

3/25/77



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

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Docket Nos. 50-329  
50-330

MOTION FOR CENSURE OF MYRON H. CHERRY

Pursuant to 10 CFR Section 2.730 and 2.713, the NRC Staff hereby moves that Myron M. Cherry, Esq., Counsel for Intervenors in this proceeding other than Dow Chemical Company, be censured for conduct which fails to conform to the standards of conduct required of attorneys in the Courts of the United States.

Background

On March 7, 1977, counsel for the NRC Staff addressed a letter to the Licensing Board, raising a question as to the propriety of a telephone call initiated by Mr. Cherry to a member of this Board in which Mr. Cherry urged the Board to make some arrangement for financial assistance to him. By letter of March 10, 1977, Mr. Cherry purported to respond to the Staff letter. That letter makes no effort to defend the conduct which was put in question by the Staff's March 7 letter. Instead, the letter first misstates the issue--incorrectly suggesting that the Staff was raising a question as to the propriety of the letters which Mr. Cherry addressed to the Board rather than raising a question to the propriety of the telephone conversation--and then

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proceeds to make an offensive and wholly unwarranted personal attack upon counsel for the NRC Staff.

The Staff continues to believe that the questions raised in its March 7 letter require the Board's serious attention. But, in any event, we submit that Mr. Cherry's March 10 letter, considered in the background of his prior conduct in this proceeding, calls for formal action by this Board, beyond mere admonition, to make clear that it will not sanction any continuation of such reprehensible conduct. For the reasons set forth below, the Staff believes that the appropriate remedy is the issuance of a formal order by this Board noting its censure of Mr. Cherry and warning that any repetition of such conduct will require institution of a proceeding, pursuant to 10 CFR §2.713, to consider his suspension from this case.

#### Appropriateness of the Remedy

Section 2.713(b) of the Commission's Rules requires that "an attorney shall conform to the standards of conduct required in the Courts of the United States." The standards of attorney conduct applicable in Federal Courts are not codified by Rule but instead are drawn principally from the standards for professional conduct promulgated by the American Bar Association. See, e.g., Van Iderstine Co. v. RGJ Contracting Co., 480 F 2d. 454 (2d Cir. 1973). Canon 7 of the ABA's Code of Professional Responsibility provides that "a lawyer

should represent a client zealously within the bounds of the law." The more specific "Ethical Considerations" which the ABA has developed in explanation of this Canon make clear that zealous advocacy does not justify conduct which abuses other counsel or which exhibits disrespect for the tribunal. Thus, Ethical Consideration 7--36 provides:

Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of proceedings. While maintaining his independence, a lawyer should be respectful, courteous, and above-board in his relations with a judge or hearing officer before whom he appears. He should avoid undue solicitude for the comfort or convenience of judge or jury and should avoid any other conduct calculated to gain special consideration.

and Ethical Consideration 7--37 provides:

In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer in his conduct, attitude, and demeanor towards opposing lawyers. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

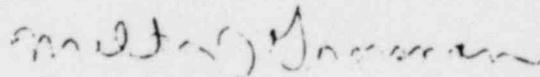
These particular ethical standards have been specifically adopted and applied in prior Commission proceedings. In Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit No. 3), Docket No. 50-382, ALAB-121, 6 AEC 319 (1977), the Appeal Board sua sponte ordered the striking of a brief submitted by counsel for a party. In "an

obviously studied, as well as petty effort to demean the Chairman of the Licensing Board through the vehicle of outright uncivility," the brief referred to the Chairman by last name only. The Appeal Board stated that such disrespectful and undisciplined conduct went beyond the bounds of legitimate advocacy. In Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1) Docket No. 50-367, ALAB-204, 7 AEC 835, the Appeal Board, quoting from Ethical Consideration 2-37, noted its strong disapproval of a motion paper which characterized staff counsel as "de facto co-counsel" for the applicant. The Appeal Board described that comment as gratuitous, unwarranted, and unprofessional. Finally, only recently the Appeal Board again reminded counsel that unpleasantries between counsel are not only unprofessional but unhelpful; they serve only to focus attention on personalities and distract attention from the issues to be decided." Toledo Edison Co. (Davis Besse Nuclear Power Station, Units 1, 2, & 3) Docket No. 5-346A, order issued February 25, 1977.

On at least two occasions during the course of this proceeding, the Board found it necessary to give oral admonitions to Mr. Cherry to desist from insulting conduct with respect to fellow participants in the proceeding and to conduct himself in accordance with the standards required by attorneys in the United States Courts. (Tr. 2502-02; 2573-74) There were many other occasions when similar admonitions would have been in order. (E.g., Tr. 2450-51,

2473, 2489). It is evident that these oral admonitions have not had the intended effect of inducing Mr. Cherry to conduct himself in accordance with the established standards for professional conduct. Mr. Cherry's March 10 letter involves a gross violation of these standards. The letter is replete with insulting and abusive comments regarding the personal conduct, ability, and motivations of NRC Staff counsel. Judged by the benchmark of the Appeal Board decisions cited above, we submit that these comments unquestionably go far beyond the bounds of what is permissible in the zealous representation of a client's interest. Accordingly, this Board should issue a formal order of censure and warning that any similar conduct in the future will require institution of a proceeding under 10 CFR §2.713 to consider the suspension of Mr. Cherry from further participation in this case.

Respectfully submitted,



Milton J. Grossman  
Chief Hearing Counsel

Dated at Bethesda, Maryland  
this 25th day of March 1977.

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

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the above-captioned matter. In accordance with §2.713, 10 CFR Part 2, the following information is provided:

|                  |                                                                                                                                              |
|------------------|----------------------------------------------------------------------------------------------------------------------------------------------|
| Name             | - Milton J. Grossman                                                                                                                         |
| Address          | - U. S. Nuclear Regulatory Commission<br>Washington, D. C. 20555                                                                             |
| Telephone Number | - Area Code 301 - 492-7201<br>(Or Code 179 - Ext. 7201)                                                                                      |
| Admissions       | - United States District Court for<br>the District of Columbia<br><br>United States Court of Appeals for<br>the District of Columbia Circuit |
| Name of Party    | - NRC Staff<br>U. S. Nuclear Regulatory Commission                                                                                           |

*Milton J. Grossman*

Milton J. Grossman  
Chief Hearing Counsel

Dated at Bethesda, Maryland  
this 25th day of March 1977.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "MOTION FOR CENSURE OF MYRON M. CHERRY" and "NOTICE OF APPEARANCE" for Milton J. Grossman, in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or air mail, this 25th day of March 1977:

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