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January 31, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE ADMINISTRATIVE LAW JUDGE IVAN SMITH

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In the Matter of)
)
METROPOLITAN EDISON COMPANY)
)
(Three Mile Island Nuclear)
Station, Unit No. 1))

Docket No. 50-289
(Restart)

OFFICE OF SECRETARY
DOCKETING SERVICE
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UNION OF CONCERNED SCIENTISTS' MOTION
FOR LEAVE TO REPLY TO LICENSEE AND STAFF RESPONSES TO
UCS, COMMONWEALTH, AND TMIA DISQUALIFICATION MOTIONS
AND UCS' REPLY

MOTION

The Union of Concerned Scientists moves pursuant to 10 C.F.R. § 2.730(c) for leave to file a brief reply to the Licensee and Staff responses to the disqualification motions filed by UCS, the Commonwealth of Pennsylvania, and TMIA. The purpose of the reply is to assure that the record is complete with respect to the extrajudicial nature of the disqualifying actions taken by Judge Smith and to respond to Licensee arguments against UCS' motion.

REPLY

Licensee argues, in essence, that the disqualifying action taken by Judge Smith is not extrajudicial in nature, and that, in any event, the actions would not lead a reasonable person, knowing the facts, to perceive an appearance of bias or prejudgment. As the original movants, and now the NRC Staff, have demonstrated, Licensee is incorrect.

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I. The Disqualifying Actions Stem From An Extrajudicial Source.

According to Licensee, Judge Smith's letter to Judge Rambo and his comments with respect to the treatment of Messrs. G and H and other individuals do not stem from an extrajudicial source, but solely from Judge Smith's participation in the restart hearings as Chairman of the Licensing Board. Assuming, arguendo, that Licensee has applied the correct legal standard, it has reached the wrong conclusion.

The letter to Judge Rambo clearly stems from an extrajudicial source. It involves a criminal prosecution wholly outside the hearing process of which Judge Smith was a part. Judge Smith could not have learned of that prosecution in the course of his judicial duties. In addition, Judge Smith has stated that he was asked to send the letter, apparently by Mr. Floyd's attorney. Tr. 32,600. This, too, could not have occurred in the course of Judge Smith's judicial duties in this proceeding.

The extrajudicial source for Judge Smith's appearance of bias or prejudice is even clearer with respect to his comments about Messrs. G and H. The actions of which Judge Smith has complained occurred outside the judicial context as part of an agreement between the Commonwealth and the Licensee. Again, Judge Smith could not possibly have learned of those actions in the course of presiding over this hearing. For the same reason, he could not have developed his concern about the treatment of these individuals as a result of the record of this case since that treatment is not part of the record.

When Judge Smith's letter to Judge Rambo and his comments about the treatment of individuals such as G and H are considered together, they appear to be related aspects of Judge Smith's general concern about the treatment of GPUN employees affected by these proceedings. Since much of the information about the treatment of such employees stems from agreements reached and actions taken outside the context of the adjudicatory proceeding, Judge Smith's knowledge and concern on this point must stem from an extrajudicial source.

Accordingly, the actions identified by UCS as the basis for disqualifying Judge Smith meet the extrajudicial test, even as that test is interpreted by Licensee.

II. A Reasonable Person Possessing All The Facts Would Perceive Bias Or Prejudgment By Judge Smith.

Licensee is correct in arguing that the editorial position of the Philadelphia Inquirer is by no means controlling in determining the reaction of a reasonable person to the actions and statements of Judge Smith. The fact remains, however, that a reasonable person with knowledge of all the facts could well perceive bias or prejudice on the part of Judge Smith.

Fundamentally, Judge Smith's comments would lead an impartial observer to conclude that any party seeking a remedy that might adversely affect GPUN employees could not expect a fair hearing. Judge Smith has attempted to assure that no party will seek such a remedy outside the context of the restart hearing, Tr. 33212-13, and his comments create the appearance that he would not, under virtually any circumstances, reach findings of fact

that could be used for such a purpose. Indeed, he has stated that if he had known how previous findings might be used, he might have done something other than what he, at that time, considered to be justified by the record. Tr. 33089-90. That being the case, an impartial observer would reasonably expect Judge Smith to avoid making findings that might adversely affect a GPUN employee, even if Judge Smith himself considered those findings to be justified by the record.

In addition, of course, Judge Smith appears already to have decided that deception on operator licensing examinations is very unlikely, although that is a major issue in this case. He made that decision at a time when he had seen only one panel of witnesses sponsored by the Licensee, and even then the examination of that panel had not yet been completed. To an impartial observer this would not appear to be a reasonable preliminary assessment, as suggested by Licensee, but a prejudgment before Judge Smith had heard all of the witnesses or considered points made on cross-examination. This is particularly true because Judge Smith's statement was more than a mere assessment of his current views in the midst of trial. Rather, it was a statement made to a Federal Court and was clearly intended to be taken as a considered ultimate judgement on which that Court should base its actions.

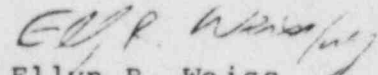
For these reasons, an impartial observer could well perceive unfairness in Judge Smith's continued participation on the Licensing Board for the TMI-1 restart proceeding.

Conclusion

For these reasons, and those stated in its original motion, UCS urges Judge Smith to disqualify himself from further participation in this proceeding.

Respectfully submitted,


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Dated: January 31, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Nuclear Regulatory Commission

In the Matter of)
)
METROPOLITAN EDISON COMPANY) Docket No. 50-289 SP
) (Restart - Management Phase)
(Three Mile Island Nuclear)
Station, Unit No. 1))

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the UNION OF CONCERNED SCIENTISTS' MOTION FOR LEAVE TO REPLY TO LICENSEE AND STAFF RESPONSES TO UCS, COMMONWEALTH, AND TMIA DISQUALIFICATION MOTIONS AND UCS' REPLY was served on those indicated on the accompanying Service List. Service was made by deposit in The United States mail, first class, postage prepaid, on January 31, 1985..



William S. Jordan, III