



WASHINGTON, D. C. 20565

FEB 6 1978

The Honorable John D. Dingell  
Chairman, Subcommittee on Energy and Power  
Committee on Interstate and Foreign Commerce  
United States House of Representatives  
Washington, D.C. 20315

Dear Mr. Chairman:

On February 6, 1978, Chairman Hendrie responded to your letter of January 17, 1978, in which you inquired about recent news stories and press releases relating to the establishment of a special panel to hear charges of "professional misconduct" against attorneys participating in an NRC licensing proceeding. As indicated in Chairman Hendrie's letter, the NRC staff has been requested to provide responses to your inquiries. It is my pleasure to provide those responses on behalf of the NRC staff.

Before dealing with your specific questions, I believe it might be helpful if I set forth a brief background of this special proceeding. In 1976, acting on a petition for review of a final Atomic Energy Commission decision authorizing the issuance of permits to Consumers Power Company for the construction of two nuclear power facilities at its Midland Plant in Midland, Michigan, the United States Court of Appeals for the District of Columbia Circuit remanded the final AEC decision to the Nuclear Regulatory Commission for further adjudicatory proceedings on specific issues. (Aeschliman v. NRC, 547 F. 2d 622 (D.C. Cir. 1976), certiorari granted sub nom. Consumers Power Company v. Aeschliman, 429 U.S. 1090 (1977)). Acting on the remand of the court, the NRC in 1976 reopened the hearing before an NRC designated Atomic Safety and Licensing Board.

In the reopened proceeding Myron M. Cherry, an Illinois attorney, represented certain intervenors and James R. Tourtellotte, Milton J. Grossman and other NRC attorneys represented the NRC staff. During the course of the proceeding, on March 25, 1977, the NRC staff filed a motion with the presiding Atomic Safety and Licensing Board for the censure of Mr. Cherry for allegedly unprofessional conduct during the proceeding (copy enclosed). On March 16, 1977, the intervenors represented by Mr. Cherry filed a motion with the presiding Atomic Safety and Licensing Board for disciplinary action against Mr. Tourtellotte, Mr. Grossman and other unnamed members of the NRC staff for alleged misconduct (copy enclosed).

8007210 761

These charges and others made orally and in letters during the course of the remand proceeding were referred by the presiding Atomic Safety and Licensing Board, in an Order dated November 4, 1977, to a special board in accordance with Section 2.713(c) of the Commission's Rules of Practice. On November 7, 1977, the Chairman of the Atomic Safety and Licensing Board Panel designated the members of this Special Board. On January 9, 1978, the Special Board held a prehearing conference.

In your letter you requested that you be advised as to the basis of the allegations against Mr. Cherry and the NRC staff attorneys. I believe that the above discussion and the enclosures will provide that information. Additional details are available in the public docket on this special proceeding which is located in the NRC Public Document Room at 1717 H Street, N. W., Washington, D.C. Copies of this material will be made available to you or your staff upon request.

This type of proceeding is not unprecedented for either the NRC or the Federal Government. The authority of Federal agencies such as the NRC to control the conduct of attorneys representing clients before those agencies in quasi-judicial proceedings stems from the Administrative Procedure Act. Section 181 of the Atomic Energy Act of 1954, as amended, makes the provisions of the Administrative Procedure Act applicable to NRC quasi-judicial proceedings conducted under the Atomic Energy Act. The most recent judicial decision relating to the authority of agencies to discipline attorneys under the provisions of the Administrative Procedure Act is Koden v. U.S. Department of Justice, 564 F. 2d 228 (7th Cir. 1977).

The Special Board designated to preside in the special proceeding was appointed under the general authority of Section 191 of the Atomic Energy Act of 1954, as amended. Under Section 2.713 of 10 CFR Part 2 of the Commission's Rules of Practice, copy enclosed, which deals with attorney appearance and practice before the Commission in adjudicatory proceedings, a presiding Atomic Safety and Licensing Board must prefer charges against an attorney before that attorney may be suspended or barred from participation and that attorney must be afforded an opportunity to be heard before another presiding officer. In the instant matter, as indicated above, the presiding Atomic Safety and Licensing Board referred the charges against Mr. Cherry and the NRC staff attorneys to a special board. Under the authority of Section 2.721 of the Commission's Rules of Practice, the Chairman of the Atomic Safety and Licensing Board Panel designated the members of the Special Board in this matter.

The provisions of 10 CFR § 2.713 have been applied in the past in connection with charges of unprofessional conduct made against a law firm representing

a utility company applicant (Matter of Toledo Edison Co. and Cleveland Electric Illuminating Co. (Davis Besse Units 1, 2, 3)). A copy of the NRC Atomic Safety and Licensing Appeal Board decision in that matter is enclosed.

A decision was made to retain private counsel for the charged members of the NRC for the following reasons. It was our judgment that legal counsel from outside the Office of the Executive Legal Director was appropriate in view of the existence of a potential conflict between the interests of the NRC attorneys charged with professional misconduct and the interests of the NRC staff members prosecuting the charges against Mr. Cherry. In reaching this decision we consulted with the NRC General Counsel.

Consideration was given to having members of the staff of the NRC Office of the General Counsel serve as counsel for the charged members of the NRC staff. That was determined to be unacceptable because members of the Office of the General Counsel may be called upon by the Commissioners to assist them with the review of any decision of a Special Board.

Consideration was also given to seeking the assistance of the Department of Justice. However, the Department's regulations do not extend to the utilization of Department attorneys to defend Federal agency personnel against charges of misconduct in Federal agency quasi-judicial administrative proceedings, (28 CFR Part 50).

With respect to your inquiry regarding NRC's authority to contract for private counsel, that authority is found in 5 U.S.C. 3109, and in the NRC Appropriation Act for fiscal year 1978, Pub. L. 95-96 (91 Stat. 797).

In general, however, even with the authority to contract for such outside services, Federal agencies may not procure services on a contractual basis where regular employees of the Federal government are qualified and available to perform the work involved. Thus, where a Federal agency has employees available to perform a particular task, it should not contract for the performance of that task. Each Federal agency, however, is responsible for determining in each case whether the particular services could be performed by Federal agency employees. As discussed above, it was our judgment that the legal services required in defending the NRC staff members against charges of misconduct could not appropriately be performed by NRC employees. In reaching this judgment to employ outside counsel we relied on a recent decision of the Comptroller General of the United States which was issued on July 22, 1977 (B-133381).

The attorney who was selected to defend the NRC staff members is Mr. T.S.L. Perlman, a member of the Washington law firm of Kominers, Fort, Schlefer, and

Boyer. Mr. Perlman was recommended because of his outstanding reputation and because of his extensive litigation experience. Both Mr. Grossman and Mr. Tourtellotte agreed to his selection. Neither Mr. Perlman, nor any other member of his law firm, has appeared before the NRC or any of its Boards on any matter. This, of course, was also an important element in the selection process.

With respect to your questions as to whether the NRC staff members involved were acting within the scope of their employment and the resultant implications of paying for private counsel to defend them, I believe the following observations will be helpful. At the outset, in our consideration of the employment of outside counsel, the NRC Executive Legal Director determined that the employees involved were clearly acting within the scope of their authority. That, indeed, was a threshold question which had to be answered in the affirmative before proceeding further. As a result, it was our view that with respect to this aspect of the matter outside counsel could be employed. We do not believe that determination should be affected by the outcome of this proceeding. You should also be aware that the Commissioners themselves played no part in that decision.

In your letter you raised the question of Mr. Perlman's primary loyalties. I wish to make it clear that he has been retained to represent those NRC staff members who have been charged with professional misconduct. His primary loyalties, indeed his sole loyalties, are to the members of the NRC staff which he represents.

In your letter you raised several questions regarding press stories dealing with the presentation of the case against the attorneys involved. Since the receipt of your letter a significant new development has occurred which may have an important impact on how or whether this proceeding continues. On January 30, 1978, the Chairman of the Commission sent a letter to the Chairman of the Special Board suggesting that the Special Board and the parties to the special proceeding pursue the possibility of settlement of the matter. That failing, Chairman Hendrie stated that the matter should be heard by a Special Board consisting of attorneys with no previous involvement with either the Atomic Energy Commission or the NRC. A copy of that letter is enclosed.

In your letter you referred to the fact that Commission staff is presenting the case against Mr. Cherry but not against the two staff members. You then asked why, if the Commission had evidence relating to the allegations made against the NRC staff members, the Commission does not have a responsibility to affirmatively present such evidence. The Commission staff has no evidence which would support these allegations against the staff attorneys. In any event, if the settlement discussions are not successful and the Commission designates a new Special Board to preside, that Special Board will have to decide whether each

party who moved for disciplinary action will be expected to prosecute his own charges before the Board.

The criteria to be followed by a special board in judging the professional conduct of charged attorneys are those set forth in 10 CFR § 2.713 of the Commission's Rules of Practice and the American Bar Association's Canons of Professional Ethics including its Disciplinary Rules. In essence, the criteria tracks closely that followed in grievance procedures before State bars.

The Special Board which had been designated to preside in this proceeding was appointed under authority of Section 191 of the Atomic Energy Act of 1954, as amended, by the Chairman of the Atomic Safety and Licensing Board Panel in accordance with 10 CFR § 2.721 of the Commission's Rules of Practice. The three members of that Special Board are:

1. Chairman Valentine B. Deale, who has had his own law office in Washington, D.C. since 1953. He is admitted to practice in the District of Columbia and in Ohio. He is currently serving a 3-year appointment on a hearing committee under the District of Columbia Court of Appeals Disciplinary Board.
2. Member Margaret M. Laurence, who is the senior partner in Laurence, Stokes & Neilan of Arlington, Virginia. Mrs. Laurence is admitted to practice in the State of Virginia, the State of Mississippi, and the District of Columbia. Mrs. Laurence is a former president of The Women's Bar Association of the District of Columbia and former Regional Director of the National Association of Women Lawyers.
3. Member Gary L. Milhollin, who is an Associate Professor at the University of Wisconsin Law School at Madison, Wisconsin. Before going to Madison, Mr. Milhollin was Associate Professor at Catholic University of America School of Law. Prior to his teaching career, Mr. Milhollin was a government attorney in Massachusetts, engaged in the private practice of law, and served as law clerk to a U. S. District Judge.

More detailed resumes of each of these members are enclosed. None of the members of the Special Board had any previous personal, professional or working relationships with any of the attorneys charged in this proceeding.

If I can be of any further assistance to you in this matter, please do not hesitate to contact me.

Sincerely,

~~(SIGNED)~~ Lee V. Gossick

Lee V. Gossick  
Executive Director  
for Operations

Enclosures:

1. NRC Staff Motion dtd 3/25/77
2. MCherry Motion dtd 5/16/77
3. Rules of Practice Sec. 2.713
4. ALAB-332 dtd 6/11/76
5. Ltr to VDeale fm JHendrie dtd 1/30/78
6. Resume of VDeale
7. Resume of MLaurence
8. Resume of GMilhollin