August 6, 1976

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NRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

DEPARTMENT OF STATE RESPONSE TO NRC LETTER OF JULY 26, 1976

On July 26, 1976, the Nuclear Regulatory Commission requested the Department of State to consider the procedural issues raised by a petition for leave to intervene filed by fourteen members of Congress, five concerned organizations, and three concerned resident aliens in the Matter of U.S. Nuclear Inc., on application for the export of special nuclear material to the Republic of South Africa.[1/] The Department has been provided with copies of the petition and the answers of U.S. Nuclear and the NRC Staff. Account has been taken of the views expressed in each of these documents and by other concerned

1/ The Commission's letter of July 26, 1976, is attached as an Appendix. The procedural questions answered in this response are set forward in that letter.

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agencies within the Executive Branch.

The Department reached the following conclusions:

(1) None of the petitioners is entitled to a hearing under Section 189(a) of the Atomic Energy Act. The same criteria for determining standing apply to each of the petitioners.

(2) Public policy considerations militate against deciding to hold a discretionary, legislative-type hearing prior to the communication of the Executive Branch position on issuance of the proposed license.

(3) The jurisdiction of the Nuclear Regulatory Commission in regard to its export licensing functions is limited to considerations relevant to the common defense and security determination required by the Atomic Energy Act of 1954, as amended.

(4) The United Nations Charter provisions and the resolutions of the General Assembly and Security Council cited by petitioners do not provide a legal basis for their claim of standing to intervene in the current proceeding.

(5) There are no special factors which bear on the manner in which the Commission should treat the question of legal standing.

I. Petitioners Lack Standing to Intervene

The first and fourth questions which the Commission has asked the Department to address are both concerned with the standing of the petitioners to intervene under Section 189(a) of the Atomic Energy Act. Fourteen of the petitioners are members of Congress who generally allege that their congressional functions

give them an interest in the current proceedings.[2] Petitioners Mhlamibiso, Landis, and Gurirab allege that they are aggrieved by certain actions of the South African Government in denying them entry into South Africa or Namibia and in refusing to adhere to its international legal obligations under the United Nations Charter.[3] Petitioners American Committee on Africa, the Episcopal Churchmen for Africa, and the Washington Office on Africa assert institutional interests in the current proceeding arising out of their concern with United States policies toward and events in southern Africa.[4] Petitioner South-West Africa Peoples Organization (SWAPO) asserts an interest in seeing that, "Security Council resolutions concerning Namibia be implemented and that the International Court of Justice Advisory Opinion of June 21, 1971... be observed."[5]

2/ Amended Petition at 13-15.

3/ Id. at 12.

4/ Id. at 8-9, 11-12.

5/ Id. at 11.

The Department has concluded that none of the petitioners has standing under the tests currently applied by the courts and adopted by the Commission. The Department has concluded, further, that the same criteria for standing apply to all the petitioners whether Congresspersons, United States citizens, resident aliens, organizations incorporated in the United States, or foreign organizations. The NRC Staff Answer has correctly stated and applied the standing doctrines applicable to this petition for leave to intervene. Petitioner Congresspersons have failed to allege a "personal stake in the outcome" of this proceeding.[6/] Petitioners Mhlambiso, Landis, and Gurirab fail to establish the causal nexus between the inquiries they assert and Commission action and, thus, do not meet the "injury in fact" test for standing. Additionally, they complain of injuries beyond the "zone of interests" protected by the Atomic Energy Act.[7/] Neither the deep felt concern nor the need to provide information to members is sufficient to

6/ NRC Staff Answer, at 10.

7/ Id. at 6-8.

give any of the petitioner organizations standing.[8] The Department adopts the reasoning and conclusion of the NRC Staff Answer for the record and will limit its own discussion to issues not fully developed in that Answer.

A. Issuance of This License Will Not Impair the "Effectiveness of the Exercise of a Specific Power of the Legislator," the Only Basis upon which Congresspersons can Claim Standing in their Legislative Capacities.

Legislators are subject to the same requirements for standing as are members of the general public.[9] Standing is conferred by virtue of the attributes of the legislative office only when the challenged action impairs, "the effectiveness of the exercise of a specific power of the legislator."[10] While such an impairment may be found in the effect of a purported pocket veto on a Senator's power to vote for legislation[11] it is not present in the interest of a legislato

8/ Id. at 8-9.

9/ Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973); Harrington v. Schlesinger, 528 F.2d 455 (4th Cir. 1975); Metcalf v. National Petroleum Council, 407 F. Supp. 257 (D.D.C. 1976).

10/ Korioth v. Briscoe, 523 F.2d 1271 (5th Cir. 1975).

11/ Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974).

in being informed regarding the constitutionality of a war[12] or in having access to unbiased information,[13] even though having such information might be useful to the legislator in casting his vote.[14] There is no allegation here of the impairment of any such "specific power". The congressional petitioners merely assert interests "arising out of their Congressional duties to make appropriations for, to hold hearings on, to take other legislative actions on, as well as remain currently informed as to the Commission's administration of the Atomic Energy Act, as amended, and agreements

12/ Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973); Harrington v. Schlesinger, 528 F.2d 455 (4th Cir. 1975).

13/ Metcalf v. National Petroleum Council, 407 F. Supp. 257 (D.D.C. 1976).

14/ In Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973), the Court stated in dictum that a Congressperson had standing to sue for a declaration that the President was waging an unlawful war. The Court raised the hypothetical possibility that the plaintiffs in that case would find such a declaration useful in discharging their constitutional duties with respect to impeachment and other legislative duties. The point was not argued before the Court. The Mitchell Court's view of legislators' standing has not been followed and has been criticized by other Circuit Courts which have focused on the question. Holtzman v. Schlesinger, 484 F.2d 1307, 1315 (2d Cir. 1974); Harrington v. Schlesinger, 528 F.2d 455, 459 (4th Cir. 1975).

pertinent thereto."[15/]

These interests seem "...little different from that of any citizen who might find a court's advice useful in casting his votes in presidential and congressional elections..."[16/]

In any event, it is impossible to see how the Commission's decision on the current license application could affect the capacity of these petitioners to perform their legislative duties. As noted in Harrington v. Schlesinger,[17/] regardless of the outcome of this proceeding, Congress has the resources to ascertain the facts pertaining to United States nuclear export policy, and to remedy any possible deficiencies by the enactment of legislation, including any related to the Commission's interpretation of the Atomic Energy Act, if that be the congressional will.

15/ Amended Petition, at 13.

16/ Harrington v. Schlesinger, 528 F.2d 455,459 (4th Cir. 1975).

17/ Id.

B. Petitioners Mhlambiso, Landis, Gurirab, and SWAPO Lack Standing Because They Fail to Allege Sufficient Causal Nexus Between Their Injuries and Commission Action and Because Their Injuries are Outside the Zone of Interests Protected by the Atomic Energy Act.

Petitioners Mhlambiso, Landis, Gurirab and SWAPO rest their claim to standing upon actions by the Government of South Africa. In particular, petitioners claim to be aggrieved by South Africa's "denial to them of entry into South Africa or Namibia (formerly known as South West Africa) or its refusal to adhere to its international legal obligations under the United Nations Charter."[18/] None of these injuries, however genuine and profound, give the petitioners standing to intervene under Section 189(a) of the Atomic Energy Act since these injuries are neither causally related to the proposed Commission action,[19/] nor within the "zone of interests" protected by the Atomic Energy Act.[20/]

18/ Amended Petition, at 12.

19/ Eastern Kentucky Welfare Rights Organization v. Simon, 44 U.S.L.W. 4724 (U.S. June 1, 1976); Warth v. Seldin, 422 U.S. 490 (1975).

20/ Association of Data Processing Service Organization v. Camp, 397 U.S. 150 (1970).

Petitioners have cited Diggs v. Dent,[21] in support of their petition to intervene. In that case, it was held that some of these same petitioners and persons situated had standing to seek a declaratory judgment to the effect that it would be inconsistent with the international legal obligations of the United States for the Department of Commerce to grant a waiver necessary legally to import fur seal skins from South Africa and Namibia.[22]

Neither Diggs v. Dent nor Diggs v. Schultz,[23] the case upon which Diggs v. Dent relied, are sufficient basis for finding that petitioners in this Case have standing. In the first instance, both cases must be read

21/ Civ. Action No. 74-1292 (D.C.C. May 14, 1975), appeal docketed, sub nom. Diggs v. Morton et al., No. 75-1775 (D.C. Cir., August 8, 1975).

22/ The plaintiffs sought injunctive as well as declaratory relief. It is worth noting that the District Court, notwithstanding its decision on standing, dismissed the complaint for lack of justiciability. Diggs v. Dent, id. at 8-9. Consequently, the Court's ruling on the standing issue may be regarded as dictum.

23/ Diggs v. Shultz, 470 F.2d 461 (D.C. Cir., 1975), cert. den. 411 U.S. 931 (1973). In Diggs v. Shultz, the Court of Appeals found that plaintiffs who had been denied entry into Rhodesia had standing to maintain an action for declaratory and injunctive relief on the basis of allegations that the Byrd Amendment, 50 U.S.C. § 98-98h (Supp. II 1973), did not and could not authorize the issuance of a general license for the import of Rhodesian chrome in contravention of United States international obligations. The complaint in this case was also ultimately dismissed for lack of justiciability. Thus, neither Diggs v. Dent nor Diggs v. Shultz can be considered to be a square holding on the issue of standing.

in light of two subsequent Supreme Court cases on the law of standing, Warth v. Seldin[24] and Eastern Kentucky Welfare Rights Organization v. Simon.[25] In both of these cases, the Supreme Court emphasized the necessity of a clear causal link between the proposed agency action and the plaintiff's injuries. In Warth the Court held that the plaintiff's allegations were insufficient to give them standing because,

> ...they rely on little more than the remote possibility, unsubstantiated by allegations of fact that their situation might have been better had respondents acted otherwise, and might improve were the court to afford relief.[26]

The petitioners here stand in precisely the same posture. Wholly unsupported by allegations of fact is their apparent belief that action by the Commission on this export license will result in the "new social and political order in South Africa" necessary to enable the individual petitioners to return to their homelands.[27] Equally unsupported is the theory that

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24/ Warth v. Seldin, 422 U.S. 490 (1975).

25/ Eastern Kentucky Welfare Rights Organization v. Simon, 44 U.S.L.W. 4724 (U.S. June 1, 1976).

26/ 422 U.S. at 507.

27/ Amended Petition, at 8.

denial of this license will induce South Africa to comply with its international obligations regarding Namibia.[28] Thus, petitioners here fail to demonstrate a "substantial likelihood" that the proposed agency action would be decisive in redressing their grievances, which the Court in Simon held necessary to establish "injury in fact." In this regard, it is especially important that the claims of these petitioners to standing be evaluated in light of the Supreme Court's admonition that the courts must,

> ...act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.[29]

It is clear that the Petitioners' injuries are the result of independent action by the Government of South Africa; the Petitioners can neither be harmed by Commission action nor does it appear that they can be helped by it.

28/ The international legal obligations of the United States regarding Namibia are treated with the greatest seriousness by the Department of State. The Department will ensure that the Executive Branch position transmitted to the NRC pursuant to Executive Order 11902 takes full account of these obligations.

29/ Eastern Kentucky Welfare Rights Organization v. Simon, 44 U.S.L.W. 4724, 4729 (U.S. June 1, 1976).

Resident alien petitioners and foreign organization petitioners lack standing in this case for another reason. Not only have they failed to allege "injury in fact" stemming from or remediable by Commission action, but the interests they assert fall outside the "zone of interests" protected by the Atomic Energy Act of 1954, as amended. To be included within the "zone of interests", a requirement first articulated in Association of Data Processing Service Organization v. Camp,[30] the plaintiff must show that he comes within the class of persons whose interests were intended to be regulated or protected by operation of the statute.[31] In particular,

> The cases make it clear that the answer to the question of whether a plaintiff has standing to seek enforcement of a particular statutory requirement that is alleged to have been breached is whether Congress' purpose in enacting that requirement was to protect the plaintiffs' interests.[32]

30/ Association of Data Processing Service Organization v. Camp, 397 U.S. 150 (1970).

31/ Gifford-Hill & Company, Inc. v. Federal Trade Commission, 523 F.2d 730 (D.C. Cir., 1975).

32/ Illinois State Employees Union, Council 34 v. Hodgson, 335 F.Supp. 960, 962 (D.C. Ill. 1971).

In this proceeding, the resident alien petitioners and SWAPO seek to enforce a statutory requirement, that issuance of the license not be inimical to the common defense and security of the United States, a requirement aimed at protecting the interests of the people of the United States. The Supreme Court in Warth emphasized the weight of prudential considerations barring litigants from establishing standing by asserting the right of third parties.[33/] Foreign persons and organizations whose injuries relate to entry into South Africa and Namibia, or a concern about apartheid, simply have not asserted an "injury in fact" within the "zone of interests" protected by the common defense and security determination required by Section 57(c) of the Atomic Energy Act of 1954, as amended. They, therefore, lack standing to intervene in this case.[34/]

II. Public Policy Considerations Militate Against Deciding to Hold a Discretionary Legislative-Type Hearing Prior to the Communication of the Executive Branch Position on Issuance of the License.

33/ 422 U.S. 508-10.

34/ Gifford-Hill & Company, Inc., v. Federal Trade Commission, 523 F.2d 730, 731 (1975); Sissons v. Office of Selective Service of the United States, 454 F.2d 279 (9th Cir. 1972).

It is the position of the Executive Branch that it would be inappropriate for the NRC to decide to hold a discretionary legislative-type hearing prior to receiving the position of the Executive Branch on the merits of the application. The Executive Branch consideration of its position as to whether the license should be issued, including the judgment as to whether the issuance of the license will or will not, be inimical to or constitute an unreasonable risk to the common defense and security, is still under way at the present time. In the absence of an Executive Branch position on the merits, the value of any hearings in terms of public education and public scrutiny of U.S. nuclear export policies with regard to South Africa cannot be assessed. Executive Branch agencies could not, of course, participate in any such hearings except possibly as interested observers prior to the formulation of a coordinated Executive Branch position pursuant to the procedures estabished by the President in Executive Order 11902.

III. The Jurisdiction of the Nuclear Regulatory Commission in Regard to Its Export Licensing Functions is Limited to Considerations Relevant to the Common Defense and Security Determination required by the Atomic Energy Act of 1954, as amended.

In the Edlow case, the Commission made clear that it considered its jurisdiction with respect to export licensing limited to factors bearing on the common defense and security.[35/] Assuming that the NRC is, in the exercise of its statutory authority, required to make a common defense and security determination independent of that of the Executive Branch, the particular concern of the Commission in this regard must be, "the adequacy of the safeguards and related assurances applicable to this U.S.-supplied fuel and any special nuclear material produced therefrom."[36/] As to other, more general, foreign policy concerns, such as the relevance of the United States arms embargo against South Africa and United States international obligations with respect to Namibia,[37/] these clearly fall within the special constitutional competence of the Executive.[38/] Moreover, certain contentions of the petitioners advanced as reasons for denial of this

35/ 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, at 41-44 [hereinafter Edlow].

36/ Id. at 56.

37/ Amended Petition, at 23-24.

38/ Cf. Part I (D) of the Department of State's Supplemental Response of March 19, 1976, in Edlow.

license seem to be directed more at the internal policies of the South African Government than they are at the common defense and security of the United States. 39/ While the internal situation in South Africa may be relevant to risks of theft, sabotage, or diversion, risks of which the Executive Branch will be fully cognizant in developing its position on the merits of this application, the Commission must not permit these proceedings to become a broad ranging review of South Africa's internal policies and problems.

IV. Special Factors.

There are no special factors which bear upon the manner in which the Commission should treat the question of legal standing. Of course, the sale of enriched uranium to South Africa has important foreign policy aspects. However, any special factors relating to foreign policy would more appropriately be treated at a later stage.

39/ Amended Petition, ¶¶ (f), (g), and (h), at 23-24.

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Date: August 6, 1976.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "DEPARTMENT OF STATE RESPONSE TO NRC LETTER OF JULY 26, 1976" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk by delivery to the 1717 H Street, Washington, D.C., office of the Commission, this 6th day of August, 1976.

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OFFICE OF THE
SECRETARY

July 26, 1976

7616027

Mr. C. Arthur Borg
Executive Secretary
Department of State
Washington, D.C. 20520

Attention: Myron B. Kratzer
Deputy Assistant Secretary of State

Dear Mr. Borg:

On July 8, 1976 the Nuclear Regulatory Commission was served with a Petition seeking leave to intervene in the Matter of U.S. Nuclear Inc., on application for the export of special nuclear material to the Republic of South Africa. Petitioners (14 Members of Congress, the American Committee on Africa, Episcopal Churchmen for South Africa, the Southwest African People's Organization (SWAPO), the Washington Office on Africa, Elizabeth S. Landis, Theo-Ben Gurirab, and Thami Mhlambiso) also have requested that the Commission conduct a hearing in connection with the consideration of this export license application.

The Commission has already received answers to the Petition from U.S. Nuclear and the NRC Staff, which are attached to this letter for your information.

Before ruling on the issues presented by the Petition, the Commission wishes to obtain further information and views of concerned agencies of the Executive Branch, to assist it in making its decisions. Accordingly, and pursuant to the procedures established by Executive Order No. 11902, we are requesting the Department of State (in conjunction with such other Executive Branch agencies as the Department may deem appropriate) to consider the procedural issues raised by Petitioners in the instant matter; and to submit the views and comments of the Executive Branch to the NRC.

In particular, the Commission invites the Executive Branch to address the following issues:

(1) The several Petitioners belong to five general categories (Members of Congress, United States citizens, resident aliens, organizations

incorporated in the United States, and foreign organizations. What persons or organizations, if any, among Petitioners would be entitled to a hearing under Section 189(a) of the Atomic Energy Act of 1954? Would the same criteria for determining the legal standing of these persons and organizations apply to each of the Petitioners?

(2) If Petitioners are not entitled to a hearing as a matter of right, should the Commission exercise its discretionary authority to convene a legislative-type public hearing of the kind adopted for consideration of issues arising from the proposed export of nuclear material to India's Tarapur Atomic Power Station? Are there factors which would distinguish the present situation from Tarapur in this regard?

(3) If a hearing were to be granted by the Commission on the export license, are there any issues raised by Petitioners which should be excluded from the Commission's consideration as falling outside NRC jurisdiction?

(4) To what extent should the Commission consider the United Nations Charter provisions and resolutions of the General Assembly and Security Council cited by Petitioners in assessing the legal basis for their claim of interest in the present licensing proceeding? Do such provisions and resolutions have any relevancy to the issue of legal standing to seek intervention?

(5) Are there any special factors which bear upon the manner in which the Commission should treat the Petition to Intervene?

The Commission would request that written statements on behalf of the Executive Branch be submitted no later than 5:00 P.M., August 6, 1976.

Sincerely,

Samuel J. Chilk
Secretary to the Commission

2 Attachments:
1. NRC Staff Answer
2. U.S. Nuclear's Answer