

SEP 14 1977

Docket Nos. 50-329  
50-330

THIS DOCUMENT CONTAINS  
POOR QUALITY PAGES

Mr. J. Leslie Toohar  
1450 Valencia Road  
Schenectady, New York 12309

Dear Mr. Toohar:

This is in response to your letter of August 23, 1977 to the Chairman of the Nuclear Regulatory Commission, requesting that Mr. Myron Cherry be permitted to continue to cross-examine witnesses in the public hearings being held concerning continued construction by Consumers Power Company of the Midland Nuclear Plant. Your letter also expressed concern over the Staff's motion to censure Mr. Cherry.

The Chairman has requested that I respond to your inquiry since the matter you raise involves an ongoing proceeding in which decisions made by the presiding Licensing Board may come before the Commission for a final ruling. In these circumstances, it would be inappropriate for the Chairman or any member of the Commission to comment on your concerns.

The hearing to which you refer was held to determine whether continued construction of the Midland facility should be permitted in light of the decision by the Court of Appeals for the District of Columbia Circuit in Nelson Aeschliman, et al. v. U. S. Nuclear Regulatory Commission, 547 F.2d 622 (D.C. Cir., 1976). In that decision, the Court directed the Commission to re-examine certain issues which had been inadequately dealt with in connection with the original issuance of the Midland facility construction permit.

The hearing to which you refer commenced on November 30, 1976, and continued intermittently until conclusion on May 13, 1977. The Commission designated Atomic Safety and Licensing Board (Board) now has the record before it for a decision. At this hearing, Mr. Cherry represented all intervenors other than Dow Chemical Co. Mr. Cherry participated actively in the proceeding. He cross-examined a number of witnesses at the hearing, both of the NRC Staff and Consumers, and presented expert testimony on behalf of his clients. At no time in the proceeding did any party suggest that Mr. Cherry's right to cross-examination be curtailed. On occasions, both Consumers and the NRC Staff objected to certain questions or areas of inquiry which were argued to be irrelevant and beyond the scope of the issues the Board was convened to consider. In some instances, the Board sustained such objections. In others, it overruled them. Such arguments as to the extent of cross-examination are commonplace in any adjudicatory proceeding.

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As to your concerns regarding the censuring of Mr. Cherry, no action has been taken by the Board or the Commission. For the background and current status of this matter, I am enclosing copies of the NRC Staff motions and Board Orders. The Licensing Board has announced that it will rule upon the censure motion after it has issued its decision on the question of interim license suspension.

I want to reassure you that the NRC Staff has no desire to stifle Mr. Cherry's full and effective representation of his clients' interests. However, the established canons of ethics for attorneys draw a sharp distinction between vigorous advocacy and conduct which abuses and demeans the presiding tribunal, the parties, or their counsel. We believe that this distinction must be observed in NRC hearings if those hearings are to serve their purpose as rational and fair forums for resolving disputed issues.

Thank you for expressing your interest in this matter.

Sincerely,

Original Signed by Thomas F. Engelhardt  
Thomas F. Engelhardt  
Deputy Executive Legal Director

Enclosures:

- Staff Motion dtd March 25, 1977
- Staff Motion dtd June 6, 1977
- Board Memorandum dtd June 15, 1977
- Appeal Board Memorandum and Order dtd June 29, 1977

- cc (w/out encls.):
- Frederic J. Coufal, Esq.
- Dr. J. Venn Leeds, Jr.
- Dr. Emmeth A. Luebke
- Myron M. Cherry, Esq.
- Judd L. Bacon, Esq.
- Ms. Mary Sinclair
- Harold F. Reis, Esq.
- L. F. Nute, Esq.
- Mr. Steve Gadler
- R. Rex Renfrow, III, Esq.
- Norton Hatlie, Esq.

Distribution:

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DATE →	9/13/77	9/1/77	9/13/77		

FROM: J. L. Toohar Schenectady, N. Y.		ACTION CONTROL	DATES	CONTROL NO. 02459
TO: Chairman Rowden		COMPL DEADLINE	3/15/77	DATE OF DOCUMENT 3/23/77
DESCRIPTION <input type="checkbox"/> LETTER <input type="checkbox"/> MEMO <input type="checkbox"/> REPORT <input type="checkbox"/> OTHER		ACKNOWLEDGMENT		PREPARE FOR SIGNATURE OF: <input type="checkbox"/> CHAIRMAN <input type="checkbox"/> EXECUTIVE DIRECTOR OTHER: <u>Shapar</u>
<p>urges that Myron Cherry be permitted to continue to cross examine in the Dow Chemical-Consumers Power Proceeding (H. 1000)</p>		INTERIM REPLY		SPECIAL INSTRUCTIONS OR REMARKS
CLASSIFIED DATA		FINAL REPLY		
DOCUMENT/COPY NO.		FILE LOCATION		
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ASSIGNED TO:	DATE	INFORMATION ROUTING	LEGAL REVIEW	<input type="checkbox"/> FINAL <input type="checkbox"/> COPY
Shapar	3/11/77		ASSIGNED TO:	NO LEGAL OBJECTIONS NOTIFY:
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NRC FORM 232  
(11-75)

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No. 77-1392 Logging Date 8/31/77

NRC SECRETARIAT

TC.  Commissioner \_\_\_\_\_ Date \_\_\_\_\_

Exec. Dir./Oper. \_\_\_\_\_  Gen. Counsel \_\_\_\_\_

Cong. Liaison \_\_\_\_\_  Solicitor \_\_\_\_\_

Public Affairs \_\_\_\_\_  Secretary \_\_\_\_\_

\_\_\_\_\_

Incoming: J. Leslie Toher

From: 1450 Valencia Rd.  
Schenectady, N.Y. 12309

To: Rowden Date 8/23/77

Subject: Expressing opinion that Myron  
Cherry should be allowed to continue  
cross examinations in Dow Chemical-Consumer  
Power proceeding (Midland)

- Prepare reply for signature of:
- Chairman
  - Commissioner \_\_\_\_\_
  - EDO, GC, CL, SOL, PA, SECY
  - Signature block omitted
  - \_\_\_\_\_
  - Return original of incoming with response

For direct reply\*

Suspense: Sept. 16

- For appropriate action
- For information
- For recommendation

Rec'd Off. TDU  
 Date 8/31/77  
 Time 3:15

Remarks: Cpys to: OGC, PE.  
Original to Docket Logged Ex Parte

For the Commission: *[Signature]*

\*Send three (3) copies of reply to Secy Mail Facility