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NRC

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

JUL 23 1976

BEFORE THE COMMISSION

In the Matter of	)	
	)	
U.S. NUCLEAR INC.	)	License No.
	)	XSNM-690, Amendment 2
(Export of Special Nuclear	)	
Material to the Republic of	)	
South Africa	)	

NRC STAFF ANSWER TO PETITION FOR LEAVE TO INTERVENE  
FILED BY CONGRESSMAN CHARLES C. DIGGS, JR., ET AL.

1. By petition dated 2 July 1976, fourteen members of Congress, four concerned organizations and three concerned persons jointly requested that a hearing be held and that they be granted leave to intervene in the above captioned matter.

2. Upon careful review and consideration of the petition, the NRC Staff believes that petitioners have not established that they fall within that special class of persons who may properly invoke a statutory hearing right under the Atomic Energy Act ("Act") in this licensing matter. The NRC Staff therefore believes that the petition should be denied. However, the Commission may properly choose to exercise its discretion and hold a hearing on this licensing matter under legislative-type procedures similar to those fashioned in

Edlow. <sup>1/</sup>

1/ Opinion of the Commissioners, In the Matter of the Application of Edlow International Co. as Agent for the Government of India, to Export Special Nuclear Material, 7 May 1976.

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3. Section 189a. of the Act provides in pertinent part that "in any proceeding under this Act, for the granting ... of any license ... the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding." Thus, a statutory right to a hearing and participation as a party in the hearing is granted only to those persons who can show that they have an "interest [which] may be affected by the proceeding." This statutory provision is implemented in the Commission's "Rules of Practice" in 10 CFR § 2.714 which requires that petitions for leave to intervene set forth the interest of the petitioner in the proceeding and how that interest may be affected by the proceeding.

4. The Commission, and its predecessor the U.S. Atomic Energy Commission, have applied judicial standing doctrines in defining the metes and bounds of the statutory rights to a hearing and participation as a party under section 189a. of the Act. <sup>2/</sup>

5. In this respect, the leading judicial standing doctrines, as relied upon and cited by the Commission as recently as its Edlow Opinion, may be summarized as follows. Speaking in language of general

<sup>2/</sup> Edlow, Id at 11-15. See e.g., Northern States Power Co. (Prairie Island Nuclear Generating Station, Units 1 and 2), 6 AEC 188 (1973); Long Island Lighting Co. (Jamesport Nuclear Power Plant, ALAB-292, NRCI-75/10 (October 2, 1975); Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), ALAB-273, NRCI-75/3 at 492 (May 28, 1975).

application on the requirement of standing, the Supreme Court in Flast v Cohen <sup>3/</sup> stated:

The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of the issues upon which a court so largely depends for illumination of difficult constitutional questions.' Baker v Carr, 369 U.S. 186, 204 (1962). In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justifiable. 392 U.S. at 99-100. <sup>4/</sup>

6. Subsequently, in Association of Data Processing Service Organizations v Camp <sup>5/</sup> and Barlow v Collins <sup>6/</sup>, the Supreme Court enunciated a two-pronged test for determining whether persons have standing to obtain judicial review of federal agency action: (1) where they have alleged that the challenged federal action has caused them "injury in fact," and (2) where the alleged injury in fact is to an interest "arguably within the zone of interests to be protected or regulated" by the statutes claimed to be violated by the federal agency. 397 U.S. at 152, 153.

<sup>3/</sup> 392 U.S. 83 (1968).

<sup>4/</sup> In Edlow, the Commission remarked: "The functional need for well defined and specific interests, which will lend concrete adversity to the decision-making process, applies as directly to our licensing review as it would to a federal law suit." Furthermore, "an expansive rule of standing would be undesirable in the export licensing context, which involves sensitive questions of the nation's conduct of foreign policy," at 13. Opinion at 12-13.

<sup>5/</sup> 397 U.S. 150 (1970).

<sup>6/</sup> 397 U.S. 159 (1970).

7. Four later decisions by the Court provide useful guidance on the proper application of the "injury in fact" test. In Sierra Club v Morton, <sup>7/</sup> the Court indicated that an organization's "interest in a problem", no matter how longstanding the interest may be and no matter how qualified the organization may be in evaluating the problem, is not sufficient for standing to obtain judicial review. Thus the "injury in fact" which the Court spoke of in Data Processing and Barlow is something more than an asserted "injury" to the goals, purposes or policies of an organization.

8. Furthermore, as the Court made clear in U.S. v Students Challenging Regulatory Agency Procedures (SCRAP) <sup>8/</sup>, even alleged injuries of a more tangible kind than those alleged in Sierra Club must still be "something more than an ingenious academic exercise in the conceivable".<sup>9/</sup> It must be alleged that the challenged action will in fact cause perceptible harm to an organization's members. It is not sufficient under the "injury in fact" test to merely assert that circumstances can be imagined in which an organization's members could be affected.

9. The "injury in fact" test in Data Processing and Barlow also requires some nexus between the alleged "injury in fact" and the action complained of. Judicial guidance on this aspect of the first test is

<sup>7/</sup> 405 U.S. 727 (1972).

<sup>8/</sup> 412 U.S. 669 (1973).

<sup>9/</sup> Id. at 688.

set forth in the recent case of Warth v Seldon. <sup>10/</sup> As the Court made clear in Warth, specific facts must be alleged demonstrating both that the challenged action harms petitioner and that petitioner would benefit in a tangible way from the Court's intervention.

10. On June 1, 1976 in Simon v Eastern Kentucky Welfare Rights Organization <sup>11/</sup>, the Supreme Court again squarely faced questions of standing and strongly reaffirmed the earlier principles laid down in Flast, Sierra Club, Data Processing, Barlow and Warth. Of particular interest in Simon is the Court's strong insistence that the required "injury in fact" must "fairly be traced to the challenged action of the defendant, and not [merely be] injury that results from the independent action of some third party not before the court." <sup>12/</sup> It must be shown that "the asserted injury was the consequence of the defendant's actions, or that the prospective relief will remove the harm." <sup>13/</sup>

11. The challenged action in the instant matter relates to the proprietary of the NRC granting a license to export a quantity of highly enriched uranium to South Africa. For the reasons set forth below, application of the judicial standing doctrines discussed above shows that

<sup>10/</sup> 422 U.S. 490 (1975).

<sup>11/</sup> \_\_\_ U.S. \_\_\_, No. 74-1124. Decided June 1, 1976.

<sup>12/</sup> Id. Slip Opinion at 11.

<sup>13/</sup> Supra note 12 at 18.

the petitioners have no statutory rights to hearings or participation in these export license proceedings. For purposes of the analysis below, the petitioners will be grouped into three categories which will be treated separately: (1) concerned individuals; (2) concerned organizations; and (3) Congressman.

12. Three concerned individuals, natives of South Africa now living in the United States, allege interest based upon their inability to return to South Africa because they are prohibited or face arrest should they return. Thami Mhlambiso asserts that his return depends upon the establishment of a new social and political order within South Africa and such change will be postponed by the approval of the subject license. <sup>14/</sup> Elizabeth Landis and Theo-Ben Gurirab assert that the subject license would violate various international legal obligations because it does not contain a condition prohibiting the use by South Africa of Namibian ore. Petitioners Landis and Theo-Ben further assert that they are barred from exercising their legal rights in this regard in South Africa or Namibia. <sup>15/</sup>

13. These allegations fail the "injury in fact" test on several grounds. First, the assertion that the granting of the proposed license may, in some undisclosed manner, postpone the establishment of a new social and political order in South Africa and therefore would postpone

<sup>14/</sup> Amended Petitions, 7-8.

<sup>15/</sup> Amended Petitions, 9-11. There is no indication in either the joint petition or the Commission's files that the subject license involves the use of Namibian source material.

petitioners return to South Africa is, if anything, more speculative than the assertions that were rejected in Warth, and Simon.

Petitioners have not shown how the present social and political order in South Africa results from (or would even be sustained by) the grant of this license, or how the grant of this license would itself lead to the use of Namibian ore or to the derogation of the individual's legal rights. Conversely, petitioners have not shown how denial of this license would remove or even mitigate the injuries which they allege. A more reasonable explanation would be that the asserted injuries result or would result not from the actions of the Commission, but rather from the actions of a third party - the government of South Africa.

14. Second, these allegations of injury raise an issue regarding application of the second prong of the test of Data Processing and Barlow - are the alleged injuries, e.g., not being able to return to one's homeland, within the zone of interests to be protected or regulated by the Atomic Energy Act? The Staff believes that such matters as the ability to return to one's homeland or the protection of foreign natural resources bear no logical relation to U.S. common defense and security interests which the Act was designed to promote and protect.

15. Finally, the assertions that the granting of this license would violate an international obligation regarding use of Namibian ore do

not demonstrate a concrete and direct interest to petitioners. Even assuming, arguendo, this assertion is correct, the petitioners "asserted harm is a generalized grievance shared in substantially equal measure by all or a large class of citizens [which] alone normally does not warrant exercise of jurisdiction." Warth, at 499. citing Schlesinger v Reservists to Stop the War <sup>16/</sup> and United States v Richardson. <sup>17/</sup> As the Commission said in Edlow, "[p]etitioners here assert no more than a hypothetical and speculative 'generalized grievance' shared in every respect by the entire ... population ... ." <sup>18/</sup>

For these reasons, the concerns asserted by these petitioners do not properly invoke statutory hearing rights under section 189a. of the Atomic Energy Act.

16. We now turn to the "institutional" concerns raised by the four petitioner organizations. As in the case of the individual petitioners, petitioners here raise generalized concerns regarding interest in "upholding international law, human rights and justice as they apply to Africa," <sup>19/</sup> and "support to individuals active in the struggle against apartheid and for self-determination through peaceful means in Southern Africa." <sup>20/</sup> According to petitioners, this objective (of

<sup>15/</sup> 418 U.S. 208 (1973); also see fn. 13 supra.

<sup>17/</sup> 418 U.S. 166 (1973).

<sup>18/</sup> Edlow, 27.

<sup>19/</sup> Amended Petition, 8, 11.

<sup>20/</sup> Ibid., 9.

bringing about change in South Africa) is "gravely threatened by the enhanced nuclear weapons capability for South Africa embodied in the proposed export license." 21/

17. These petitioners have failed to establish standing for several reasons. First, their allegations only evidence a generalized interest in the subject matter but fall short of the "injury in fact" test adopted in Sierra Club v Morton. In that case, despite strongly asserted institutional interests, the Supreme Court found no standing because

[A] mere "interest" in a problem, no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization "adversely affected" or "aggrieved" within the meaning of the APA. 22/

This principle, relied upon by the Commission in Edlow, was recently reaffirmed by the Court in Simon. 23/

18. Finally, petitioner Washington Office on Africa asserts a need to provide information to its members. As indicated in Edlow, this is not a basis for standing. Clearly, there are means other than adjudicatory hearings for the transfer of information. 24/

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21/ Ibid, 9.

22/ 405 U.S. at 739.

23/ Supra note 11 at 13.

24/ Edlow, at 20.

For these reasons, the institutional interests asserted by these petitioners do not establish a right to a hearing under section 189a. of the Atomic Energy Act.

19. We come, finally, to the question of standing for fourteen Members of Congress who seek to intervene in this proceeding. <sup>25/</sup> Here, the Commission should be guided by judicial opinions which clearly indicate that Congressmen, like private citizens, must establish standing based upon a personal stake in the outcome of a proceeding. In Kennedy v Sampson, <sup>26/</sup> Senator Edward Kennedy sought a declaratory judgment that a health bill on which he had voted should become law and that the attempted Presidential pocket veto was not effective. On the central issue of standing, the Senator asserted and the Court of Appeals found that a legislator has standing to protect the effectiveness of his vote on legislation. <sup>27/</sup> What is cogent to note for purposes here is that the Court reviewed and applied the traditional concepts and judicial doctrines of standing,

<sup>25/</sup> As far as we are aware, the question of standing of members of Congress has been raised in only one prior Commission proceeding, where an Atomic Safety and Licensing Board held that a congressman had standing in an individual capacity only as to those contentions in which he could demonstrate a direct interest. In other words, he was granted no special standing due to his status as a Congressman. In the Matter of Philadelphia Electric Company, Limerick Generating Station Units 1 and 2, Order Determining Intervention, 5 April 1972.

<sup>26/</sup> 511 F.2d 430 (D.C. Cir. 1974).

<sup>27/</sup> The Court relied upon Coleman v Miller, 307 U.S. 432 (1938) where the Supreme Court held that legislators (state senators) had a "plain, direct, and adequate interest in maintaining the effectiveness of their votes." at 438.

and cited some of the same cases as those relied upon here and in Edlow for other categories of petitioners. Thus, a legislator must meet the now customary requirements in order to be accorded standing: personal stake, injury in fact, within the zone of interest to be protected, benefit of favorable decision. It is not enough to simply assert status as a Congressman to gain standing. Holtzman v Schlesinger; <sup>28/</sup> Harrington v Schlesinger.<sup>29/</sup>

20. Nor is simple reliance on one's vote alone an ample assertion of standing. In Harrington, four Congressmen brought an action challenging expenditures of monies in support of military operations in Vietnam and alleged, inter alia, that their congressional duties required a judicial declaration of the legality or illegality of the Executive's activities in this regard. The Court of Appeals stated:

The plaintiffs' status as congressmen does not give them standing to sue for a declaration that Executive activities are illegal. The congressmen's interest seems little different from that of any citizen who might find a court's advice useful in casting his votes in presidential or congressional elections. In both instances the interest is too generalized to provide a basis for standing. <sup>30/</sup>

21. Most recently, in Metcalf v National Petroleum Council, <sup>31/</sup> plaintiff Senator Metcalf (and private citizen) sought declaratory

<sup>28/</sup> 414 U.S. 1321 (1973).

<sup>29/</sup> 528 F.2d 455 (4th Cir. 1975).

<sup>30/</sup> Id. at 459.

<sup>31/</sup> 407 F. Supp. 257 (D.C.D.C. 1976).

and injunctive relief alleging that the National Petroleum Council was unlawfully functioning as an advisory committee and was improperly influenced by petroleum industry special interests. Among other things, Senator Metcalf alleged his status as a United States Senator as a separate and discrete basis for standing. He charged that the defendants' actions (1) affected the effectiveness of his votes on petroleum and energy matters and (2) hindered him in carrying out his legislative duties through his inability to get unbiased advice and accurate information on these matters. The United States District Court for the District of Columbia could not find that plaintiff U.S. Senator "has been or would be injured in the performance of his congressional duties...", or that the effectiveness of his already cast vote had been effected (the court stated that plaintiffs' reliance on Kennedy was misplaced), <sup>32/</sup> and therefore refused to grant standing.

22. In the instant case, aside from Congressman Diggs, Nix, and Collins, the eleven other petitioner Members of Congress put forth no interest allegations other than their status as congressman, nor do they demonstrate their assertion of "direct and substantial interest in the instant proceeding." For the reasons discussed above, these eleven Members of Congress' petition must fail for lack of standing.

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<sup>32/</sup> Ibid at 249.

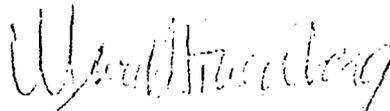
23. With regard to petitioners Diggs, Nix and Collins, the only additional assertion relates to their membership, former membership or other activity on certain committees. This alone also fails to show a personal stake or a possible "injury in fact". Petitioners do not seek to vindicate the effectiveness of their votes. Rather, they represent their congressional duties as conferring standing. It is difficult to find the requisite personal stake or to see how intervention in this proceeding will cause a direct and substantial benefit to them in line with their committee work.

24. For the foregoing reasons, joint petitioners have failed to allege an "injury in fact" legally sufficient under judicial standing doctrines. Accordingly, petition must be denied for failure to state an "interest [which] may be affected by the proceeding" within the meaning of section 189a. of the Act.

Respectfully submitted,



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Dated at Bethesda, Maryland  
this 23rd day of July, 1970.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF ANSWER TO PETITION FOR LEAVE TO INTERVENE FILED BY CONGRESSMAN CHARLES C. DIGGS, JR., ET AL." in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or air mail, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 23rd day of July, 1976.

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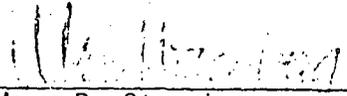
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