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July 13, 1979

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 Electric Test Reactor,
Operating License No. TR-1)

}
} Docket No. 50-70
} (Show Cause)
}



NRC STAFF RESPONSE TO BOARD ORDER

On June 18, 1979, the Atomic Safety and Licensing Board (Board) issued an Order in which each of the parties in the referenced proceeding was requested to address three questions regarding participation of Congressman Dellums in this proceeding. The Staff's responses to the questions are set forth below.

1. Does Intervenor Dellums have "standing" as that concept is employed in N.R.C. licensing proceedings, to participate in this case by virtue of his status as a Congressman?
 - a. If so, are there legal or regulatory impediments to his representation by Mr. Halterman or Ms. Snow? What are they?

It has been and continues to be the Staff's position that Congressman Dellums does not possess standing within the meaning of 10 CFR § 2.714 solely by virtue of his status as a Congressman. As counsel for the Staff represented at the prehearing conference for this proceeding held on March 5, 1978, Congressman Dellums has satisfied the Commission's requirements for intervention on the basis of his personal interest as a resident within the geographical zone of interest of the facility, and, since he also has an office in

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the area, as an individual who engages in business within the geographical zone of interest.^{1/} Tr. 20-22. However, Staff counsel stated that the Staff did not support intervention by Congressman Dellums on the basis of his second asserted interest: that of a Congressman representing a district near the facility. Tr. 22. The Board, in admitting Congressman Dellums as a party to the proceeding, did not specify on what basis he was being admitted. Tr. 22; see also, Order Following Conference dated March 28, 1978 at 1.

Congressman Dellums' representative at the prehearing conference, Mr. Halterman, claimed that the Congressman possessed the requisite legal interest to intervene on the basis of his status as a Congressman since the district that he represents is located 20-30 miles from GETR, and that the people he represents have the requisite interest themselves to appear in the proceeding. Tr. 21. He further stated that one of the Congressman's duties is to represent these people in federal agencies and that he therefore has the requisite interest to represent his constituents in this proceeding.

¹ While no specific distance from a nuclear power plant has evolved from Commission decisions to define the outer boundary of the "geographic zone of interest," the Appeal Board has found that a licensing board "cannot be tarred with the brush of irrationality" for presuming that someone who carries on everyday activities within 25 miles of the plant has an interest. Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-183, 7 AEC 222, 226 (1974). Further, the Appeal Board has indicated that 50 miles "is not so great as necessarily to have precluded a finding of standing based on residence." Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 n.4 (1977).

Mr. Halterman cited two NRC decisions in support of this claim: Allied General Nuclear Services (3 NRC 277) and Nuclear Fuel Services (1 NRC 89). Id.^{2/} However, neither of the cited cases refer to special standing of Congressmen, nor do they provide any support for the claim that a Congressman has standing to represent constituents' interests.

It is a basic legal principle that one party may not represent another without express authority to do so. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-77-11, 5 NRC 481, 483 (1977). Congressman Dellums has provided no authorization from his constituents to represent them in this proceeding, either as a private individual or in his capacity

^{2/} The Allied General Nuclear Services case involved, in part, the admission of the State in which a proposed facility was to be located as an "interested state" in a licensing proceeding pursuant to 10 CFR § 2.715(c). The Nuclear Fuel Services proceeding involved, in part, the finding of standing, pursuant to 10 CFR § 2.714, of a county located adjacent to the county in which a facility was proposed to be located, which had a creek within its boundaries which might be affected by the facility, which had citizens who worked at the facility and which had nuclear material routed through it. That decision was reversed on other grounds. CLI-75-4, 1 NRC 273 (1975). At best, an argument can be made that these cases stand for the proposition that a governmental entity, such as a state or county, can establish standing based on its mandate to protect its citizens' health, safety and environment. However, these cases provide no support to the claim of a legislator, such as Congressman Dellums, that he can establish standing to intervene in a proceeding in his capacity as a legislator. Unlike a governmental municipal entity, a legislator has no mandate as to his constituents' health and safety. His only mandate is to represent his constituents in enacting laws and other related legislative functions.

as Congressman.^{3/} The fact that Mr. Dellums is a Congressman entitles him to no special status nor does it warrant any departure from the Commission's standards relating to standing, which have consistently been interpreted as being governed by judicial concepts of standing. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976).

Federal courts have ruled that "there are no special standards for determining Congressional standing questions" and for a Congressman or any person to establish standing, he must meet the standards found in the opinions of the Supreme Court. Harrington v. Bush, 553 F. 2d 190, 204-208 (DC Cir 1977); see also, Harrington v. Schlesinger, 528 F. 2d 455 (4th Cir. 1975), and Holtzman v. Schlesinger, 414 U.S. 1321 (1973). In Harrington v. Bush, a U.S. Congressman sued for a declaration that certain CIA activities were illegal, and sought an injunction to prevent their future occurrence. The Court of Appeals affirmed the dismissal of the complaint, ruling that the plaintiff lacked standing to sue:

(i)t is not sufficient for . . . any legislator merely to allege this status as a ground for standing. Id. at 197, 198 n. 32.

The court further stated that a Congressman's specific rights, interests, and prerogatives as a Congressman lie in his power to make laws and to represent his constituents in Congress, and that this status alone does not

^{3/} The Staff notes that there have been numerous letters sent in to the Board and the Staff, both in support of and opposed to the stated position of Congressman Dellums that the GETR should remain shut down. Accordingly, Congressman Dellums can hardly claim to represent the mandate of his constituents in this matter.

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confer standing to sue a federal agency. Id. at 213. Indeed, the court declared that: ". . . the most consistent theme expressed by the Supreme Court on the question of standing is that a party must allege ' a distinct and palpable injury to himself.'" Id. at 208, quoting from Warth v. Seldin, 422 U.S. 490, 501 (1975).

While it is true in this case that Congressman Dellums can claim that in his capacity as an individual residing and working in the vicinity of the plant he may suffer an injury, he suffers no injury in his capacity as a Congressman. Unlike the situation in Kennedy v. Sampson,^{4/} there is no showing that Congressman Dellums' participation in his official capacity is necessary to protect the effectiveness of a vote on a legislative matter, or is tied to some other matter within his congressional and constitutional charter. Cf. Harrington v. Bush, supra, at 213-14. Consequently, the Staff reaffirms its position that, while Congressman Dellums has alleged sufficient interest as an individual, he has failed to allege a proper basis for participating qua Congressman.

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

The court held that a United States Senator, who had voted in favor of a bill, had standing to bring an action for declaratory judgement that the bill became validly enacted despite a pocket veto by the President and for an order requiring the appropriate government officials to publish the bill as a validly enacted law. The Court found that the Senator's object in the lawsuit was to vindicate the effectiveness of his vote and that the purposes of the standing doctrine (a determination that the complaining party has suffered some injury in fact) were fully served in the litigation.

Since the Staff does not agree that Congressman Dellums has standing as a Congressman, question 1.a. does not require a response.

2. Assuming that Congressman Dellums has "standing" as a private citizen, and was admitted to the case on that basis, do the points raised by the Commission's General Counsel have relevance to the Congressman's continued participation in the same manner as heretofore? What relevance?

Assuming that Congressman Dellums were admitted solely on the basis of his interest as a private citizen, the points raised in the Acting General Counsel's May 18, 1978 letter have only indirect relevance to the Congressman's continued participation in the same manner as heretofore. The basic concerns expressed in the Acting General Counsel's letter to the Chairman of this Licensing Board bear on the propriety of representation of the Congressman by Mr. Halterman. The view asserted in the letter was that, in the event that the Congressman's participation is based on his standing as a private citizen, Mr. Halterman's representation of him would appear to be in violation of 18 U.S.C. 203 and 205. As stated by the Acting General Counsel in his letter,

18 U.S.C. Section 203 prohibits federal employees from receiving compensation for services rendered in a federal administrative proceeding unless the service is rendered as part of his official governmental duties. Section 205 prohibits Federal employees from appearing in a Federal administrative proceeding as an agent or attorney unless it is part of his official governmental duties.

On October 26, 1978, Congressman Dellums sent a letter to the Board, with a copy of an informal opinion letter dated June 26, 1978 from the Department

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of Justice attached (DOJ letter). In the DOJ letter, the Deputy Assistant Attorney General for the Criminal Division of the Department of Justice rendered his informal opinion that Mr. Halterman's representation of the Congressman qua Congressman in this proceeding apparently did not violate 18 U.S.C. 203, but that the same conduct may be in violation of 18 U.S.C. 205 if Congressman Dellums were participating in this proceeding as a private individual.

If a court of law were to determine that the representation of Congressman Dellums in his private capacity by his aide was in fact a criminal offense, that holding would not affect the Congressman's standing to participate as a party in this proceeding, but would affect the ability of the aide to represent him. However, the Atomic Energy Act does not authorize this Board to conduct a criminal trial to determine whether any person is violating 18 U.S.C. 203 or 205. The assumption that the Congressman's aides may be violating 18 U.S.C. 203 or 205 does pose an immediate indirect impediment to their further participation in this proceeding, however, in that the Board may not wish to assume the ethical consequences of condoning such activity in a proceeding over which it presides. However, as noted below, the Staff does not perceive that this Board must reach the question of the relevance of the Acting General Counsel's concerns to this proceeding since this Board may, and the Staff submits, should prevent the continued representation of Congressman Dellums in this proceeding by Mr. Halterman or Ms. Snow by virtue of regulatory authority which this Board clearly does possess.

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Although not raised by the Acting General Counsel in his letter, the continued representation of the Congressman by a non-attorney, whether he is an aide or not, is contrary to the Commission's Rules of Practice. Title 10 CFR § 2.713(a) provides that "[a] person may appear in adjudication on his own behalf or by an attorney-at-law. . ." To the knowledge of the Staff, neither Mr. Halterman nor Ms. Snow is an attorney-at-law, and therefore may not represent the Congressman in this proceeding. Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), Order (unpublished), October 8, 1976.

Congressman Dellums has argued in his June 18, 1978 letter that his participation in this proceeding is analogous to that of an organization or corporation and that a member of that organization such as an aide, may represent him in this proceeding. Although not so stated by the Congressman, an organization or corporation is incapable of personally appearing and must, therefore, do so by some form of representative participation. Duke Power (Catawba Nuclear Station, Units 1 and 2), LBP-73-28, 6 AEC 666, 678-680 (1973). However, if Congressman Dellums were admitted as a private individual as the Board's second question assumes, he is indeed capable of personally appearing. Accordingly, the decisional rule that a corporate entity may appear in NRC proceedings represented by an officer or member is not applicable. Thus, as the Staff has previously observed,^{5/} to the extent that

^{5/} Response to Petition for Leave to Intervene of Congressman Phillip Burton and John Burton, filed April 7, 1978, at 3.

Congressman Dellums is permitted to continue his participation, 10 CFR § 2.713(a) requires, under the circumstances, that he participate either personally or by an attorney.

In sum, the Staff submits that the concerns of the Acting General Counsel may have some relevance to this proceeding, but that the Board is without jurisdiction to determine whether Congressman Dellums and/or his aide(s) are violating 18 U.S.C. 203 or 205. However, the Board does have the jurisdiction under 10 CFR § 2.713(a) to rule that these non-attorney aides may not continue to represent the Congressman in his private capacity in this proceeding, without having to consider the more complex matter of criminal culpability. By enforcing the provisions of § 2.713(a), the Board would incidentally be ensuring that there would be no possibility of future violations of 18 U.S.C. 203 or 205 by the continued activities of Mr. Halterman or Ms. Snow.

3. Should the Licensing Board attempt to determine the matter itself, or is the case an appropriate one for referral to the Department of Justice for investigation as involving a possible violation of federal criminal law?
 - a. If such referral is believed to be appropriate, should the referral be made by the Licensing Board, the Office of the General Counsel, or by some other body within the N.R.C.?

As previously noted, the Board lacks jurisdiction to consider whether Congressman Dellums and/or his aides have violated 18 U.S.C. 203 or 205. That would be within the province of the Department of Justice and, as indicated by the DOJ letter, the Department of Justice has already been made aware of the

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situation. One key factor which has not been provided to the Department of Justice is whether the Congressman has been participating in this proceeding as a private individual or as a Congressman. The Staff submits that the Board's resolution of the issue should be forwarded to the Department of Justice by the Office of the General Counsel, which functions as counsel to the Commission.

With respect to the matter of a non-attorney representing an individual in this proceeding in violation of 10 CFR § 2.713(a), however, this Board is clearly the proper body to resolve the issue. In the Staff's view, the regulations require the Board to find that Mr. Halterman and Ms. Snow should not be permitted to continue representing Congressman Dellums in this proceeding as long as they are not attorneys.

Respectfully submitted,

Daniel F. Swanson

Daniel T. Swanson
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 13th day of July, 1979

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO BOARD ORDER" 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 13th day of July, 1979:

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