

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before The Atomic Safety And Licensing Board
For Special Proceeding

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

PREHEARING STATEMENT FOR
MILTON J. GROSSMAN AND JAMES R. TOURTELLOTTE

Two lawyer members of the staff of this Commission, Milton J. Grossman, Esquire, and James R. Tourtellotte, Esquire, respectively chief hearing counsel and assistant chief hearing counsel, have been made parties to this Special Proceeding by the Presiding Officer's order of November 4, 1977. The Board's notice of December 19, 1977 for a prehearing conference has directed each attorney against whom charges have been preferred and each party that has initiated charges to submit a statement of the charges encompassed by the Presiding Officer's order. This statement is in response to the prehearing notice.

The Presiding Officer's order prefers charges in two parts: first, against Myron M. Cherry, Esquire, attorney for intervenors in opposition to Consumers Power Company's Midland Plant application, and second, against Messrs. Grossman and Tourtellotte, staff counsel in that case.

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The charges against Cherry were initiated by motions of the staff through Grossman and Tourtellotte as attorneys. Cherry responded with counter-charges alleging that the staff's charges against Cherry were "sham." Cherry sought disciplinary "sanctions" against Grossman and Tourtellotte for filing the staff's motions. The Presiding Officer, considering all motions simply on their face, has referred all to this Special Proceeding.

This prehearing statement on behalf of staff members Grossman and Tourtellotte is confined to the charge against them. The staff will, we understand, be represented by other counsel in its capacity as the party initiating charges against Cherry.

The staff's motions for censure of Cherry and, later, for his suspension from practice before the Commission arose from a series of impertinent and scandalous allegations by Cherry, impugning the integrity of the regulatory staff and of members of a hearing board ("the ECCS board") in an unrelated proceeding otherwise irrelevant here; the impertinent and scandalous matter was contained in papers filed in the Midland proceeding by Cherry for himself or as attorney for intervenors. The staff pointed out that in making these impertinent and scandalous allegations Cherry failed to conform to the standards of conduct required in the courts of the United States, engaged in contemptuous conduct, and displayed toward the Commission

and its presiding officers conduct which, if displayed toward any court of the United States, would be cause for discipline, all in violation of section 2.713 of the Rules of Practice, 10 C.F.R. § 2.713 (1977).

In response to the staff's motion for censure, Cherry, as attorney for intervenors, filed various papers among which was one entitled "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." That motion by intervenors through Cherry is the apparent basis of the charges preferred by the Presiding Officer against Grossman and Tourtellotte. The gist of intervenors' motion is that Tourtellotte's and Grossman's motions for the staff were "sham motions" made to further a scheme "to aid the regulatory staff in its cover-up of its breach of the public trust." Cherry sought an order "disciplining the regulatory staff . . . and lawyers Tourtellotte and Grossman" in an unspecified manner and barring them from further participation in the Midland proceeding.^{1/}

It is the position of Grossman and Tourtellotte that the charge against them is frivolous. Their motions were filed in good faith; to the best of their knowledge, information,

^{1/} The Presiding Officer dismissed charges against the "staff" other than Grossman and Tourtellotte because no other member of the staff was identified as a party to be charged.

and belief ample grounds existed to support them; and they were not interposed for any purpose other than discharge of the duty of Grossman and Tourtellotte as members of the bar and as attorneys for a party (the staff). Grounds to support the motions appear on the face of the record in the Midland proceeding, which includes the papers filed over the signature of Cherry containing the impertinent and scandalous matter that prompted the staff's motions.^{2/} That the motions rest on probable cause is apparent from inspection of these papers. Since probable cause for the staff's motions appears on the face of the record, the motions could not have been sham. Moreover, there could be no basis for even considering allegations that the motions were sham unless and until the motions were disposed of adversely to the moving party. In fact, the motions are pending as the primary subject of this Special Proceeding.

If the issue should be reached, Grossman and Tourtellotte expect to show that in fact their motions were made in good faith and were not part of a scheme to conceal other conduct, and so far as they know no such scheme existed.

The Presiding Officer's order cites, with respect to Grossman and Tourtellotte, sections 2.713(c)(2) and 2.713(c)(4) of the Commission's Rules of Practice and Disciplinary Rule DR 7-102(A)(7) of the Code of Professional Responsibility

^{2/} The record in the Midland proceeding also includes a denial by affected members of the ECCS board of the impertinent and scandalous allegations by Cherry against them.

of the American Bar Association. Section 2.713(c)(2) provides for sanctions against attorneys who have failed to conform to the standards of conduct required in the courts of the United States; section 2.713(c)(4) provides the same against attorneys who engage in dilatory tactics or disorderly or contemptuous conduct. The citation of these provisions does not enlarge the issues, since the only specification of charges against Grossman and Tourtellotte is that their motions for sanctions against Cherry were alleged by him to be "sham." For the reasons just stated, these allegations are not, in the circumstances of this case, sufficient to make out a violation of the rules of practice, nor of any canon of ethics.

Disciplinary Rule DR 7-102(A)(7) provides, "In his representation of a client a lawyer shall not . . . [c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent." This, too, adds nothing of substance because no illegal conduct is specified and the bare allegation of "sham" motions falls far short of the fundamental requirement that in all averments of fraud the circumstances constituting fraud must be pleaded with particularity. The charges against Grossman and Tourtellotte should be summarily dismissed as a frivolous diversion of this Board from its task of considering the serious charges of misconduct against Cherry.

As we understand the prehearing conference notice of

December 19, 1977, it contemplates that the remaining subjects listed there, namely, hearings, identification of evidence, discovery, preliminary motions, and the schedule for hearing, will be the subject of informal discussion at the conference and need not be discussed in this written submittal.

Respectfully submitted,



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January 5, 1978

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing PREHEARING
STATEMENT have been served on the following by delivery to
parties in Washington, D.C. and by first-class mail to
others this 5th day of January, 1978:

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