5/20/77

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S RESPONSE TO INTERVENORS' MOTION TO STRIKE CERTAIN PLEADINGS

Background

On March 25, 1977, the NRC Staff (Staff) filed before the Atomic Safety and Licensing Board (Board) a "Motion for Censure of Myron M. Cherry." That motion specified conduct by Mr. Cherry in this proceeding (an unwarranted personal attack upon counsel for the NRC Staff made in Mr. Cherry's letter to the Licensing Board of March 10, 1977) which, in the Staff's view, failed to conform to the standards of conduct required of an attorney in the Courts of the United States. These standards also govern attorneys' conduct before the Nuclear Regulatory Commission. (10 C.F.R. §2.713(b)).

Mr. Cherry's response to the Staff's motion was a letter dated April 5, 1977 to the Board. In the Staff's view, that letter totally failed to justify the conduct which the Staff had called attention to in its March 25 motion. Indeed the letter was principally devoted to making new accusations. The additional accusations against the ECCS Hearing Board members stand out in particular:

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> Indeed, now that we are "searching for the truth" let it be known that during those ECCS hearings, I was summoned to a private meeting by Hearing Board members asking me to halt my intervention and opposition because I had "done enough" to demonstrate improprieties and if I went any further I would only begin to destroy the fabric of the Atomic Energy Commission (p. 3).

This accusation prompted Dr. Lawrence R. Quarles, an ECCS Hearing Board member, to attach a total denial of the charge made by Mr. Cherry to a recent Appeal Board decision issued in this proceeding.[1/] Dr. Quarles bluntly states:

> I was one of the Members of the ECCS Hearing Board. Its two other members join me in stating unequivocally that there never was any discussion, suggestion or request--private or public--addressed to the possible withdrawal of the intervention of counsel's then clients from the rulemaking proceeding. Nor did the Board or any members thereof entertain at any time during the course of that proceeding the views now attributed to them by counsel's recent letter. In short, counsel's assertion is wholly false (Slip Op. page 31).

By letter dated May 6, 1977, addressed to Dr. Quarles, Mr. Cherry repeated his allegation. Mr. Cherry recalls that Dr. Quarles was not at the particular meeting referred to in Mr. Cherry's March 10 letter. Mr. Cherry suggested that Dr. Quarles contact the other Hearing Board members who "should remember the meeting to which I had reference." Of course, as Dr. Quarles clearly indicated in ALAB-395, he had already made the suggested inquiries.

1/ Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-395 5 NRC ___ (April 29, 1977), Slip Op. page 31. It should be noted that Mr. Cherry's allegations led Dr. Quarles to recuse himself as a member of the Midland Appeal Board, requiring reconstitution of that Board. This is but one indication of the disruptiveness of Mr. Cherry's unchecked allegations in this proceeding.

Noting that developments subsequent to its March 25 motion accentuated the need for a prompt ruling, the Staff, on May 9, and May 12, renewed its motion for censure of Mr. Cherry (Tr. 5220-5224; Tr. 5849). In addition, the Staff urged that, pursuant to 10 C.F.R. §2.713(c), at the termination of the present suspension proceedings, this Board institute proceedings against Mr. Cherry. As was noted by Dr. Quarles in ALAB-395, the Code of Professional Responsibility expressly provides that a "lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer." Disciplinary Rule 8-102(B).

In response to the Staff's renewal of its motion for censure and the Staff's motion to initiate proceedings under 10 C.F.R. §2.713(c), Mr. Cherry filed a "Motion to Strike Certain Papers as Sham Pleadings" (Motion) and "Further Response in Opposition to Censure Motions and Cost Motions and Statement in Support of Intervenors' Motion to Strike Certain Filings of the Regulatory Staff and Consumers in These Proceedings" (Response), supported by Mr. Cherry's affidavit, all personally served on the parties at the hearing on May 13, 1977.

In these motions, Mr. Cherry seeks to strike the censure motion of the Staff dated March 25, 1977, the response by Consumers Power Company dated April 4, 1977 and the motion of Consumers Power Company in connection with excess costs dated May 4, 1977. The Staff opposes Mr. Cherry's motion.

In his memorandum in support of the motion to strike the Staff's censure motion, Mr. Cherry states that his "investigation of the underlying facts shows that the purpose of the Censure Motion was no more than a smoke screen to cover up the Regulatory Staff's total and complete irresponsibility in this case which Intervenors' have exposed" (Further Response p. 5). Further on in that pleading Mr. Cherry states that "it is clear that the Regulatory Staff's improper and vicious attacks upon Intervenors stem from the Regulatory Staff's inability to deal with the fact that they have been exposed on this record and they are not doing their job." (Further Response, pp. 6-7). In further support of his motion, Mr. Cherry has supplied a document which purports to be an affidavit in which he states that during the entire course of the Midland suspension decision "at no time have I done anything which was not in the best interest of my clients as an advocate and which does not comport with the standards of professional conduct." (Affidavit, p. 2). Further on Mr. Cherry states that "because of the facts stated in accompanying papers" he is informed and believes that the Staff's Censure Motion was not filed in good faith but "was calculated to intimidate my representation in these and other cases" and to "place a smoke screen over the admissions of record which show that the Regulatory Staff did not do an independent review in this proceeding...." (Affidavit, pp. 2-3).

We urge this Board to take a very close look at the bases upon which Mr. Cherry rests this new round of allegations of "bad faith," "intimidation," and "smoke screens." While Mr. Cherry states that these charges rest upon an investigation he has conducted and are based upon facts stated in the motion papers, it is manifest that the motion paper states no facts whatever to support these false allegations. Essentially what Mr. Cherry states is that since his conduct in this proceeding has been wholly blameless, the Staff's motion to censure his conduct must be based upon a Staff purpose to intimidate him or create a smoke screen to cover up inadequacies of its performance . If Mr. Cherry is right in suggesting that his conduct has wholly conformed to the standards required of attorneys in the courts of the United States, and that the Staff had no reasonable basis for filing a complaint against that conduct, one might be justified in drawing one of the adverse inferences about the Staff's motives which Mr. Cherry suggests. On the other hand, if the Staff is correct in contending that Mr. Cherry's conduct in this proceeding has not conformed to the standards required of attorneys in the courts of the United States, then it ought to be apparent to the Board that Mr. Cherry's new charges are empty. If insisting that Mr. Cherry adhere to the normal standards of attorney conduct amounts to "intimidation" and "smoke screen," Mr. Cherry is in effect saying that in his self-proclaimed role of protector of the public interest in this proceeding he is not subject to the same rules that govern the conduct of other parties.

Throughout this proceeding on remand Mr. Cherry has made many attacks upon the adequacy and competence of Staff performance. Simply in the interest of making some progress toward the conclusion of this proceeding, we have generally chosen not to burden the Board with a point-by-point refutation. We believe that Mr. Cherry's attack upon the Staff's performance in this case is unfair and wrong. But that is not the issue here. The system under which the United States Government and this agency operates affords wide latitude for citizens' criticism of its performance--even criticism that is fundamentally unfair and wrong. What an adjudicative system cannot tolerate are wild and reckless allegations by one participant as to the truthfulness, integrity, and good faith of other participants.[2/] Such allegations inevitably disrupt the proceeding and fundamentally demean the adjudicatory process itself.

Thus, we suggest that an analysis of Mr. Cherry's current motion and the accompanying papers brings the issue back to precisely the one raised in the Staff's March 25 Censure Motion. Has Mr. Cherry's conduct conformed to the standard required of attorneys in the courts of the United States or, on the other hand, has his advocacy transgressed into the impermissible areas of unwarranted personal attack upon his opponents?

2/ In this context it is useful to note the Supreme Court's comment in Sacher v. United States, 343 U.S. 1 (1951): that "...it will not equate contempt with courage or insults with independence." (p. 13).

Our March 25 motion documented a clear instance in which Mr. Cherry's conduct departed from the established standards of ethical conduct required of attorneys in the courts of the United States. Nothing Mr. Cherry has said in response excuses or justifies that conduct. Instead, the Board has been presented with a stream of allegations against the Staff, each more extreme, reckless and unsupported than the one before. Mr. Cherry's remarks at the May 13 hearing session (Tr. 6065-6068), the Motion to Strike and supporting papers filed that day, and the two motions filed on May 16, 1977,[3/] demonstrate on their face -- without the need for additional comment by us -- the kind of attorney conduct which cannot be tolerated in an adversary proceeding and which should be strongly censured. The Staff motion for censure awaits this Board's decision, and it is imperative that the Board decide it promptly.

3/ "Intervenors' 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." The Staff does not intend to dignify those two scandalous documents with a response.

A failure on the part of the Board to rule promptly will effectively deny the relief the Staff seeks. That administrative inaction may constitute a denial of relief is well established. See Environmental Defense Fund, Inc., et al. v. Hardin, 428 F.2d 1093, 1099 (D.C. Cir., 1970).[4/]

The Appeal Board has adopted this principle in Detroit Edison Company (Greenwood Energy Center, Units 2 and 3), ALAB-376, 5 NRCI 426, 428 (February 22, 1977) in the context of a Licensing Board ruling on an intervention petition. While the Appeal Board was unable to discern any "substantial prejudice" following upon the failure to rule in that case, the circumstances before this Board are sharply distinguishable. Mr. Cherry's conduct has disrupted and delayed the hearing process and subjected other participants to unwarranted abuse and insult. In performing its duties under the Atomic Energy Act and the National Environmental Policy Act, this Commission is dependent upon the responsible and ethical conduct of litigants and their attorneys. Prompt rulings from the Board are required to re-establish an environment in which the parties can address themselves rationally and responsibly to the issues in this case.

4/ In fact, failure to rule on requested relief has been found to constitute final action for purposes of review under the Administrative Procedure Act where there is hardship, a purely legal question, no statutory bar to review and no further administrative action other than the possible imposition of sanctions is required. Bankers Life & Cas. Co. v. Callaway, 530 F.2d 635, 631 (5th Cir. 1976); See also, Committee for Open Media v. F.C.C., 543 F.2d 861, 865 (D.C. Cir. 1976); Nader v. FCC 520 F.2d 182, 206 (D.C. Cir. 1975); Kixmiller v. SEC 492 F.2d 641, 644 (D.C. Cir. 1974).

Conclusion

The Intervenors' "Motion to Strike Certain Papers as Sham Pleadings" should be denied. The accusations and allegations contained in that response in conjunction with the conduct by Mr. Cherry on the record of this proceeding on May 13, 1977 make even more compelling a prompt Board ruling on the Staff's motion to censure Mr. Cherry. The Staff hereby urges such a prompt ruling.

Respectfully submitted,

Milton J. Grossman
Chief Hearing Counsel

James R. Tourtellotte
Assistant Chief Hearing Counsel

William J. Olmstead
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 20th day of May, 1977

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO INTERVENORS' MOTION TO STRIKE CERTAIN PLEADINGS", dated May 20, 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 20th day of May, 1977:

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