UNITED STATES OF AMERICA

ATOMIC ENERGY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Re Consumers Power Company --
Midland Plant Units 1 and 2 --

Dockets 50-329
50-330

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STATEMENT OF
FRANK J. KELLEY, ATTORNEY GENERAL OF THE STATE OF MICHIGAN,
IN CONNECTION WITH THE ORDER TO SHOW CAUSE FOR CONTEMPT
INVOLVING ATTORNEY MYRON M. CHERRY

Now comes FRANK J. KELLEY, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, which has heretofore entered a limited appearance in this case, pursuant to Section 2.715 of the Commission's Rules, and makes the following statement in connection with the order to show cause for contempt involving attorney Myron M. Cherry, which order to show cause was issued by the Atomic Safety & Licensing Board of the Atomic Energy Commission:

I.

STATEMENT OF FACTS

In late May or early June, 1972, Arthur Murphy, Chairman of the Safety and Licensing Board of the Atomic Energy Commission, directed Myron M. Cherry, a lawyer with offices located in Chicago, Illinois, to show cause why the Atomic Safety and Licens-

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ing Board of the AEC should not hold him in contempt. The show cause order was issued at the request of Mr. Milton Wessel, attorney for intervenor Dow Chemical Company of Midland, Michigan, which strongly supports the application in this docket of Consumers Power Company for a permit to construct a nuclear powered electric generating plant in Midland, in close proximity to the chemical plant of the Dow Chemical Company.

Mr. Cherry is the attorney of record for certain environmental groups: West Michigan Environmental Action Council, the Sierra Club, Trout Unlimited, United Auto Workers, University of Michigan Environmental Law Society, Michigan Citizens for the Protection of the Environment and the Saginaw Valley Nuclear Study Group. These intervenors are referred to as the "Saginaw Valley" group.

The Saginaw Valley group has raised the issue, among others, that the radioactive emissions from the proposed Consumers Power Company nuclear generating plant may combine with gaseous effluents emitted from the chemical plants of the Dow Chemical Company, so as to produce harmful and toxic chemicals and substances in the atmosphere, with a resultant adverse effect upon the health and well-being of the persons in the Bay City area. This is the so-called "synergism" issue, i.e., the interaction between chemicals and other releases from Dow Chemical facilities with radionuclides to be emitted by the proposed

Consumers Power nuclear plant.

Another environmental group, sometimes referred to as the "Mapleton intervenors", represented by attorneys Irving Like of Babylon, New York, and William J. Ginster of Saginaw, Michigan, raised the same issue, among others.

In the year 1971, at the continuous and insistent request of Mr. Cherry, the AEC directed Dow Chemical Company to furnish to Mr. Cherry, for use by him and those who might assist him, including but not limited to present or prospective expert witnesses, a list of liquid and gaseous effluents that Dow Chemical Company anticipates emitting into the external environment in the year 1975. Said list comprises four single-spaced pages. At the time that the Commission directed Dow to provide said list, the Commission also ruled that said list would be subject to the terms and conditions of a previously issued "protective order", guarding the confidentiality of certain proprietary information provided by Consumers Power Company to the Saginaw Valley group.

After Dow had furnished the effluent list to Mr. Cherry, it appears that Mr. Like, the attorney for the Mapleton intervenors, and expert scientific witnesses obtained by the Mapleton group, came into possession of such list. Subsequently, the Dow Chemical Company released said list to the public for general circulation and publication.

The essence of the contempt charge initiated by the Dow Chemical Company against Mr. Cherry is that Mr. Cherry permitted or allowed the Dow Chemical Company list of pollutants to be made available to Mr. Like for analysis by scientific experts, allegedly contrary to this Commission's protective order.

Brief Description of Mr. Cherry

Myron M. Cherry is a nationally-known environmental defense lawyer, who has represented numerous environmental groups, including the Sierra Club, the United Auto Workers' Union, Businessmen for the Public Interest, Friends of the Earth, National Resources Defense Council, National Wildlife Federation, and others in proceedings involving the licensing of the construction and operation of atomic power plants. Mr. Cherry was one of the attorneys of record for the Calvert Cliffs' Coordinating Committee, which successfully brought suit against the Atomic Energy Commission to compel the AEC to comply with the requirements of the National Environmental Policy Act of 1969 (NEPA), in the landmark case of Calvert Cliffs' Coordinating Committee v United States Atomic Energy Commission, 449 F2d 1109 (1971), decided by the United States Court of Appeals for the District of Columbia Circuit.

Mr. Cherry was also the attorney for a number of environmental groups who intervened in Docket No. 50-255,

before this Commission, in the Consumers Power Company, Palisades Plant, licensing proceeding. After approximately a year of litigation before this Commission, the United States District Courts and the United States Courts of Appeal for the District of Columbia Circuit and the Seventh Circuit, during which time this Commission consistently refused to consider the effect of Consumers Power Company's proposed Palisades nuclear plant near South Haven, Michigan, upon the temperature of Lake Michigan waters, the so-called "thermal pollution issue", Consumers Power Company agreed with Mr. Cherry to construct and operate cooling towers at a cost of approximately $25 million so as to minimize thermal pollution of Lake Michigan. See Thermal Ecology Must Be Preserved v Atomic Energy Commission, 433 F2d 524 (1970, CCA-DC); Thermal Ecology Must Be Preserved v Atomic Energy Commission, 2 Environmental Reporter, Cases 1405 (1970, CCA-7).

In many environmental cases, Mr. Cherry has served without fee, contributing hundreds of unpaid hours to the representation of environmental positions.

## II.

## STATEMENT OF MICHIGAN ATTORNEY GENERAL'S POSITION

### (A) The National Environmental Policy Act of 1969 (NEPA)

(1) There can be no doubt that the Atomic Energy Commission must receive competent evidence of and consider the

potential harm to the environment that might result from the interaction of Dow's effluents emitted into the atmosphere with the radiation to be emitted from the proposed Consumers Power Company nuclear plant, in the light of the National Environmental Policy Act of 1969 (NEPA).[1] The United States Court of Appeals for the District of Columbia stated in Calvert Cliffs' Coordinating Committee v Atomic Energy Committee (1971), supra:

> "The sweep of NEPA is extraordinarily broad, compelling consideration of any and all types of environmental impact of federal action." (449 F2d, at p 1122).

The Circuit Court of Appeals said further:

> "NEPA, first of all, makes environmental protection a part of the mandate of every federal agency and department. The Atomic Energy Commission, for example, had continually asserted, prior to NEPA, that it had no statutory authority to concern itself with the adverse environmental effects of its actions. Now, however, its hands are no longer tied. It is not only permitted, but compelled, to take environmental values into account.* * *." (449 F2d, at p 1112).

Thus, it is clear that the synergistic effects of the Dow Chemical Company effluents in combination with the radioactive levels to be emitted by the Consumers Power Company nuclear plant was and is a subject that requires full develop-

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1 42 USCA § 4321 et seq.

ment of an evidentiary record and full consideration by AEC, prior to the issuance of a construction permit for the atomic facility. That being so, there was and is no lawful basis for the action of the AEC in blanketing the Dow effluent information under a highly restrictive protective order, that would create serious obstacles in the way of environmental groups developing this evidence on the record.

(2) The AEC, instead of placing obstacles in the path of the environmental intervenors in developing evidence concerning the synergistic effects of Consumers Power Company's proposed atomic plant, should have been actively encouraging this type of analysis, and should have itself been taking the initiative to develop such evidence on the record. As stated in Calvert Cliffs' Coordinating Committee v Atomic Energy Commission, supra:

> "* * *NEPA establishes environmental protection as an integral part of the Atomic Energy Commission's basic mandate. The primary responsibility for fulfilling that mandate lies with the Commission. Its responsibility is not simply to sit back, like an umpire, and resolve adversary contentions at the hearing stage. Rather, it must itself take the initiative of considering environmental values at every distinctive and comprehensive stage of the process beyond the staff's evaluation and recommendation." (449 F2d, at p 1119)

See, also, in regard to the Federal Power Commission, the opinion of the United States Court of Appeals for the Second Circuit in

Scenic Hudson Preservation Conference v Federal Power Commission, 354 F2d 608, 620 (1965, CCA-2):

> "In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission." Scenic Hudson Preservation Conference v FPC, 2 Cir., 354 F2d 608, 620 (1965).

The State of Michigan is vitally concerned with the quality of its air and water, and the potential degradation of air and water quality by the construction and operation of atomic power plants. Although agencies of the State of Michigan have heretofore filed statements with this Commission, expressing the belief that the proposed Consumers Power Company atomic plant would be consistent with the maintenance of proper air and water quality standards, the State nevertheless strongly favors the fullest possible inquiry by the AEC and environmental groups in analyzing, evaluating and considering every possible source of harm to the environment that may result from the construction of atomic plants, and, where necessary, the conditioning by AEC of construction and operation permits upon the making of modifications that will minimize or eliminate actual or potential hazards to the environment.

(B) Freedom of Information Act

The Freedom of Information Act, 5 USCA § 552, estab-

lishes a federal policy that information and documents in the possession of a federal agency be made freely available to the public, with certain narrow and limited exceptions. The list of Dow effluents became an agency record of the AEC at the time that Dow furnished such list to Mr. Cherry, with a copy to the AEC. The only conceivable basis upon which such list could be withheld by AEC from other intervenors or members of the public is that such list constituted "trade secrets and commercial or financial information obtained from a person and privileged or confidential", within the meaning of 5 USC § 552(b)(4). However, Dow has never claimed that its list of effluents is a "trade secret", and such list clearly does not constitute "commercial or financial information". Thus, regardless of whether such list could be considered "privileged or confidential", the list cannot be withheld from the public, because such list is not a "trade secret".

The AEC, in purporting to place the Dow effluent list under a protective order, thus withholding such information from the public, violates the letter and purpose of the Freedom of Information Act, which was described as follows in Consumers Union of United States, Inc. v Veterans Administration (USDC, S.D., N.Y., 1969), 301 F Supp 796, Appeal dismissed 436 F2d 1363:

> "The purpose of the Act, seen in the statutory language and the legislative history, was to reverse the self-protective attitude of the

agencies under which they had found that the public interest required, for example, that the names of unsuccessful contract bidders be kept from the public. The Act made disclosure the general rule and permitted only information specifically exempted to be withheld; it required the agency to carry the burden of sustaining its decision to withhold information in a de novo equity proceeding in a district court. Disclosure is thus the guiding star for this court in construing the Act. * * *" (301 F Supp 796, 799-800; emphasis added).

In the Consumers Union case, the District Court, in rejecting the claim of the Veterans' Administration that certain information concerning hearing aids was a "trade secret", defined trade secret as follows:

"* * * an unpatented, secret, commercially valuable plan, appliance, formula, or process, which is used for the making, preparing, compounding, treating, or processing of articles or materials which are trade commodities.* * *." (301 F Supp 796, 801).

(C) AEC Rules Re Disclosure of Documents

Not only does the Freedom of Information Act require disclosure of the Dow effluent list, but the AEC's own rules similarly require such disclosure. Section 2.790(b) of the AEC rules, 10CFR 2.790(b) provides:

"(b) A person who proposes that a document or a part be withheld in whole or in part from public disclosure shall at the time of filing it submit an application for withholding or make timely application thereafter identifying the document or part, and stating reasons

why it should be withheld. He shall, as far as possible, incorporate in a separate paper any part sought to be withheld. The Commission may withhold any document or part from public inspection if disclosure of its contents is not required pursuant to Part 9 of this chapter, is not required in the public interest and would adversely affect the interest of a person concerned. Withholding from public inspection shall not, however, affect the right, if any, of persons properly and directly concerned to inspect the document. If the applicant fails to comply with the requirements of this paragraph, the Commission will inform him that it intends to deny his application unless he complies with those requirements within the time stated in the notice." (10 CFR § 2.790(b), at pp 61-62).

Moreover, § 9.4 of the AEC's rules, 10 CFR 9.4, at p 103 specifically provides:

> "Any identifiable record, whether in the possession of the AEC, its contractors, its subcontractors, or others, shall be made available for inspection and copying pursuant to the provisions of this part, upon request of any member of the public."

The AEC's list of exemptions from availability of records, § 9.5 of the rules, contains nothing that would exempt the Dow effluent list from public disclosure, with the possible exception of "trade secrets", discussed above. Section 9.5(c), 10 CFR 9.5, at p 105, provides:

> "(c) Nothing in this part authorizes withholding of information or limiting the availability of records to the public, except as specifically provided in this part, nor is this part authority to withhold information from Congress."

Thus it is clear that Dow failed to comply with the

AEC's rules, particularly § 2.790, in requesting that its effluent list be withheld from the public, because Dow stated no pertinent reasons why the list should be withheld. The AEC, in purporting to place the list under a protective order, violated the same section of its rules, in that disclosure of the list <u>is</u> required pursuant to § 9.4 and § 9.5(c) of the rules, <u>is</u> "required in the public interest", and <u>would not</u> "adversely affect the interest" of Dow. Moreover, even if AEC, under its rules, had authority to withhold from general public inspection the Dow list, it had no authority to restrict the right of the Mapleton intervenors to inspect the document, since such intervenors were "persons properly and directly concerned", within the meaning of Section 2.790(b) of AEC's rules.

(D) <u>Legal Elements of Contempt by an Attorney</u>

In order for AEC to find Mr. Cherry in contempt, it must find (1) that disclosure of the Dow effluent list to the attorney for the Mapleton intervenors constituted an actual obstruction of AEC's proceedings; and (2) that Mr. Cherry intended to so obstruct the AEC proceeding. These essential ingredients were recently spelled out in <u>United States</u> v <u>Seale</u>, 461 F2d 345 (1972, CCA-7), and in <u>Re Dellinger</u>, 461 F2d 389 (1972, CCA-7), The United States Court of Appeals for the Seventh Circuit said in <u>Dellinger</u>:

"As noted in the companion opinion, United States v Seale, supra, in order for conduct to be punishable under 18 U.S.C. § 401(1), it must 'clearly be shown' that the conduct 'actually obstructed the district judge in 'the performance of judicial duty.'' In re McConnell, 370 U.S. 230, 234, 82 S.Ct. 1288, 1291, 8 L.Ed.2d 434; Ex parte Hudgings, 249 U.S. 378, 383, 39 S.Ct. 337, 63 L.Ed. 656. Our opinion in Seale requires, in addition to proof of the requisite wrongful intent, proof that the misbehavior was an 'actual and material obstruction.' * * *." (461 F2d, at p 397)

"* * *.

"With respect to the question of intent, we said in Seale that the minimum standard is one of a voluntary action known by the actor to be wrongful or one that he reasonably should have been aware was wrongful.* * * Given this extreme liberality necessary to a vital bar and thus the effective discovery of truth through the adversary process, an attorney possesses the requisite intent only if he knows or reasonably should be aware in view of all the circumstances, especially the heat of controversy, that he is exceeding the outermost limits of his proper role and hindering rather than facilitating the search for truth." (461 F2d, at p 400).

In the instant case, there is not the slightest evidence or indication that the providing of the Dow effluent list to the Mapleton intervenors obstructed the AEC in the performance of its statutory duties. To the contrary, if anything, the providing of such list could only assist the AEC in performing its statutory duty, mandated by NEPA, supra, to consider all of the environmental consequences of the proposed licensing of the Consumers Power Company atomic plant.

Nor is there any evidence that Mr. Cherry knew or rea-

sonably should have known that in providing the effluent list to the attorney for the Mapleton group, he was exceeding his proper role and hindering the search for truth. Exactly the opposite was true: In making the list available to the Mapleton attorney, Cherry was making it possible for additional scientific experts to analyze the effects of combining the Dow effluents with the Consumers Power radiation, and to present their findings and expert opinions to AEC. Furthermore, as is clear from Mr. Cherry's affidavit filed with this Commission on August 30, 1972, Cherry had no intent to violate the AEC's protective order, because Cherry was not aware, or had forgotten, that the Dow list had been casually added to the Consumers Power Company documents which had been originally covered by the protective order. Moreover, a plain reading of the "protective order" would not prohibit Cherry from turning the list over to anyone who could assist in preparation on the synergistic issue.

## III.

## CONCLUSION

In view of the foregoing, it is clear that the Dow effluent list, which Mr. Cherry is charged with providing to an attorney for another environmental group, could not legally have been covered by a protective order; that under the Freedom of Information Act, the public had a full right to the disclosure of this list; that the disclosure of the list caused no actual obstruction to the performance of AEC statutory duties;

that Mr. Cherry had no intent to obstruct those duties; and that disclosure of the list to Mr. Like did not violate the terms of the protective order.

The fact that Dow voluntarily released the list to the entire public after Dow complained that the attorney for the Mapleton intervenors had been shown a copy of the list, demonstrates how frivolous and lacking in merit Dow's claim is that such list should not have been viewed by another attorney in the case, or that such list was entitled to protection from public inspection.

I, as Attorney General of the State of Michigan, strongly urge the AEC to conduct the fullest and most careful inquiry into the safety and environment-related effects of proposed nuclear plant construction in Michigan, and, to that end, to encourage environmental groups to actively and meaningfully participate in that process. The issuance of the order to show cause, directed to Mr. Cherry, can do nothing to facilitate the necessary full inquiry; it can serve only to deter public spirited lawyers from actively attempting to assist the AEC in this inquiry, consideration and decision.

I therefore urge the Commission to dismiss the order to show cause, as having been improvidently issued, and to find that no cause existed for the issuance of such order.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

September 8, 1972