UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board
For Special Proceeding

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

MOTION OF MYRON M. CHERRY
TO DISMISS SUSPENSION CHARGES
FOR LACK OF JURISDICTION

This motion, filed on behalf of Myron M. Cherry, Esquire, seeks dismissal for lack of jurisdiction of all charges preferred against him pursuant to paragraph 10 of the November 4, 1977 Order issued by the Midland Atomic Safety and Licensing Board ("Midland Board") in these proceedings. As discussed in detail below, the Nuclear Regulatory Commission ("the Commission"), and accordingly, this Special Board, is totally without authority to suspend attorneys for conduct of the sort which forms the basis of these charges against Mr. Cherry. Accordingly, these charges must be dismissed.

STATEMENT OF FACTS

1. Background of the Present Proceeding.

This special proceeding arose out of hearings regarding the application by Consumers Power Company for an operating license for certain facilities in Midland, Michigan. The hearings before the Midland Board on the license approval involved the Commission staff and Consumers Power, both of whom strongly favored the license, and a group of concerned citizens, known as the Saginaw Intervenors, who did not.

Because of the apparent identity of interest between the staff and Consumers Power only the participation of the Saginaw Intervenors contributed to the development of any sort of useful record before the Midland Board. As the Midland Board itself put it:

> "[Testimony offered by the Saginaw Intervenors seems] to the Board to be valuable additions to the hearing record. We have so stated in the past. Without it, the only evidence in the record relating to the same areas of concern will be that of the Licensee and the Staff which are not diverse in general effect." February 25, 1977 Order, ¶ I.

When the Commission granted Consumers' license application without consideration of several factors

the Saginaw Intervenors considered important, the Saginaw Intervenors appealed to the United States Court of Appeals for the District of Columbia Circuit, which unanimously reversed the Commission and remanded the case for further proceedings. Aeschliman v. Nuclear Regulatory Commission, 547 F.2d 622 (D.C. Cir. 1976), cert. granted, 429 U.S. 1090 (1977).

Throughout the proceedings the Saginaw Intervenors were represented by Myron M. Cherry, an experienced attorney in private practice and a member in good standing of the Bar of the State of Illinois. Much, if not all, of Mr. Cherry's representation of the Saginaw Intervenors has been at reduced fee or no fee, and for most of these proceedings, which are now in their eighth year, Mr. Cherry has been the sole counsel for the Saginaw Intervenors.[1/] His contribution to the Midland proceedings is evident, not only from the results he achieved on behalf of his clients, but from the statement of the Midland Board, which specifically "acknowledge[d] that his participation has been of value." February 25, 1977 Order, ¶ IV.

1/ For the past two years, Mr. Cherry has been aided from time to time by his associate Mr. Flynn. However, Mr. Cherry is the only attorney fully knowledgeable about these proceedings and about the Saginaw Intervenors' interests.

Following the decision of the D.C. Circuit, Mr. Cherry moved the Midland Board to halt the construction of the facility pending the remand hearings. The Midland Board did not order an immediate halt to construction, but instead ordered a hearing on this question. In the course of the resulting hearings, Mr. Cherry uncovered certain matters embarrassing to the staff and to Consumers Power.

Specifically, Mr. Cherry discovered that Consumers Power's counsel had attempted to conceal the highly significant fact that Dow Chemical Company, the major intended user of power from the proposed facilities, was seriously considering terminating its agreement to purchase power from Consumers, thereby rendering the plant superfluous. Consumers' counsel proposed to conceal this fact by calling witnesses carefully selected for their lack of knowledge on this important subject and by threatening to sue Dow if its witnesses testified forthrightly on this subject, a course of conduct characterized by Dow's counsel as "pretty damn close to blackmail." Midland Intervenors Exhibit 25. Mr. Cherry also discovered that Consumers' counsel had planned to "prepare the NRC staff" for the hearings

and was confident (quite rightly, as it turned out) that the staff would do no independent research or preparation for the case and, therefore, would not discover Consumers' strategem.2/

In light of this background, it is no surprise that the staff and Consumers Power, on the one hand, and Mr. Cherry's clients, on the other, found themselves in a hotly contested proceeding in which there were not only important substantive differences but also questions as to the conduct of certain counsel. As a result, the proceedings were accompanied by continuing acrimony among counsel, manifested by various charges and counter-charges which need not all be detailed here.3/

2. The Suspension Charges

On April 5, 1977, in response to one of the staff's charges -- this time a motion to censure Mr. Cherry for allegedly insulting the staff in an earlier

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2/ On September 23, 1977, the Midland Board issued an order citing Consumers' plan for concealing the facts regarding Dow. Despite protest from Consumers, the findings outlined above appear in only slightly modified form in the Midland Board's amended order dated November 4, 1977.

3/ Some of these matters are discussed in connection with the motion, filed this day, to dismiss the censure charges against Mr. Cherry.

letter by accusing them of bias -- Mr. Cherry wrote a letter defending himself. In the letter he described his reasons for concluding that the staff was not free of bias in its conduct in this proceeding. Mr. Cherry described an incident which had occurred before a hearing board of the now defunct Atomic Energy Commission, in which several board members had met with Mr. Cherry privately and requested him to temper his opposition to the Emergency Core Cooling System ("ECCS") rulemaking proceeding because he had "done enough to demonstrate improprieties" and further opposition would only "destroy the fabric of the AEC." The ECCS proceeding has no relation to any matter before the Midland Board, and Mr. Cherry did not name the AEC Board members involved in that proceeding.

On April 29, 1977, Dr. Lawrence R. Quarles, now retired but then a member of the Midland Appeal Board, recused himself from the Board because he had been a member of the defunct AEC hearing board to which Mr. Cherry referred in his April 5 letter. Dr. Quarles did not check with Mr. Cherry to determine if the letter was meant to refer to him. However, in his recusal

opinion, Dr. Quarles maintained that neither he nor any of the other AEC board members participated in the conversation referred to by Mr. Cherry.

Mr. Cherry then wrote to Dr. Quarles on May 6, 1977, with copies to all parties in the Midland proceeding, explaining that his April 5 letter was in no way directed to Dr. Quarles because Dr. Quarles was not present when the conversation in question took place.

On May 9, 1977, the staff made an oral motion that the Midland Board suspend Mr. Cherry from practice before the Commission after the hearing on the question of halting the Consumers Power project concluded. The basis of this motion was stated to be Mr. Cherry's allegedly false accusation directed against Dr. Quarles. May 9, 1977 Transcript, at 5220-22.

On November 4, 1977, the Midland Board issued an order regarding the various staff charges. With respect to the motion to suspend Mr. Cherry, the Board found that the events relating to the AEC hearing, which were the sole basis for the motion, "may very well result in a fact finding expedition into a proceeding not involving this Board." November 4, 1977 Order, ¶ 10. See also January 9, 1978 Transcript, at 79 (Remarks

of Mr. Olmstead). However, the Board concluded that "the conduct [of Mr. Cherry] charged, if true, violates the American Bar Association Code of Professional Responsibility, Canon 7, and its Ethical Consideration 7-36." November 4, 1977 Order, ¶ 10. Accordingly, the Midland Board referred the charges to this Special Board.[4/]

Notably, the Midland Board did not conclude that Mr. Cherry's conduct interfered with or obstructed the Midland proceedings. No such finding could have been made because the hearing continued with Mr. Cherry's participation and without interruption for some five weeks after the April 5 letter which formed the basis of the charges. In fact, the staff's motion seeking Mr. Cherry's suspension explicitly requested that charges be instituted following the termination of the proceeding on the question of halting the construction of the Consumers Power project. May 9, 1977 Transcript, at 5221. Mr. Grossman, on behalf of the staff, stated on the record, "[w]e do not believe that there is a need to

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4/ The Midland Board also referred to this Special Board serious charges against Messrs. Grossman and Tourtellotte of the Commission Staff. November 4, 1977 Order, ¶ 11.

disrupt the conclusion of this suspension proceeding by the institution of these charges . . . ." Id. Also, as noted, Mr. Cherry's conduct took place outside of the hearing room, and his allegations involved only the AEC, the Commission's defunct predecessor.

SUMMARY OF ARGUMENT

This Board has no jurisdiction to suspend Mr. Cherry from the Midland proceedings.

The Commission has only such authority as delegated to it by Congress. This authority includes the power to regulate certain aspects of the nuclear energy industry, including the power to hold necessary hearings. However, the Commission has no power to maintain a separate bar or to discipline attorneys generally.

Accordingly, the Commission's only authority over attorneys is derived from its implied power to maintain order at its hearings. The precedents make clear that this limited authority extends only to proscribing conduct that is actually disruptive and occurs at a hearing.

In the present case, the conduct of Mr. Cherry for which his suspension is sought neither disrupted nor occurred during any hearing. Both the Midland Board and the staff readily concede that they have no knowledge of the underlying incident or related circumstances. In fact, as previously noted, they both suggest that the matter is so collateral to anything before the Commission that in order to determine what occurred, it is necessary to undertake an investigation of the unrelated proceeding. November 4, 1977 Order, ¶ 10; January 9, 1978 Transcript, at 79.

Neither the Commission nor this Special Board has jurisdiction to conduct such an inquiry, and both are without power to suspend an attorney from a Commission proceeding on the basis of what such an inquiry may reveal.

ARGUMENT

A. The Commission and this Special Board Can Only Regulate Contemptuous Conduct.

1. The Commission Has Jurisdiction to Regulate Nuclear Power, Not Attorneys.

The Commission, like all federal administrative agencies, has only such powers as have been delegated

to it by Congress. See Stark v. Wickard, 321 U.S. 288, 309 (1944). And while an administrative agency may adopt regulations to carry out its duties, these regulations obviously cannot exceed the agency's delegated powers. See, e.g., Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213-14 (1976); Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129, 134 (1936); Campbell v. Galeno Chemical Co., 281 U.S. 599, 610 (1930).

As the Court of Appeals observed in National Ass'n of Regulated Utility Comm'rs v. Federal Communications Commission, 533 F.2d 601, 617 (D.C. Cir. 1976):

> "the allowance of 'wide latitude' in the exercise of delegated powers is not the equivalent of untrammelled freedom to regulate activities over which the statute fails to confer . . . Commission authority."

Congress has granted the Nuclear Regulatory Commission authority to regulate certain aspects of the nuclear energy industry. There is no need to detail that authority here. Nor is there any need to detail the obvious fact that nowhere in the Commission's enabling legislation has Congress authorized the Commission

to maintain a special bar or to discipline professionals.[5/]

The reason for Congress' decision not to grant any such authority to the Commission is evident. The Commission is expert in nuclear energy matters. But as the court held in Kivitz v. Securities and Exchange Commission, 475 F.2d 956, 962 (D.C. Cir. 1973):

> "[Discipline of attorneys] is not concerned with some specialty developed in the administration of the Act entrusted to the agency."

5/ The absence of such express authority in the nuclear regulatory statutes contrasts with its presence in a few other laws. See, e.g., 31 U.S.C. § 52(f) (empowering the Comptroller General to make rules and regulations concerning the practice of attorneys before the General Accounting Office); 31 U.S.C. § 1026 (empowering the Secretary of the Treasury to make rules for the recognition of persons representing complainants, and empowering him to disbar persons from practicing before the Department); and 35 U.S.C. § 31 (empowering the Commissioner of Patents, with the approval of the Secretary of Commerce, to prescribe regulations regarding the practice of agents and attorneys before the Patent and Trademark Office). Indeed, the Seventh Circuit's decision in Koden v. United States Department of Justice, 564 F.2d 288 (7th Cir. 1977), which the staff distributed to the Special Board at the hearing on January 9, 1978, relied on just such an express statutory provision. The basis of the Court's decision is stated, as follows: "It is elementary that any court or administrative agency which has the power to admit attorneys to practice has the authority to disbar or discipline attorneys for unprofessional conduct." Id. at 233 (emphasis supplied). In that case, the Court found express authority in 8 U.S.C. § 1362 for the Immigration and Naturalization Service, Board of Immigration Appeals, to "admit attorneys to practice." Id. at 233-34.

Rather, such questions come uniquely within the expertise of courts and bar associations.[6/]

Congress has gone further than simply failing to provide the Commission with general power to regulate attorneys. Through the enactment of 5 U.S.C. § 500(b) in 1965 as part of the Administrative Procedure Act, Congress has explicitly prohibited such regulation by administrative agencies like the Commission.[7/] The statute provides as follows:

> "An individual who is a member in good standing of the bar of the highest court of a State may represent a person before an agency on filing with the agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts." 5 U.S.C. § 500(b).

6/ A court, unlike an administrative agency, can in a special proceeding discipline attorneys for conduct unconnected with a proceeding before it. See In re Carroll, 416 F.2d 585, 587 (10th Cir. 1969), cert. denied, 396 U.S. 1011 (1970). Indeed, a court is the only authority empowered to discipline members of the bar of that court. In re Carroll, supra, 416 F.2d at 588; Feldman v. State Board of Law Examiners, 438 F.2d 699, 702 (8th Cir. 1971); cf. Mullen v. Canfield, 105 F.2d 47 (D.C. Cir. 1939).

7/ Because the enactment of this statute resulted in a change of law, cases decided prior to 1965 which found a broader power in agencies to regulate attorney conduct are no longer good authority.

According to the legislative history, the express purpose of this provision was to prohibit agencies, other than those expressly authorized to establish bars by other enactments, from setting up criteria for practice. As described in the accompanying House Report, the statute was worded to provide

> "for the right of persons to be represented by any attorney in good standing in matters before Federal agencies. The bill would do away with agency-established admission requirements for licensed attorneys, and thus allow persons to be represented before agencies by counsel of their choice." H.R. Rep. No. 1141, 89th Cong., 1st Sess. (1965), reprinted in [1965] U.S. Code Cong. & Ad. News, p. 4170-71.

The House Report goes on to state that:

> "The committee believes that there is a presumption that members in good standing of the professions of the law and certified public accountancy are of good moral character, and that surveillance by State bar associations and State associations of certified public accountants will sufficiently insure the integrity of practice by such persons . . . ." Id. at 4173.

In a similar vein, Senator Long, introducing the bill, forcefully stated:

> "If a man is competent to practice before the supreme court of his State, he should be able to practice before a Federal agency. Yet, these agencies impose certain additional tests or requirements which have the effect of intimating that the attorney's integrity and professionalism is more subject to compromise when before the agencies than when before the courts. Such intimations are wholly unwarranted and at best are self-righteous assertions of superiority." 111 Cong. Rec. 7725 (April 9, 1965).8/

It is evident, therefore, that the Commission has no general power to regulate attorney conduct. Once an attorney has qualified for admission to the Bar of his or her state, that attorney is entitled to practice before the Commission and the Commission is without power to provide otherwise.9/

2. The Commission Has Power to Suspend Attorneys Only as Required to Maintain Order During Hearings

Since the NRC has no authority to establish a special bar, its sole source of disciplinary power

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8/ This comment was made with specific reference to the Internal Revenue Service, which had particularly detailed rules of practice, but was of general applicability.

9/ To the extent 10 C.F.R. § 2.713 is inconsistent with this rule, it is invalid. See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213-14 (1976).

would be its authority to conduct adjudicative hearings. This could encompass the very circumscribed power to protect a proceeding from disruption. Perhaps, in appropriate cases, this may include the ouster of an obstreperous attorney, or even his suspension from the particular proceeding. But it is well established that a suspension by an administrative agency can only occur where an attorney engages in contemptuous behavior such as would allow a court summarily to cite the attorney for contempt. See 18 U.S.C. § 401.

This limitation on the authority of agencies has been expressly recognized by the federal courts. See, e.g., Securities and Exchange Commission v. Csapo, 533 F.2d 7, 11 (D.C. Cir. 1976) ("before the SEC may exclude an attorney from its proceedings, it must come forth . . . with 'concrete evidence' that his presence would obstruct and impede the investigation"); Great Lakes Screw Corp. v. National Labor Relations Board, 409 F.2d 375, 379 (7th Cir. 1969) ("Contemptuous behavior is the appropriate ground for excluding a person from the hearing"); Camp v. Herzog, 104 F. Supp. 134, 139 (D.D.C. 1952) ("no person will be precluded from being represented by the person of his choice, except in the case in which such representative has been contempuous

at a hearing . . .").[10/]

For example, in Great Lakes Screw Corp., supra, the Seventh Circuit set aside an NLRB order issued following the agency's exclusion of counsel for one of the parties. According to the Board, the removal of counsel was predicated on the fact that during the hearing the attorney, Mr. O'Brien,

> "intimidated witnesses by shouting at them, questioning their intelligence, and disparaging their language weaknesses. Further, throughout the hearing Mr. O'Brien constantly belittled the legal ability of the General Counsel's representative, harassed the Trial Examiner by a barrage of meaningless and superfluous objections, and ignored the Trial Examiner's admonitions directed at his disruptive conduct." 409 F.2d at 379.

While agreeing that Mr. O'Brien's conduct "was far from being the paragon of comportment," the court found that

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10/ Even where it appears that one or more of the Canons of Ethics may have been breached, courts are extremely reluctant to disqualify counsel. See, e.g., W.T. Grant Co. v. Haines, 531 F.2d 671, 677-78 (2d Cir. 1976) (alleged violation of DR 7-104); Lefrak v. Arabian American Oil Co., 527 F.2d 1136 (2d Cir. 1975) (alleged violation of DR 2-103(C), (D), (E) and DR 2-104(A)(1)); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975) (alleged violation of Canons 4 and 9); Ceramco, Inc. v. Lee Pharmaceuticals, 510 F.2d 268 (2d Cir. 1975) (alleged violation of Canons 5, 7 and 9).

it fell "short of constituting contemptuous behavior." 409 F.2d at 380. Accordingly, the court held that the Board was without power to suspend O'Brien.

The Great Lakes Screw Corp. decision establishes that extraordinary misconduct must be present to warrant a finding of contemptuous conduct. The elements of such misconduct are:

> "1) Intentional conduct constituting 2) misbehavior which causes 3) an actual and material disruption or obstruction of the administration of justice 4) within the court's presence." United States v. Oliver, 470 F.2d 10, 12 (7th Cir. 1972) (emphasis in original).

See also Harris v. United States, 382 U.S. 162, 164 (1965); Fed. R. Crim. P. 42(a).[11/]

11/ In order to be found contemptuous, behavior must actually impede the ability of the court to conduct the particular proceeding. Thus, it has been held repeatedly that

> "mere disrespect or insult cannot be punished where it does not involve an actual and material obstruction." In re Dellinger, 461 F.2d 389, 400 (7th Cir. 1972).

Similarly, the courts have noted that

> "Trial courts . . . must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice." Brown v. United States, 356 U.S. 148, 153 (1958).

Every judicially sanctioned suspension of counsel by an administrative agency of which we are aware has satisfied these requirements. See Ubiotica Corp. v. Food and Drug Administration, 427 F.2d 376, 382 (6th Cir. 1970) (exclusion of counsel from active participation upheld where the record supported a finding that "counsel had deliberately refused to follow the directions of the Chair to the point that an orderly hearing was impossible"); Okin v. Securities and Exchange Commission , 137 F.2d 398, 401 (2d Cir. 1943) (counsel's on the record "anger increased until eventually the proceedings lost all decorum"); Camp v. Herzog, 104 F. Supp. 134 (D.D.C. 1952) (unprovoked physical assault in the hearing on attorney for General Counsel of NLRB).

Nor is it difficult to understand why the authority of the Commission, or of any similar administrative agency, to suspend attorneys is so limited.

First, suspension of an attorney during the course of a proceeding interferes with his client's right to counsel. The right to be represented by counsel of one's choice in an administrative proceeding is granted by statute and is expressly recognized by the Commission's regulations. 5 U.S.C. § 500(b); 10 C.F.R.

§ 2.713(a). See Great Lakes Screw Corp. v. National Labor Relations Board, supra, 409 F.2d at 381; Securities and Exchange Commission v. Higashi, 359 F.2d 550, 553 (9th Cir. 1966); Backer v. Commissioner of Internal Revenue, 275 F.2d 141, 144 (5th Cir. 1960). Thus, as the Appeal Board emphasized in Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-332, 3 NRC 785, 800 (1976), attempts to suspend counsel from a proceeding before the Commission "present issues of great sensitivity and importance," not least because "[t]hey could result in depriving a party of the right to be represented by the law firm which is his first choice."[12/]

12/ As previously described (pages 2-4, supra) this concern is particularly critical in the case of Mr. Cherry's clients. While Consumers is represented by a large firm and house counsel, and the Commission is represented by a large legal staff, the Saginaw Intervenors have been represented for the last eight years by one lawyer at a reduced fee or no fee. Moreover, for most of that time, the Saginaw Intervenors have been the sole active party in the proceeding opposing the grant of the license. Thus, the attempt to suspend Mr. Cherry from further participation in the Midland proceedings may deprive Intervenors not merely of their chosen, but of their only, counsel and deprive the Midland Board of a second point of view. Indeed, the Midland Board has already pointed out the unique value of the Saginaw Intervenors' contribution. See February 25, 1977 Order, ¶ 1, quoted at p. 2, supra.

Second, suspension of an attorney for conduct less egregious than that subject to summary contempt in the courts would limit vigorous advocacy, thus undermining the entire administrative process. Accordingly, it has been held that

> "Attorneys have a right to be persistent, vociferous, contentious, and imposing, even to the point of appearing obnoxious, when acting on their client's behalf. An attorney may with impunity take full advantage of the range of conduct that our adversary system allows." In re Dellinger, supra, 461 F.2d at 400.

See also Great Lakes Screw Corp. v. National Labor Relations Board, supra, 409 F.2d at 381.[13/]

Third, suspension of an attorney for an expression of views which does not amount to contempt would pose serious problems under the First Amendment

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13/ In the case of Mr. Cherry, it is particularly important that there be no impediment to his ability to serve as a zealous advocate. Mr. Cherry's clients, the Saginaw Intervenors, are currently the sole party which does not favor the grant of a license. Thus, they espouse a position unpopular with the nuclear establishment. For this very reason, it is imperative that their voice be heard and that their counsel be permitted the full range of advocacy countenanced by our adversary system.

of the United States Constitution, from which the criticism of judges (or administrative hearing officers) has not been carved out as an exception. See Wood v. Georgia, 370 U.S. 375, 393 (1962); Craig v. Harney, 331 U.S. 367, 376 (1947);[14/] Bridges v. California, 314 U.S. 252, 270 (1941). It has been recognized that the Constitution limits the power to proscribe attorney conduct where speech is involved. See, e.g., In re Sawyer, 360 U.S. 622, 636 (1959); Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 257 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976) ("We read the Supreme Court general contempt cases as indicating that the First Amendment does not authorize restrictions on 'pure speech' [by lawyers] merely for the purpose of protecting judges from criticism"); Chase v. Robson, 435 F.2d 1059, 1061 (7th Cir. 1970); see also Polk v. State Bar of Texas, 374 F.Supp. 784, 787-88 (N.D. Tex. 1974). Indeed, in Chase v. Robson, supra, the court held that "before a trial court can limit . . . attorneys' exercise of

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14/ "[T]he law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate." Craig, supra, 331 U.S. at 376.

first amendment rights of freedom of speech, the record must contain sufficient specific findings by the trial court establishing that . . . [the] attorneys' conduct is 'a serious and imminent threat to the administration of justice.'" 435 F.2d at 1061.

In summary, the Commission's rules, set forth at 10 C.F.R. § 2.713, constitute a valid exercise of the Commission's power only if they are limited to the suspension of an attorney for conduct at a hearing which is so egregious that, unless the attorney is permanently removed from the proceeding, the hearing could not reasonably proceed further. Short of such circumstances, the Commission is without power to suspend an attorney from a proceeding in which he is participating. Therefore, insofar as 10 C.F.R. § 2.713 purports to permit suspension from a proceeding for conduct which, as in this case, did not occur in the presence of the hearing panel, and which is neither related to nor substantially obstructed that proceeding, the regulation is ultra vires.[15/]

15/ Toledo Edison Company (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-378, 5 NRC 557 (1977), ALAB-332, 3 NRC 785 (1976), may not be read to imply that the Commission has broader jurisdiction to disqualify counsel on the basis of events which did not occur in the presence of a hearing board. That case,

B. Mr. Cherry's Alleged Conduct Does Not Fall Within the Commission's Power to Discipline Attorneys.

It is absolutely clear that the Commission is without authority to suspend Mr. Cherry for the conduct upon which the present charges are based.

First, Mr. Cherry's statement concerning the conduct of certain members of a board established by the AEC -- an agency which went out of existence in 1975 -- did not obstruct the proceedings before the Midland Board. This is plain from the fact that the Midland Board delayed some seven months, until after the completion of the pending hearings and the entry

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[Footnote continued]
of course, involved the totally different question of whether counsel should be permitted to represent a party in a proceeding, when the same counsel previously had represented a party with adverse interests in another proceeding and the former client opposed the new representation. Obviously, the propriety of such representation substantially affected the right of the parties to receive a fair hearing and necessarily involved the exploration of what had occurred in connection with the earlier and substantially related matter. Even in that case, the Appeal Board noted that "to be sure, it is not for the Commission to punish SS&D for some past asserted wrong doing . . . ." 3 NRC at 796. Moreover, as the opinion correctly pointed out, courts do disqualify attorneys in the case of conflict of interest. Notably, however, courts do not suspend attorneys from representing their clients in mid proceedings, or discipline them in mid-proceedings for conduct which is not punishable through the summary contempt power. See note 10, supra.

of its order with respect to that entire aspect of the proceedings, before entering its order regarding the alleged misconduct.

In a strikingly similar situation, the Seventh Circuit set aside a contempt citation against an attorney based on his unflattering characterization in the courtroom of the presiding judge's evidentiary ruling. Parmelee Transportation Co. v. Keeshin, 292 F.2d 806 (7th Cir. 1961), rev'd on other grounds, 370 U.S. 230 (1962). In its opinion, the Seventh Circuit observed that:

> "The [trial] court waited more than five months after the alleged contempt had been committed, and only then specified the contempt charges and entered the order from which this appeal has been taken. The very fact that in the meantime various proceedings, including a long-drawn-out trial, had occurred, is rather conclusive evidence that these words of respondent in no way obstructed the court in the performance of its judicial duty, an element that must be clearly shown in every case where the power to punish for criminal contempt is exercised." 292 F.2d at 810 (emphasis supplied).

In the present case, far from finding that Mr. Cherry's conduct impeded the proceeding, the Midland Board expressly held that the public interest would

be frustrated and the proceeding hindered if it devoted its attention to the collateral issues of attorney conduct rather than the complex substantive matters before it. See June 15, 1977 Memorandum, at 5-6. In point of fact, in its motion seeking Mr. Cherry's suspension, the staff emphasized that it did "not believe that there is a need to disrupt the conclusion of this suspension proceeding by the institution of these charges . . . ." May 9, 1977 Transcript, at 5221. Thus, even the party initiating the charges has conceded that the hearing would be impeded by its own attempt to disqualify Mr. Cherry, not by his continued participation.

Second, it is undisputed that Mr. Cherry's comments did not occur in the course of the hearing or in the presence of the Midland Board. Although the Board members received copies of the correspondence addressed to Staff Counsel, the sole references to the matter on the hearing record are the remarks by counsel for the staff, echoed by counsel for Consumers Power, on a day when Mr. Cherry was not even present.

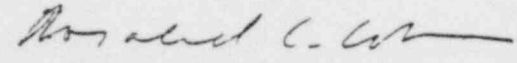
Mr. Cherry's conduct simply does not satisfy, and is not even alleged to satisfy, the standards discussed earlier which must be met before the Commission

has jurisdiction to consider the pending charges. See pp. 15-19, supra. As noted, the business of the Commission is to dispose of substantive matters within its area of expertise "and not to act as a general overseer of the ethics of those who practice here unless the questioned behavior taints the trial of the cause before it." W.T. Grant Co. v. Haines, 531 F.2d 671, 677 (2d Cir. 1976). Accordingly, the Commission -- and this Board -- is without jurisdiction to proceed in this matter.

CONCLUSION

For the foregoing reasons, the suspension charges against Mr. Cherry should, be dismissed for lack of jurisdiction.

Respectfully submitted,



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Dated: February 2, 1978