup> This is normally accomplished by reprimand or rebuke if the conduct is not repeated.<sup>15/</sup> While the question of whether to censure, reprimand or rebuke is normally a matter of sound discretion, a mere placid direction will not suffice where rebuke is warranted and the nature and severity of rebuke must be reasonably sufficient to remove the harmful effect of the misconduct.<sup>16/</sup>

In this proceeding, conduct by Intervenor's counsel in gross violation of established standards of professional conduct has gone without censure or reprimand. In an April 5, letter to the Licensing Board counsel drew into question the propriety of conduct of members of the ECCS hearing board. These statements were later characterized by a member of that Board as "wholly false."<sup>17/</sup> The Licensing Board made no statement on this matter. On February 18, 1977, Intervenor's counsel engaged in an ex parte argument to a Member of the Licensing Board which went far beyond the narrow communication of procedural information to which the other parties had agreed. The Licensing Board made no statement on this matter. On March 10, 1977, Intervenor's counsel in a letter distributed to the parties made an

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<sup>14/</sup> 88 C.J.S. Trial §199 (1955).

<sup>15/</sup> Id.

<sup>16/</sup> Id.

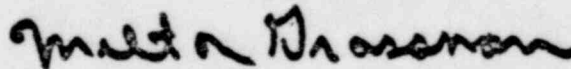
<sup>17/</sup> ALAB-395 Separate Statement of Dr. Quarles.

unwarranted attack on Staff counsel which resulted in no reprimand or other warning from the Licensing Board.

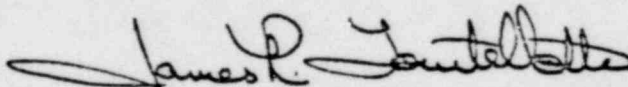
Further personal attacks upon Staff counsel--more extreme, insulting, and unsupported than the earlier ones--were made by Mr. Cherry in remarks on the record (Tr. 6065-6068) and in pleadings and an affidavit filed May 13, 1977.<sup>18/</sup>

While the above instances are not exhaustive, they have been brought to this Board's attention for the purpose of illustrating the harm which has been caused by counsel's unchecked behavior in these proceedings. The failure of the Board to act has a seriously adverse effect upon the quality and dignity of Commission proceedings. In these extraordinary circumstances the Appeal Board should immediately exercise its prerogative to direct certification and restore at once the order and decorum which is necessary for a full, fair and effective proceeding.

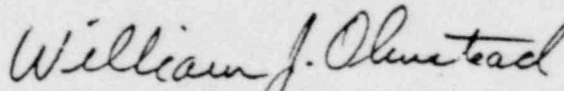
Respectfully submitted,



Milton J. Grossman  
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James R. Tourtellotte  
Assistant Chief Hearing Counsel



William J. Olmstead  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 6th day of June, 1977.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S MOTION FOR DIRECTED CERTIFICATION" dated June 6, 1977 in the above-captioned proceeding, have been served on the following by deposit in the United States mail, first class or air mail, this 6th day of June, 1977:

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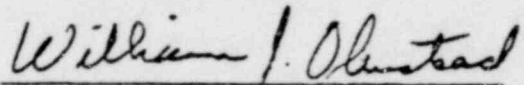
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