



asserted to have taken place by Intervenors' counsel which is an affront to the Licensing Board. There is no suggestion, nor can there be, that Intervenors' counsel did anything which was disrespectful or contumacious conduct against the Licensing Board.

What the Staff complains about, at best, is a disagreement over the appropriateness of a telephone call to which the Staff and Consumers agreed on the record on February 16, 1977. That the telephone conversation, as it was pointed out in a letter of February 19, 1977, went beyond a simple Yes or No was, of course, the function of the telephone conversation itself and once again, no Board member has indicated that the comments made in that telephone conversation were anything but an effort to advise the Board of difficult options facing the Intervenors with respect to financial assistance and the production of Dr. Timm. Since the telephone call was authorized by the parties and thus did not represent an ex parte communication, it was perfectly proper. Because the telephone call, as a result of questions addressed to Intervenors' counsel went beyond a simple Yes or No, it was incumbent upon Intervenors' counsel to write the letter of February 19, 1977 to spread of record all that had taken place. Were the February 19, 1977 letter not written, there might have been a suggestion that one counsel engaged in unreported conversations with the Board.

This background then is the focal point for the unqualified anger which was set forth in our letter of March 10, 1977.

Thus, the Regulatory Staff's March 7, 1977 letter totally mischaracterized the purpose of the telephone call and went on further, knowingly and falsely, to state that Intervenors' counsel:

"...attempted to persuade the Board to rule in his favor to his various requests for financial assistance."

That statement, of course, by Mr. Tourtelotte is a flat lie, and known by Mr. Tourtelotte to be a lie for two reasons. First of all, Mr. Tourtelotte did not participate in the conversation (since he agreed it could be held without his participation) and therefore, he could not know what took place. Second of all, the information which I was requested to and did submit to the Board in that telephone call was promptly spread of record (within 24 hours) in the letter of February 19, 1977 so that all parties would know of the substance of that telephone call. Once again, viewed in its proper context nothing was done improperly and any question of impropriety could only have arisen if the letter of February 19, 1977 was not written.

The second reason why Mr. Tourtelotte's statement is a knowing falsehood is that nothing in my letter of February 19, 1977 indicates that I attempted to persuade the Licensing Board one way or another (as indeed I could not, since I was talking to Dr. Luebke, who does not even represent a quorum in the absence of the full Board being convened because he is not the Chairman). The information I gave to Dr. Luebke was simply that I had further information which could be of benefit to the Board and did he want me to give it to him now to pass on to Mr. Coufal. I do so and promptly confirmed

that request in writing. There was no argument with Dr. Luebke outside the presence of other parties and the telephone call was appropriate in all regards, particularly in light of the follow up promptly in the February 19, 1977 letter.

No member of the Licensing Board has ever raised the suggestion that Intervenors' counsel's conduct was improper, as they could not.

Viewed in these circumstances, the request by Mr. Tourtelotte in his March 7, 1977 letter to "admonish Mr. Cherry" was appropriately replied to by me in my March 10, 1977 letter. Since Mr. Tourtelotte attempted to distort the record (apparently feeling upset that he had agreed to the telephone call in the first place) and then base his conclusions in his letter of March 7, 1977 upon assumptions he knew to be untrue, or upon responsible investigation, he could have determined were not true, the request for censure was improper, precipitous and irresponsible.

For that reason, the response of March 10, 1977 made very clear our position so that the Regulatory Staff would know that express or implicit intimidation tactics will not work, as they have not worked in the past.

Because, therefore, Mr. Tourtelotte's letter of March 7, 1977 was totally uncalled for and out of line, Intervenors placed in the record (as is their right because of the direct and unwarranted personal attack) the true nature and extent of the surrounding circumstances.

Mr. Tourtelotte's letter, as well as the Staff's Motion, is thus highly improper, is based upon a knowing distortion of the facts, and attempts to create an inference without factual basis. If anyone has violated Ethical Consideration 7-37, it is the Regulatory Staff in its conduct towards Intervenors' counsel as exemplified by the numerous rude and improper remarks on and off the record to Intervenors and their counsel.

We must now search the record for a reason why Mr. Tourtelotte, followed by Mr. Grossman and the Regulatory Staff, have chosen to begin vicious attacks upon Intervenors' counsel. Our investigation of the underlying facts shows that the purpose of the Censure Motion was no more than a smoke screen to cover up and avoid the Regulatory Staff's total and complete irresponsibility in this case which Intervenors have exposed.

Thus:

(a) The Exhibits in this cause show that the Regulatory Staff did not prepare its own evidence, but rather met with Consumers Power Company to prepare a facade rather than evidence. This is supported by Dow Chemical Company memorandum where in a meeting, it was recorded that Mr. Renfrow, counsel for Consumers Power Company, was scheduled to go to Washington to meet with Mr. Brenner, initial counsel for the Regulatory Staff, and:

"prepare the Regulatory Staff for the hearing."

(b) The Regulatory Staff did no independent work prior to the cross-examination by Intervenors and time and time again,

Regulatory Staff witnesses revealed that they did no independent work but relied on Consumers gathering information through telephone calls.

(c) Had the Regulatory Staff done any independent analysis, they would have discovered the dispute between Dow and Consumers, as well as the underlying reasons for the dispute. Indeed, this information could have been available to the Regulatory Staff months and months before the hearing had they properly done their investigative and follow up job.

(d) Had the Regulatory Staff done a decent and honest review, they would have determined what Dow witnesses testified to, that blackmail was going on and Consumers Power Company (with the active or inactive assistance of the Regulatory Staff) was attempting to persuade Dow Chemical to produce a non-knowledgeable witness which, of course, is just a euphemism for someone who will avoid telling the truth. To its credit, Dow Chemical Company refused to be a party to such a sham on justice and it was only after Intervenors' counsel's cross-examination that the Regulatory Staff began to investigate the matter at all.

(e) On at least three occasions, the Regulatory Staff was chastized by the Licensing Board for not having adequately prepared their position.

While the record can catalog many other affronts to justice exposed by Intervenors' counsel, it is clear that the Regulatory Staff's improper and vicious attacks upon Intervenors' counsel stem

from the Regulatory Staff's inability to deal with the fact that they have been exposed on this record and that they are not doing their job. It was for this additional reason that I suggested to Mr. Tourtelotte, who is paid by the United States of America, of which I am both a citizen and taxpayer, that Intervenors did not believe on March 10, 1977 that the Regulatory Staff was doing its job and they do not believe so today.

Finally, the only comments made by the Licensing Board in an official capacity which shed any light on this subject is the Licensing Board's February 1977 Order in which it said that Intervenors and their counsel have provided valuable assistance at substantial loss of professional business and income. No such comments were ever directed to the Regulatory Staff or for that matter to Consumers Power Company's counsel.<sup>1</sup>

2. Similarly, Consumers Power Company's response dated April 4, 1977 is a distortion and is out of line. Consumers refers to other cases in which Intervenors' counsel has been involved, and refers to remarks made by Appeal Boards. All of those remarks, however, deal with legal positions taken, fairly and responsibly, and not with anything else. Moreover, those cases have nothing to do with the particular facts of this case. Finally, Consumers Power's

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<sup>1</sup>At page 4 of the Regulatory Staff's March 25, 1977 Motion, the Regulatory Staff suggests that oral admonitions were given by the Board. Those citations are in error and are knowingly in error, in our judgment. The selective use of transcript references avoids totally and completely the numerous times, during this hotly contested hearing, the Board was forced to restrain lawyers acting as advocates including Mr. Tourtelotte himself and Consumers' counsel.

response fails to point out that Appeal Board members, and in particular Chairman Rosenthal, when testifying before the now-defunct Joint Committee on Atomic Energy, specifically called to the J.C.A.E.'s attention as examples of responsible intervention, two cases in which Intervenor's counsel was the lawyer. These cases, the Midland proceeding and the Point Beach proceeding, were specifically called to Congress' attention as examples of intervention which added, rather than detracted, from the fund of knowledge and honest and fair regulation.

Why then does Consumers Power Company support a motion personally directed against Intervenor's counsel? We find the answer again by going to the facts of this case to understand the smoke screen which the Regulatory Staff and Consumers Power Company is attempting to create:

First. It was Mr. Rosso and Mr. Renfrow, not Mr. Cherry, who this Licensing Board on its own initiative requested to explain why Dow Chemical witnesses had testimony prepared for them by Consumers Power Company lawyers which distorted the true facts. That serious question raised by the Board on its own is still pending.

Second. Consumers Power Company's internal memoranda show that its own highly placed officers and directors were concerned (see Midland Intervenor's Exhibits 25 through 30), even consumed, with one thing---that is, Intervenor's cross-examination and participation by Mr. Cherry. These documents and memoranda show that during the summer and fall of 1976, Consumers was not worried about nuclear

safety or the National Environmental Protection Act, but rather were concerned solely and chiefly with the participation of Intervenor's counsel which they did not want and which they feared. Consumers did not care about participation by the Regulatory Staff (or even, for that matter, by the Licensing Board), since it was apparently planned that Mr. Renfrow would go to Washington and prepare the Regulatory Staff so that no surprises would creep into the hearing.

Third. Messrs. Orrefice and Temple, Dow's witnesses, testified under oath that they did not trust or respect Consumers Power. Mr. Orrefice testified that Consumers and their representatives attempted to get a Dow witness who would edge the truth, and Mr. Temple testified that his testimony as prepared by Consumers' lawyers was calculated not to tell the whole story.

Fourth. Intervenor's and their counsel, along with the assistance of Dr. Timm, have been instrumental in showing the bankruptcy of Consumers' position.

Thus, if we are to find a reason why Consumers Power Company would strike out against the lawyer who has forced them to stop polluting Lake Michigan at Palisades, who has beaten back their attempts at ignoring environmental conservation by succeeding before the U. S. Court of Appeals, and who is presently committed to halting the Midland facility because it does not make sense to build that facility under any test, economic or otherwise, we need only look at the record to determine that these Intervenor's and their counsel

have caused discomfort to Consumers and they do not like it. Hence, instead of responsibly dealing with public complaints, they lash out against lawyers hoping to intimidate them under the cloak of a sham response to a motion.

B. Further Response to Consumers' Motion for Costs.

We have already set forth in our response of May 9, 1977 reasons why Consumers' Motion is improper and should be promptly denied. We here add the following:

1. Under the circumstances present in the Commission's untimely granting a decision on financial assistance, together with the problems that presented for Intervenors and their counsel personally in connection with funds, our presentations concerning Dr. Timm were proper and appropriate.

2. The reasons why everyone was informed at the time they were concerning Dr. Timm have already been placed on the record. Those statements are true and Consumers' May 4, 1977 Motion cannot and does not quarrel with the truth of those statements. Rather, it assumes they are false and then builds upon assumption and inference to distort its position.

3. No one but Intervenors and its counsel can know the serious difficulties which denial of financial assistance has placed upon them. No one but Intervenors and their counsel can appreciate the problems of making decisions of spending their own funds, when they do not have them, in pursuit of the public interest and in an attempt to right wrongs which have occurred at the Nuclear Regulatory Commission and

its predecessor for many years. Perhaps Consumers Power Company just does not appreciate what it means to be in a competitive world and have to rely on their own funds to make decisions that they are responsible for. Perhaps that is why they cannot appreciate the mental anguish and torment that occurs when a public interest lawyer says, "Something is wrong, I would like to help, but I can't raise three or four thousand dollars." Consumers' Motion should be denied.<sup>2</sup>

C. Statement in Support of  
Contemporaneous Motion to Strike.

Intervenors are contemporaneously filing their serious Motion to Strike the Regulatory Staff's Censure Motion of March 25, 1977, Consumers Power Company's Response to that Motion of April 4, 1977, and Consumers' Motion of Costs of May 4, 1977.

This Motion is based upon the facts as set forth in this response, as well as the supporting Affidavit of Myron M. Cherry, which shows beyond a doubt that those Motions were filed in this proceeding for reasons to intimidate Intervenors and their counsel and have no other purpose.

For that reason, those Motions are a blight on justice and are sham pleadings and should be stricken.

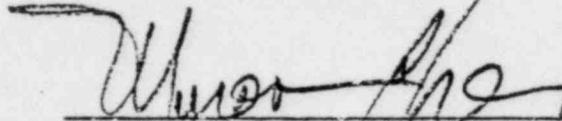
WHEREFORE, Intervenors request that the Board dismiss and strike the Regulatory Staff's March 25, 1977 Censure Motion,

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<sup>2</sup>We point out in passing there is pending before this Board a Motion by Intervenors directed against Consumers and their counsel for certain relief, including costs, in connection with Consumers' willful manipulation of Dow Chemical testimony. We believe Consumers' May 4, 1977 Motion is an attempt to smoke screen its own bad news.

Consumers Power Company's April 4, 1977 Response thereto, and Consumers Power Company's Motion for Costs.

Respectfully submitted,

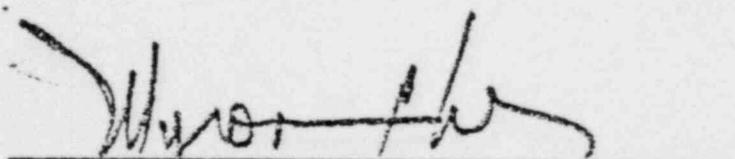
  
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Attorney for All Intervenors  
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PROOF OF SERVICE

I certify that a copy of the foregoing document, as well as the contemporaneous Motion to Strike and the supporting Affidavit of Myron M. Cherry were served upon the Licensing Board and counsel for all parties in open hearing on Friday, May 13, 1977. On the same day, a copy of the same documents was mailed postage prepaid, properly addressed, to the Docketing and Services Section of the Secretary of the Nuclear Regulatory Commission.

  
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Myron M. Cherry