

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
GENERAL ELECTRIC COMPANY)	
(Vallecitos Nuclear Center - General)	Docket Nos. 50-70
Electric Test Reactor, Operating)	(Show Cause)
License No. TR-1)	

NRC STAFF RESPONSE TO CONGRESSMAN DELLUMS' FILING
DATED OCTOBER 26, 1979

Introduction

On October 26, 1979, Congressman Ronald V. Dellums, an intervenor in this proceeding, submitted a pleading to the Chairman of the Licensing Board requesting him to certify an interlocutory appeal to the Commission with respect to certain determinations made by the Board in its Memorandum and Order dated October 9, 1979 ("Order"). Congressman Dellums asserts that the Board's ruling on two issues impinges on his ability to participate in the proceeding, and should be reviewed by the Commission as the earliest practicable moment. The two rulings of concern to Congressman Dellums are 1) that he was admitted as a party to this proceeding on the sole basis of his personal interest, and not on the basis of his asserted representative status, and 2) that he may not participate in this proceeding except in a personal capacity or by an attorney representing him.

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In his filing, Congressman Dellums specifically requests the Board to "certify" an "interlocutory appeal." Since the Commission's Rules of Practice do not provide for certification of an interlocutory appeal, the Staff presumes that the Congressman is seeking to file either an interlocutory appeal pursuant to 10 CFR § 2.714a, which should have been submitted directly to the Appeal Board, or a request for the Licensing Board, pursuant to 10 CFR § 2.730(f), to refer the issues in his submittal to the Commission for their review. In this response, the Staff addresses both alternatives. On either basis, the Staff opposes the request.

Interlocutory Appeal Pursuant to § 2.714a

The Commission's Rules of Practice narrowly limit the extent of appeals that may be taken from decisions rendered by licensing boards prior to issuance of an initial decision. 10 CFR § 2.730(f) specifically prohibits parties from taking interlocutory appeals to the Commission from rulings of the presiding officer. The only exception to that prohibition is contained in 10 CFR § 2.714a. The portion of that regulation relevant to the instant request permits a person who has petitioned to intervene to appeal from an order concerning his petition only if the order denied the petition outright. An order which admits the petitioner may not be appealed by that person even though it may restrict his participation such as by limiting the issues to be addressed in the proceeding or, as in the case here, by limiting the basis upon which interest was found and intervention was permitted.

See, Puerto Rico Water Resources Authority (North Coast Nuclear Plant, Unit 1), ALAB-286, 2, NRC 213, 214 (1975), and Boston Edison Co. (Pilgrim

Nuclear Generating Station, Unit 2), ALAB-269, 1 NRC 411, 413 (1975) and cases there cited. Since Congressman Dellums was admitted as a party to this proceeding, an interlocutory appeal utilizing § 2.714a is therefore not available to him.^{1/} Accordingly, the Staff opposes Congressman Dellums' request to the extent that it may be construed to be an interlocutory appeal.

Certification of Ruling Pursuant to § 2.730(f)

As stated above, Congressman Dellums' request may also be a request for certification of the issues directly to the Commission. Although interlocutory appeals are not generally permitted, interlocutory review of licensing board rulings can be sought pursuant to 10 CFR § 2.730(f). Under this section, a presiding officer may refer a ruling directly to the Commission when, in his judgment, a prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense. Accordingly, Congressman Dellums must demonstrate a concern that falls within one of the categories just described, or he must fail in his attempt to convince the presiding officer to refer the questioned rulings to the Commission.

The sole reason asserted by Congressman Dellums for requesting the certification is that he feels that the Board's rulings on the two issues would

^{1/} The Staff notes two additional barriers that would inhibit Congressman Dellums' ability to use § 2.714a as a means to appeal the Order. That regulation permits an appeal only if it is filed within 10 days after service of the order. Even allowing for 5 days mailing time for service of the October 9, 1979 Order, Congressman Dellums' request, which was postmarked October 27, 1979, would appear to be 3 days tardy. Furthermore, § 2.714a requires an appeal filed under that section to be accompanied by a supporting brief. See, Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-140, 6 AEC 575 (1973) Congressman Dellums' request is not supported by a brief.

impinge seriously upon his ability to participate in the proceeding. No factual averments nor legal analysis is provided in support of his claim. Based on the record developed in this proceeding, including prior submittals from Congressman Dellums, the Staff, as discussed below, concludes that the Board ruled properly on the issues, and that the Board's rulings do not pose a detriment to the public interest nor will they result in an unusual delay or expense to Congressman Dellums.

The first issue involves the basis upon which Congressman Dellums' interest was founded, and participation as a party was allowed. Congressman Dellums argues that he should have been admitted on the basis of both his personal interest and his status as a congressman. However, the record in this proceeding fully supports the Board determination set out in its Order that Congressman Dellums has not alleged an injury in fact to him as a congressman, but only a personal interest based upon his residence and employment within the geographical zone of interests related to the GETR. The decisions of the federal courts have consistently held that there are no special standards for determining congressional standing questions, and that for a congressman or any other person to establish standing, he must meet the standards set forth in the judicial concepts of standing. See "NRC Staff Response to Board Order" dated July 13, 1979 (Staff Response), p. 4 and cases cited therein.^{2/} Absent a showing by Congressman Dellums that he has interests

^{2/} Also in accord, see, the Toledo Edison Co. and the Cleveland Electric Illuminating Co. (Davis-Besse Nuclear Power Station, Unit No. 1), Memorandum and Order Denying Request for Hearing, slip op. (October 23, 1979), in which a state senator was denied special status in his attempt to intervene in the proceeding merely on the basis of his position as a senator.

qua congressman in this proceeding, he may not be admitted on the basis of his representative status as a congressman. As indicated above, no such interest is even alleged in the latest request, nor does the Congressman allege how the Board's ruling on this matter affects his ability to participate in the proceeding. Under the circumstances, the Staff submits that Congressman Dellums has failed to set forth a basis in favor of granting certification of this issue to the Commission.

The second issue involves the Board's ruling that Congressman Dellums must participate in this proceeding either personally or by a representative who is an attorney. On this matter as well, Congressman Dellums has failed to assert any supporting argument upon which this Board could rely in finding that its decision not to permit a non-attorney to represent the Congressman constitutes a detriment to the public interest or an unusual delay or expense. It is true that Congressman Dellums would now have to hire an attorney to represent him if he personally cannot participate in the proceedings, and that act could be a personal expense to the Congressman. However, the hiring of an attorney to represent a party in an NRC proceeding is hardly an unusual expense within the meaning of 10 CFR § 2.730(f).

Furthermore, the Board in disallowing the Congressman from being represented by a non-attorney was not making a legal or factual interpretation of a Commission regulation which might be susceptible to differing interpretation. To the contrary, the Board merely applied the unequivocal language of 10 CFR § 2.713(a) which permits a person to appear in an adjudication only:

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... on his own behalf or by an attorney-at-law in good standing admitted to practice before any court of the United States, the District of Columbia, or the highest court of any State, territory, or possession of the United States.

No other interpretation of this regulation can reasonably be made than the one contained in the Order. See, Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), Order (unpublished), October 8, 1976.

Accordingly, the Staff submits that the application of Commission's regulation that a litigant either appear on his own behalf or by an attorney does not constitute a detriment to the public interest or create unusual delay or expense and that no basis exists for granting certification of this second issue to the Commission.^{3/}

^{3/} Although not raised by Congressman Dellums, the Staff notes that a challenge to the Commission's regulations is available here since it is not an initial licensing proceeding. 10 CFR § 2.758(a). However, Congressman Dellums has not offered any argument as to why the circumstances of this proceeding are sufficiently special that application of § 2.713(a) would not serve the purposes for which the regulation was adopted. See, § 2.758(b). The Staff considers that the application of § 2.713(a) in this proceeding is exactly as the Commission intended: i.e. to minimize the possibility of a party being represented by a non-attorney who is uninformed and inexperienced in the technical aspects of administrative procedure and in trial techniques with a concomitant impact on the ability of a board to conduct a hearing with fairness and dispatch in accord with the Commission's Rules of Practice. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-73-28, 6 AEC 666, 678-80 (1973).

To the extent that Congressman Dellums finds 10 CFR § 2.713(a) objectionable, the proper manner in which to challenge the regulation is to petition for rule making pursuant to § 2.802.

Conclusion

The Staff urges the Board to deny Congressman Dellums' request for certification since the Congressman has failed to show that the rulings of this Board constitute a detriment to the public interest or that they have created an unusual delay or expense.

Respectfully submitted,

Daniel T. Swanson

Daniel T. Swanson
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 16th day of November, 1979

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(Vallecitos Nuclear Center -)
General Electric Test Reactor,)
Operating License No. TR-1))

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO CONGRESSMAN DELLUMS' FILING DATED OCTOBER 26, 1979" 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, through deposit in the Nuclear Regulatory Commission's internal mail system, this 16th day of November, 1979:

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