



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

50-289-SP

December 3, 1984

DOCKETED
USNRC

'84 DEC -3 A10:34

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Dear Mr. Gamble:

This responds to your request of November 23, 1984 for advice regarding whether the federal conflict of interest laws bar you from testifying in the Three Mile Island Restart proceeding. On November 13, 1984, the Atomic Safety and Licensing Board presiding over the hearing issued to you a subpoena to testify on behalf of Three Mile Island Alert, a party to the restart proceeding.¹

Under 18 U.S.C. 205(2), a federal government employee may not act as an agent for a private party before any federal agency in connection with any application, proceeding, request for a ruling or other determination, controversy, charge, accusation, or other particular matter, in which the United States is a party or has a direct and substantial interest.

18 U.S.C. 205 also provides that nothing in the section "prevents an employee from giving testimony under oath or from making statements required to be made under penalty for perjury or contempt."

In the following discussion, we address the pertinent provisions and set forth the legal limitations governing your testimony. As noted above, to trigger the prohibitions of 18 U.S.C. 205 several elements must be present: (1) a government employee; (2) a proceeding or other particular matter; (3) the United States as a party or having a direct and substantial interest in the matter; and (4) the government employee acting as agent or attorney before the federal government for anyone other than the United States with respect to the particular matter.

Based on the facts contained in your letter and our review of your pre-filed testimony dated November 1, 1984, in our view it is clear that if you provide testimony, the first three elements

¹After receiving a copy of your November 23, 1984 request for a legal opinion, the Licensing Board suspended the subpoena.

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of 18 U.S.C. 205 described above will have been met.² The question is whether by providing testimony you are acting as an "agent" of TMIA.³ We have discussed this matter with the Office of Government Ethics, Office of Personnel Management (OGE) and have been advised that you would not be acting as TMIA's agent if you testify only as the result of a subpoena, make clear to all the parties to the proceeding and to the Licensing Board that you are not acting as TMIA's agent, and limit your testimony to a discussion of facts that were known to you while you were an NRC employee and to opinions that you held while you were an NRC employee. If, on the other hand, in your testimony you were to address matters that you did not personally work on as an NRC employee or provide opinions that you did not hold at the time you terminated your NRC employment, you would be construed as acting as TMIA's agent.

This conclusion is based on one of the principles included in the federal conflict of interest laws, i.e., that there will be no violation of the criminal statutes if a party is subpoenaed to testify about facts that he learned as a government employee and opinions that he held as a government employee. However, to the extent that an employee's testimony is not based on personal knowledge obtained as a government employee, the individual is not providing information about past occurrences or views, but is generating new information or views.

The Federal conflict of interest laws are based on a premise that federal employees serve one master -- the federal government. Assisting private parties by providing testimony containing information or views not gained as a federal employee is considered to be inconsistent with that premise.

The last remaining question to be addressed is the meaning of the "testimony under oath" exception found in Section 205. While this provision on its face would appear to provide that an individual is never precluded from testifying under oath, OGE takes the position that a federal employee does not have an unqualified legal right to testify under oath on behalf of a private party regarding particular matters that the individual personally and substantially worked on as a government employee. OGE has promulgated regulations implementing 18 U.S.C. 207 (post-employment restrictions on former federal employees), a statutory provision with a virtually identical "testimony under

²You are a federal employee, the Three Mile Island restart proceeding is a particular matter, and the NRC staff is a party to that proceeding.

³It is our understanding that you would not be representing TMIA as an attorney in this proceeding.

oath" exception.⁴ Those regulations, which are based on the legislative history underlying 18 U.S.C. 207, limit the circumstances under which a former government employee can testify under oath on behalf of a private party with respect to a "particular matter" that the individual worked on personally and substantially while serving as a federal employee.⁵ That regulation, 5 CFR 737.19(b), provides in pertinent part:

A former Government employee may testify before any court, board, commission, or legislative body with respect to matters of fact within the personal knowledge of the former Government employee. This provision does not, however, allow a former Government employee, otherwise barred under 18 U.S.C. 207(a), (b), or (c) to testify on behalf of another as an expert witness except: (1) to the extent that the former employee may testify from personal knowledge as to occurrences which are relevant to the issues in the proceeding, including those in which the former Government employee participated, utilizing his or her expertise, or (2) in any proceeding where it is determined that another expert in the field cannot practically be obtained; that it is impracticable for the facts or opinions on the same subject to be obtained by other means and that the former Government employee's testimony is required in the interest of justice.

Although that regulation does not implement 18 U.S.C. 205, OGE has advised that the testimony under oath exception of Section 205 should be interpreted to have the same limitations as those contained in the regulations implementing Section 207. Accordingly, any testimony that you provide should be consistent with the limitations contained in 5 CFR 737.19.

Another limitation on your testimony is derived from Executive Order 11222, "Prescribing Standards of Ethical Conduct for Government Officers and Employees" (May 8, 1965). That

⁴OGE provides overall direction of executive branch policies relating to preventing conflicts of interest by federal employees. See Section 402 of the Ethics in Government Act of 1978, 5 U.S.C. Appendix 5. Its regulations, which are promulgated after concurrence is received from the Department of Justice, are binding on all federal agencies, including the NRC.

⁵18 U.S.C. 205, unlike 18 U.S.C. 207, does not provide that an employee must have worked on the particular matter upon which he is testifying personally and substantially as a federal employee.

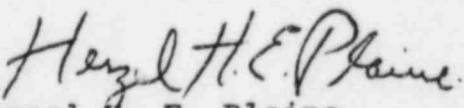
Executive Order provides that "an employee shall not directly or indirectly make use of, or permit others to make use of, for the purpose of furthering a private interest, official information not made available to the general public." NRC's implementing regulations, 10 CFR 0.735-41, provide that no employee shall use information gained as a government employee which has not been made available to the general public to further a private interest unless prior written authorization to use such information has been obtained from the Executive Director for Operations.⁶

Conclusion

It is not illegal for you to testify under oath in the Three Mile Island Restart proceeding under the subpoena issued by the Licensing Board on behalf of TMIA. However, your testimony should conform with the requirements of 5 CFR 737.19. In addition, you should observe the restrictions of 10 CFR 0.735-41 regarding the use of non-public information gained as a federal employee.

We have discussed this matter informally with the Office of Government Ethics and it concurs with the conclusions reached in this letter. We have also discussed this matter with David Ream, attorney-adviser, Office of General Counsel, Department of Defense, who advised us that if you complied with the restrictions noted above, no regulation of the Department of Defense would be violated.

Sincerely,


Herzel H. E. Plaine
General Counsel

cc: TMI-1 Service List

⁶Obviously, 18 U.S.C. 205 and 10 CFR 0.735-41 would not apply if you testified in this proceeding on behalf of the NRC staff or were called as a Licensing Board witness.