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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

'85 JAN 30 P2:37

BEFORE ADMINISTRATIVE LAW JUDGE IVAN W. SMITH

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

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

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NRC STAFF'S RESPONSE TO COMMONWEALTH OF PENNSYLVANIA, THREE MILE ISLAND ALERT, AND UNION OF CONCERNED SCIENTISTS MOTIONS TO DISQUALIFY JUDGE IVAN SMITH

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I. INTRODUCTION

On January 11, 1985, the Commonwealth of Pennsylvania (Commonwealth) filed a Motion [1/] requesting that Administrative Law Judge Ivan Smith recuse himself from further participation in this remanded proceeding. On January 14, 1985, the Union of Concerned Scientists (UCS) filed a motion [2/] seeking Judge Smith's disqualification from further participation in matters respecting training at Unit 1. Seeking relief additional to that requested by the Commonwealth and UCS, Three Mile Island Alert (TMIA), on January 14, 1985, moved [3/] that Judge Smith recuse himself as

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1/ Commonwealth of Pennsylvania Motion to Disqualify Administrative Law Judge Ivan Smith, January 11, 1985 (Commonwealth Motion).

2/ Union of Concerned Scientists' Motion to Disqualify Administrative Law Judge Ivan Smith and Answer to the Commonwealth's Motion to Disqualify, January 14, 1985 (UCS Motion).

3/ Three Mile Island Alert's Motion to Disqualify Judge Ivan W. Smith, January 14, 1985 (TMIA Motion).

presiding officer in this proceeding and that the remanded management issues be reheard [4/] by a newly-constituted licensing board "untainted by Judge Smith's prejudice and bias." TMIA Motion at 1.

The motions by the Commonwealth, UCS and TMIA (Movants), taken together, generally assert that the disqualification of Judge Smith is mandated by (1) a letter Judge Smith sent to U.S. District Court Judge Rambo urging leniency in the sentencing of James R. Floyd for his criminal conviction based on cheating on a Licensee-administered licensed operator requalification examination, (2) Judge Smith's alleged bias concerning rulings that may adversely affect individuals, and (3) various on-the-record statements which allegedly show bias against TMIA.

The Staff hereby responds to the three motions. For the reasons set forth below, the Staff believes that Judge Smith should recuse himself from further participation in this proceeding.

II. DISCUSSION

A. Applicable Legal Standards

Section 2.704 of the Commission's Rules of Practice provides that a party to a proceeding may move for disqualification of the presiding officer or a designated member of a licensing board. 10 C.F.R. § 2.704(c). A motion filed pursuant to 10 C.F.R. § 2.704(c) seeking disqualification of a member of a licensing board is to be determined, in the first

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4/ In this regard, it should be noted that hearings are complete on two of the issues pending with the Licensing Board, namely, the circumstances surrounding the 1979 mailgram from Herman Dieckamp to Congressman Udall and the adequacy of Licensee's training and testing program. Hearings on leak rate testing practices at TMI-1 and TMI-2 have not yet begun.

instance, by the individual whose recusal is sought rather than by the Commission or the full board. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-80-9, 11 NRC 436, 437; Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-672, 15 NRC 677, 683, rev'd on other grounds, CLI-82-9, 15 NRC 1363 (1982). If the presiding officer does not grant the motion or the individual member does not recuse himself, the motion for disqualification is referred to the Appeal Board or the Commission, as appropriate, for review. 10 C.F.R. § 2.704(c); Nuclear Engineering Co. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-494, 8 NRC 299, 301 n.3 (1978); see also Diablo Canyon, supra, at 437. 5/

Motions for disqualification or recusal must be filed in a timely manner. This requirement has been construed to mean that such motions must be submitted "as soon as practicable after a party has reasonable cause to believe that grounds for disqualification exist." Marcus v. Director, Office of Workers' Compensation Programs, 548 F.2d 1044, 1051 (D.C. Cir. 1976). The Appeal Board in Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-101, 6 AEC 60, 63 (1973) has likewise held that a request for disqualification must be made promptly once the

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5/ Section 2.704(c) also requires that a disqualification motion "be supported by affidavits setting forth the alleged grounds for disqualification." 10 C.F.R. § 2.704(c). Except under limited circumstances, the Appeal Board has stressed that a party moving for disqualification of a licensing board member has the manifest duty to be most particular in establishing the foundation for its charge as well as to adhere scrupulously to the affidavit requirement. Maryland Power Cooperative (LaCross Boiling Water Reactor), ALAB-497, 8 NRC 312, 313 (1978); Detroit Edison Co. (Greenwood Energy Center, Units 2 and 3), ALAB-225, 8 AEC 379, 380 (1974). This is so even if the motion is founded wholly on matters of public record. Greenwood Energy Center, supra at 380; Duquesne Light Co. (Beaver Valley Power Station, Units 1 and 2), ALAB-172, 7 AEC 42, 43 n.2 (1974).

information or events supporting the request become known. As noted in Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-749, 18 NRC 1195, 1198 (1983), "any delay in filing a motion for disqualification or recusal necessarily casts a cloud over the proceeding and increases the likelihood of delay in the ultimate completion of the case in the event recusal or disqualification is warranted and a new decisional officer must be appointed."

In its South Texas decision, the Commission emphasized that presiding officers in administrative proceedings are subject to the same disqualification standards that apply to federal judges. 6/ Houston

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6/ The Appeal Board has summarized the standards in these terms:

> [A]n administrative trier of fact is subject to disqualification if he has a direct, personal, substantial pecuniary interest in a result; if he has a "personal bias" against a participant; if he has served in a prosecutive or investigative role with regard to the same facts as are in issue; if he has prejudged factual--as distinguished from legal or policy--issues; or if he has engaged in conduct which gives the appearance of personal bias or prejudgment of factual issues.

Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-101, 6 AEC 60, 65 (1973). The current statutory foundation for these standards is found in 28 U.S.C. 144 and 455. Section 144 requires a federal judge to recuse himself when faced with the timely and sufficient affidavit of a party asserting that the judge has a personal bias or prejudice either against that party or in favor of an adverse party. 28 U.S.C. 144 (1976). Section 455, to the extent here relevant, provides:

> (a) Any justice, judge, magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) When he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . . .

28 U.S.C. § 455 (Supp. V 1981).

Lighting & Power Co. (South Texas Project, Units 1 and 2), CLI-82-9, 15 NRC 1363, 1365-67 (1982). The Commission also determined in South Texas that, as a general proposition, disqualifying bias or prejudice must be extrajudicial. South Texas, supra, at 1365. The alleged bias or prejudice must arise by virtue of some factor which creates partiality arising apart from the events which occur in the adjudicatory proceeding itself. In re International Business Machines Corp., 618 F.2d 923, 927 (2d Cir. 1980). Expressly adopting the rule in United States v. Grinnell Corp., 384 U.S. 563 (1966), [7] the Commission, in Commonwealth Edison Co. (LaSalle County Nuclear Power Station, Units 1 and 2), CLI-73-8, 6 AEC 169, 170 (1973), observed that "[p]reliminary assessments, made on the record, during the course of an adjudicatory proceeding - based solely upon application of the decision-maker's judgement to material properly before him in the proceeding - do not compel disqualification as a matter of law." [8] See also South Texas, supra, at 1365. That a trier of fact's actions are erroneous, gratuitous

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7/ "The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." United States v. Grinnell Corp., 384 U.S. 563, 583 (1966).

8/ While one court has noted that conduct in the course of an adjudicatory proceeding may in some circumstances be relevant to establish extrajudicial bias, see Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-749, 18 NRC 1195, 1200 n.16, citing In re IBM, 618 F.2d 923, 928 n.6 (2d Cir. 1980), as a general rule courts have been reluctant to disqualify a judge whose comments are based on an existing record. See, e.g., In re IBM, supra; Johnson v. Trueblood, 629 F.2d 287 (3d Cir. 1980); Whitehurst v. Wright, 592 F.2d 834 (5th Cir. 1979).

or otherwise improper, does not, without more, support a finding of bias stemming from an extrajudicial source. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-749, 18 NRC 1195, 1200 (1983). To demonstrate bias legally cognizable as a basis for recusal or disqualification, a party must "identify . . . [a] personal connection, relationship, or extrajudicial incident which accounts for the alleged personal animus of the trial judge." In re IBM, supra, 618 F.2d at 928. 9/ Thus, a motion for disqualification ordinarily may not be predicated on a judge's rulings, conduct or remarks in response to matters arising during adjudicatory proceedings. Phillips v. Joint Legislative Committee on Performance and Expenditure Review of the State of Mississippi, 637 F.2d 1014, 1020 (5th Cir. 1981).

Some courts have recognized an exception to the general rule that bias must be extrajudicial under circumstances in which "pervasive bias is shown by otherwise judicial conduct." United States v. Gregory, 656 F.2d 1132, 1137 (5th Cir. 1981); see also Berger v. United States, 255 U.S. 22, 35-36 (1921); Phillips, supra, at 1020; Nicodemus v. Chrysler Corp., 596 F.2d 152, 155-56 (6th Cir. 1979). However, as the Commission noted in South Texas, courts have been reluctant to invoke this exception except in the most extreme cases. South Texas , supra, at 1366. The court in In re IBM observed that a judge's role in a case involving a

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9/ The Commission has noted that Section 455(a), supra note 6, "establishes an objective standard for recusal, i.e., when a reasonable person knowing all the circumstances would be led to the conclusion that the judge's impartiality might reasonably be questioned." Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), CLI-82-9, 15 NRC 1363, 1366 (1982), citing Fredonia Broadcasting Corp. v. RCA Corp., 569 F.2d 251, 257 (5th Cir. 1978) ("Section 455(a) is a general safeguard of the appearance of impartiality and establishes a 'reasonable factual basis - reasonable man' standard").

complex and technical field is not that of a passive observer, but rather is one of an active participant required to penetrate the parties' posturing to determine the accuracy of their presentation and the veracity of the witnesses before him. In re IBM, supra, at 930-931. Thus, the court noted that conduct such as stares, glares and scowls do not constitute evidence of personal bias. Id. Likewise, occasional outbursts toward counsel during a trial of even limited duration do not provide any basis for finding personal prejudice against the party represented by counsel. See id. at 932. 10/

10/ The Model Code of Judicial Conduct provides further guidance on the disqualification of judges. Relevant to the three motions to disqualify Judge Smith are the following:

CANON 2

A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL HIS ACTIVITIES

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge . . . should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him.

CANON 3

A JUDGE SHOULD PERFORM THE DUTIES OF HIS OFFICE IMPARTIALLY AND DILIGENTLY

C. DISQUALIFICATION

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

MODEL CODE OF JUDICIAL CONDUCT (1983).

B. Analysis of the Alleged Grounds for Disqualification

1. Judge Smith's Letter to Judge Rambo

The Commonwealth, TMIA and UCS assert that Judge Smith's letter of December 27, 1984 to Judge Rambo, urging leniency in the sentencing of James Floyd, demonstrates that Judge Smith has prejudged factual issues currently before him and, therefore, he should recuse himself voluntarily from further participation in this proceeding. 11/ Movants assert further that even if Judge Smith's letter cannot be said to reflect actual prejudgment, a disinterested observer reading the letter would be led to conclude otherwise.

As described above, bias or personal prejudice sufficient to require recusal or disqualification of presiding officers in administrative proceedings must arise from an extrajudicial source and likely result in an opinion on the merits of an issue which is based on information other than that learned by the judge from his participation in the case. United States v. Grinnell Corp., supra. TMIA argues that statements contained in Judge Smith's letter reveal information which he learned

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11/ The movants properly directed their motions to Judge Smith rather than the Licensing Board, Appeal Board or the Commission. See Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-80-9, 11 NRC 436, 437; South Texas, supra, at 683, rev'd on other grounds, CLI-82-9, 15 NRC 1363 (1982). Movants contend that if Judge Smith fails to recuse himself voluntarily, he should be disqualified by the Appeal Board. See, e.g., Nuclear Engineering Co. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-494, 8 NRC 299, 301 n.3 (1978).

from sources other than this proceeding. 12/ However, Judge Smith states in his letter that as presiding officer of the Licensing Board for the Three Mile Island restart proceeding, he "had an excellent opportunity to gain some insights into the events and the affected persons following the 1979 accident at the station." Moreover, Judge Smith explicitly stated in the letter that he knows "nothing about Mr. Floyd except the information produced on the public hearings . . . ." Thus the statements in Judge Smith's letter may simply be based on evidence and other information presented to Judge Smith during the restart proceeding.

The fact remains, however, that Mr. Floyd's criminal conviction, and the resulting sentencing hearing which prompted Judge Smith's letter, are extrajudicial events which were learned by Judge Smith apart from the NRC's restart proceeding. The Staff believes, therefore, that the views expressed by Judge Smith in the letter arguably are based on extrajudicial information. 13/ The question remains as to whether the

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12/ As basis for its argument, TMIA points to the following statements in Judge Smith's letter: (1) "I have always felt that Mr. Floyd's deception was an impulsive act and that it was not motivated by personal ambition." (2) "One senses he neglected his examination responsibilities out of misguided but altruistic effort to attend to matters of perceived greater urgency." (3) "However, Mr. Floyd's damaged career and public humiliation will be seen by others as too high a risk and price from any gain from cheating."

13/ TMIA argues that to the extent that Judge Smith's letter to Judge Rambo is conduct "outside" his responsibilities as a licensing board judge, the submission of the letter is, itself, "clearly extrajudicial." TMIA Motion at 13 n.6. As noted above, this conduct is not "extrajudicial" in the sense contemplated by the general rule that bias must be based on information or events apart from the proceeding itself.

statements made by Judge Smith in the letter, based on extrajudicial information, demonstrate bias or prejudgment.

The Commonwealth, TMIA and UCS strenuously argue that prejudgment in fact is established by the statement in Judge Smith's letter that "[d]eception in the future is very unlikely." Movants assert that because the adequacy of Licensee's training and testing program, and in particular the question of whether Licensee's examinations for licensed operators can be defeated by cheating, are issues currently before this Board, Judge Smith's statement demonstrates a prejudgment of those factual issues. It is not entirely clear, however, that this statement actually relates to any of the remanded training issues. Rather, in the sentence immediately preceding the quoted "deception" statement, Judge Smith stated that he has "confidence that the NRC administrative regulatory process, with extensive public participation, will provide an orderly and reliable mechanism for assuring that problems caused by deception respecting Three Mile Island will have been identified and resolved." Judge Smith's stated opinion that deception at Three Mile Island is unlikely may be nothing more than a further expression of his opinion that the NRC's administrative process will resolve identified problems. If so, the statement would not establish that Judge Smith has prejudged any factual issue.

Although Judge Smith's letter to Judge Rambo, viewed in isolation, does not necessarily demonstrate bias or prejudgment of factual issues, it does provide support for another alleged ground for disqualification, namely a bias in connection with findings or conclusions which may adversely affect individuals, which is discussed below. In addition,

Judge Smith's letter to Judge Rambo certainly has created the appearance of bias or prejudgment. As Movants point out, there is a public perception, reflected in newspaper articles and editorials, letters, and elsewhere, that Judge Smith is baised or has prejudged factual issues in the remanded proceeding. The statements made by Judge Smith in his letter to Judge Rambo have not promoted "public confidence in the integrity and impartiality of the judiciary." Canon 2, supra. Based on that letter alone, Judge Smith's "impartiality might reasonably be questioned" by some. See Canon 3C, supra; South Texas, CLI-82-9, 15 NRC at 1366. Therefore, there is some merit to the argument that Judge Smith's letter to Judge Rambo, when considered in conjunction with other statements by Judge Smith concerning the effect of the restart proceeding on individuals, has created a sufficient appearance of bias and prejudgment to constitute grounds for disqualification.

2. Bias In Connection With Rulings or Findings Which May Adversely Affect Individuals

UCS asserts that in addition to Judge Smith's letter to Judge Rambo, statements made by Judge Smith during the conduct of the hearing concerning the impact of the restart proceedings on individual operators or other Licensee employees establish a bias in connection with rulings that may adversely affect individuals. Specifically, UCS argues that remarks such as the following "reveal a near obsession" by Judge Smith to prevent anyone "from treating operators in a way that Judge Smith perceives to be unfair" (UCS Motion at 8):

> [W]e [the Licensing Board] make a decision based upon some understanding of what the result will be, and then there is an outside the record adjustment of the result, perhaps had we

> known of that adjustment, we would have come to a different conclusion on the evidentiary record. Perhaps there would have been other conditions. Perhaps we would have taken some other actions. We would have placed other conditions.

Tr. 33,088-89 (Judge Smith).

The Staff believes that this and other statements by Judge Smith [14/] arguably establish at least an appearance of bias or prejudgment in connection with rulings that may adversely affect individuals. As UCS argues, such statements suggest that Judge Smith may not make findings or impose conditions, which UCS will propose, based solely on the evidence. See UCS Motion at 11-12. Although the Staff does not believe that Judge Smith in fact would base his findings and ordered license conditions on other than an objective appraisal of the evidentiary record, the Staff also believes that UCS' argument has merit at least insofar as the appearance of bias or prejudice against findings or conclusions which might adversely affect individuals is concerned. While Judge Smith's statements about individuals do not, by themselves, reveal an extrajudicial source, when they are considered in conjunction with Judge Smith's letter to Judge Rambo, they appear to raise a serious perception that the resolution of the remanded issues may unfairly be colored by extrajudicial information or events which form the basis of Judge Smith's expressed concern for individuals.

In summary, the Staff believes that Judge Smith's letter to Judge Rambo, in conjunction with statements suggesting that Judge Smith's resolution of issues may be influenced by their potential adverse effects

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14/ See section II.B.3 of this brief, infra.

on individuals, establish at least the appearance of bias or prejudgment which stems from an extrajudicial source and may result in Judge Smith's deciding the issues on a basis other than an objective appraisal of the evidence presented in the restart proceeding.

3. Settlement Agreement Between the Commonwealth and Licensee

As grounds additional to those noted above, the Commonwealth, TMIA and UCS cite on-the-record statements made by Judge Smith criticizing the stipulated agreement between the Commonwealth and Licensee. 15/ Movants argue that Judge Smith's criticisms are neither appropriate nor relevant to the restart proceedings and compromise Judge Smith's ability to protect the public health and safety. Movants point to the following excerpt as an example of such bias:

> . . . I understand that after the hearing that one of the operators named G or H was removed from his career as a licensed operator, although that was not the Board's intention. But it was a product

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15/ By stipulation with the Commonwealth, Licensee agreed, inter alia, that:

> 2. Now and at any time in the future Licensee will not utilize Mr. [Husted] (whose attitude was criticized by the ASLB) to operate TMI-1 or to train operating license holders or trainees.
>
> 3. Licensee will direct that the ASLB-mandated training audit specifically evaluate Mr. [Husted's] performance and attitudes as an instructor and Licensee will comply with the findings in a timely and appropriate manner, but in no event would Mr. [Husted] be utilized for any function specified in paragraph 2, above. Prior to the audit Licensee will continue to monitor Mr. [Husted's] performance and assign work consistent with that performance.

Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1222, (1984), quoting Commonwealth Motion to Withdraw, Stipulation at 2.

> of this hearing and was something agreed upon by the Commonwealth and the Licensee.
>
> I think that's an absolute violation of that man's due process, and I won't be a party to that type of activity unless it is absolutely necessary for a broader ruling on the public safety.

Tr. 29,093. With respect to similar statements cited by Movants as reflecting Judge Smith's alleged bias, Judge Smith explained as follows:

> I have a concern that the hearing process has resulted in an unfair treatment to Mr. Husted.
>
> * * * *
>
> . . . I am concerned about an adverse effect on safety when persons found to be competent are removed from their role, a substitute placed, and the respect, the adverse effect to safety, that disrespect for our process might ingender.
>
> I think for our process to gain respect, it must be fair. And that is my concern with the scope of adjudication.

Tr. 33,086 (Judge Smith). The Staff does not believe that statements of this type provide any basis for disqualification.

As noted above, the applicable standards for the disqualification of licensing board members for bias generally require that the alleged bias arise from an extrajudicial source and result in an opinion on the merits of an issue based on information other than that learned by the judge from his participation in the proceeding. United States v. Grinnell Corp., supra. Thus, "[m]atters are extra-judicial when they do not relate to the judge's official duties in the case." Seabrook, supra at 1200. Even if the statements cited by Movants are deemed inappropriate and irrelevant, it cannot be said that they do not relate to Judge Smith's official duties in these remanded proceedings. Indeed, Judge Smith has correctly remarked during the course of the proceedings that the Licensing Board is "charged with managing a process which has a stated purpose of providing public assurance that the operators at the plant are qualified and prepared to run the plant . . . ." Thus, the

cited statements are related to Judge Smith's official duties in this proceeding. Furthermore, if the cited statements are irrelevant as Movants argue, then they do not consititute ar opinion by Judge Smith on the merits of any specific factual issue pending before him. In any event, the Staff does not believe that Judge Smith's comments regarding the Commonwealth-Licensee settlement agreement reflect a bias warranting disqualification.

Although the Staff does not believe that Judge Smith's comments on the settlement agreement, by themselves, are sufficient to demonstrate bias arising from an extrajudicial source, the Staff does believe that they provide further support for the argument, discussed above, that Judge Smith has a bias against findings or rulings which might adversely affect individuals.

4. Alleged Intemperate Judicial Conduct

TMIA argues in its motion that even if Judge Smith's letter to Judge Rambo is found not to constitute bias or personal prejudice arising from an extrajudicial source so as to mandate recusal or disqualification, Judge Smith must recuse himself or be disqualified because he has demonstrated pervasive bias and prejudice on the record in this proceeding. TMIA Motion at 14. 16/ As bases for this assertion, TMIA cites the

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16/ While not arguing the exception to the general rule that bias must be extrajudicial, the Commonwealth asserts that the following "emotional outburst" by Judge Smith "creates an additional implication of bias and prejudice and further compromises his ability to preside in this proceeding" (Commonwealth Motion at 8):

> JUDGE SMITH: He [Charles Husted] didn't reflect the necessary attitude that authorities would have liked.
> Well, I am concerned that the lawyers in this hearing having accepted that. You can continue your cross-examination. I would have expected lawyers to have gagged, to have gagged on that treatment.

Tr. 32,323.

following as evidence of what TMIA characterizes as "unwarranted attacks against TMIA's counsel and TMIA's witnesses": remarks and statements made on the record by Judge Smith to David Gamble unrelated to the subject matter of the proceeding, id. at 15-17; statements made on the record by Judge Smith at the November 19, 1984 prehearing conference concerning TMIA's purposes in offering the testimony of former NRC Commissioners Bradford and Gilinsky, id. at 17-18; remarks made on the record by Judge Smith attributing to TMIA responsibility for poor operator attitude and morale at Unit 1 and 2, id. at 18-20; attempts by Judge Smith to prevent TMIA counsel from conferring by admonishing them not to confer during the proceedings, id. at 20; "attacks" by Judge Smith on TMIA counsel when she was attempting to put objections on the record, id. at 20; rulings made by Judge Smith during the course of this proceeding, id. at 21; 17/ and Judge Smith's interruption of TMIA's

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17/ Although TMIA fails to address these rulings with any specificity, it argues, nonetheless, that these rulings demonstrate Judge Smith's inability to analyze impartially the parties' arguments and "even-handedly" to decide their requests. TMIA Motion at 21-22. This allegation falls far short not only of the mandate that bias necessary for recusal or disqualification be extrajudicial, but also the exception to that mandate. Indeed, there is no authority or logic in assuming that any party to an adjudicatory proceeding is entitled to a certain number of favorable decisions. In re International Business Mach. Corp., 618 F.2d 923, 929-30 (2d Cir. 1980) ("A trial judge must be free to make rulings on the merits without the apprehension that if he makes a disproportionate number in favor of one litigant, he may have created the impression of bias").

cross-examination having the effect of prompting witnesses, id. at 22-23. 18/

Taken individually or collectively, these incidents fall far short of judicial conduct demonstrating pervasive bias and prejudice. 19/ South Texas, supra. Cases in which judicial conduct has been found to require the recusal or disqualification of a judge demonstrate that such conduct must indicate not only an intemperance, but also an inability to conduct trials, weigh evidence, consider the law and render decisions in an impartial manner. See, e.g., Berger, supra; Nicodemus, supra. Contrary to TMIA's allegations, Judge Smith has not exhibited bias from the bench so pervasive as to warrant disqualification.

For example, TMIA complains that Judge Smith's examination of Mr. Gamble as well as his characterizations of this witness's testimony was improper and that Judge Smith's interruptions of TMIA's cross-exam-

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18/ For the most part, these events cited by TMIA as basis for its motion to disqualify occurred as early as November 13, 1984. Yet without explanation or justification, TMIA waited until January 14, 1985 to file its motion to disqualify Judge Smith. Under the circumstances, a motion to disqualify Judge Smith based on the above asserted grounds alone could be denied for lack of timeliness. See Seabrook, supra note 8, at 1198; Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-757, 18 NRC 1356, 1361 (1983). However, because these grounds are being asserted in conjunction with Judge Smith's letter to Judge Rambo, the Staff believes they should be considered on their merits with the letter as part of the totality of circumstances which are alleged to constitute grounds for disqualification.

19/ Moreover, the grounds asserted by TMIA fail to support a finding of bias stemming from an extrajudicial source sufficient for disqualification. A review of the record demonstrates, for example, that Judge Smith's remarks concerning Mr. Gamble derive solely from material properly before Judge Smith, namely Mr. Gamble's prefiled testimony.

ination in one instance allowed a witness to rehabilitate his testimony to appear more credible. This is not the kind of conduct sufficient to require recusal under the exception cited by TMIA. A trier of fact has the obligation to probe the veracity and reliability of witnesses before him. In re IBM, supra, at 931. His questions, interruption and insistence on clarification may be prompted by his need to determine the truth. Id. Likewise, TMIA's assertions that Judge Smith's on-the-record remarks that TMIA is the cause, in part, of poor operator attitude and morale, and his explanation of the basis for his rulings regarding the proposed testimony of former Commissioners Bradford and Gilinsky, are not indicative of pervasive bias. Indeed, they represent Judge Smith's immediate reactions to material properly before him. As the court in In re IBM observed, "'[the judge] must also shrewdly observe the stratagems of the opposing lawyers, perceive their efforts to sway him by appeals to his predilections. He must cannily penetrate through the surface of their remarks to their real purposes and motives.'" Id. at 930, quoting In re J. P. Linahan, Inc. 138 F.2d 650, 653-54 (2d Cir. 1943) (Frank, J.).

Finally, TMIA asserts that Judge Smith's admonishments to TMIA counsel not to confer during the hearings and his "attacks" on TMIA counsel when she was attempting to put objections on the record further evidence Judge Smith's partiality. Such assertions are wholly without merit. Not only are Judge Smith's statements in these regards mis-

leadingly excerpted out of context, [20/] they are not reflective of Judge Smith's judicial demeanor.

Under the Commission's Rule of Practice, Licensing Boards are charged with the duty to conduct fair and impartial hearings in accordance with applicable law and Commission regulation, and to take action, where necessary, to ensure the expeditious resolution of issues consistent with the demands of fairness to all parties. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452-454 (1981). The presiding officer and the Licensing Board have all the powers necessary to achieve these goals, including the power to reprimand, censure or suspend from participation in a proceeding any party who refuses to comply with the Board's directions or who is guilty of disorderly, disruptive or contemptuous conduct. 10 C.F.R. § 2.713(c)(1).

As the foregoing illustrates, Judge Smith, as presiding officer, is charged with the obligation to ensure the development of a record which will lead to a decision that adequately protects the public health and safety. Statement of Policy, supra, at 453. The restart proceedings have been lengthy, complex and contentious. Certainly a trier of fact

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20/ While TMIA is correct in asserting that TMIA counsel were admonished not to confer, this admonition was not for the purpose TMIA asserts. Rather, counsel for TMIA were reprimanded on multiple occasions by Judge Smith when counsel for TMIA were actively conferring while personally being addressed by Judge Smith. See, e.g. Tr. 29,039; 29,798; 30,150. In addition, Judge Smith urged counsel to confer, but not when being addressed by the Board. Tr. 30,506. In the Staff's view, such admonishment was simply a proper reaction to the lack of courtesy exhibited by counsel for TMIA when being personally addressed.

under such circumstances cannot be faulted for vigorously exercising his power to maintain order and control the proceeding. Any abuse of discretion or actual error in ruling can be pursued on appeal. See Phillips, supra, at 1020. TMIA's claims that Judge Smith's conduct of the proceeding demonstrates a pervasive bias are insufficient to warrant disqualification under the exception to the general rule of extrajudicial bias.

C. Summary of Staff's Position on the Disqualification of Judge Smith

The applicable standards for the disqualification of licensing board members for bias or prejudice generally require the disqualifying bias or prejudice to be extrajudicial, i.e., the alleged bias or prejudice must arise from an extrajudicial source and likely result in a decision on the merits of an issue which is based on information other than that learned by the judge from his participation in the proceeding. South Texas, supra, citing United States v. Grinnell Corp., supra. A number of the alleged grounds asserted by TMIA for the disqualification of Judge Smith fail to meet this test and, therefore, are not legally cognizable bases for disqualification. For example, TMIA asserts that Judge Smith should be disqualified because of on-the-record comments concerning Mr. Gamble, a witness subpoenaed to testify by TMIA, and Judge Smith's questioning of Mr. Gamble. TMIA also cites as additional grounds on-the-record admonishment by Judge Smith of TMIA counsel, his leading questioning of certain witnesses, his on-the-record statement of his belief that TMIA is the cause, in part, of poor operator attitude, and his on-the-record explanation of the basis for his rulings regarding the proposed testimony of former NRC Commissioners Bradford and Gilinsky. These grounds clearly

do not stem from extra-judicial sources and do not even suggest that Judge Smith has reached an opinion on the merits of a factual issue on a basis other than what Judge Smith learned in this proceeding. Consequently, as discussed above, they do not support disqualification.

As noted above, there is an exception to the general rule that bias or prejudgment must stem from an extrajudicial source where judicial conduct is so extreme as to constitute pervasive bias against a party. South Texas, supra. This exception is invoked in only the most extreme cases. Id. The on-the-record statements asserted by TMIA as a basis for disqualification are precisely the types of conduct cited in the caselaw as falling far short of that required for this exception. See section II B of this Brief, supra.

Similarly, Judge Smith's statements concerning the settlement agreement between the Commonwealth and the Licensee, considered apart from the other alleged grounds for disqualification, are based on information learned in this proceeding and, therefore, are not extrajudicial. Furthermore, as the movants point out, those statements concern an issue no longer before Judge Smith. Thus, even if the statements are extrajudicial in any respect, the statements do not suggest that Judge Smith has prejudged any factual issue remaining before him.

Two asserted grounds for disqualification, however, do raise a substantial question as to whether Judge Smith must be disqualified or voluntarily should recuse himself: (1) Judge Smith's December 27, 1984 letter to Judge Rambo concerning the sentencing of James R. Floyd, and (2) Judge Smith's statements which suggests that he might reach different conclusions on the evidentiary record if his conclusions might be used to

adversely affect individuals. As described above, while neither of these alleged grounds, viewed in isolation, demonstrates an extrajudicial source of bias or prejudgment, when considered together they do. Although the Staff has no reason to question Judge Smith's dedication to fairly and objectively deciding the issues before him, and the Staff has no reason to believe that Judge Smith in fact is biased or has prejudged any issue, the statements in Judge Smith's letter to Judge Rambo arguably are extrajudicial in nature and clearly have created the appearance of bias or prejudgment. In addition, Judge Smith's statements in the hearing suggest that his (understandable and laudable) sensitivity to the effect of his findings and conclusions on individuals may color his future decisions on issues which should be decided solely on the evidentiary record.

The Staff has carefully considered these two matters in light of the the applicable standards for disqualification and the importance of maintaining public confidence in both the independence of the NRC's administrative judges and the integrity of the NRC's adjudicatory proceedings. It is absolutely necessary both that adjudicated issues be decided objectively based solely on the evidence and that the public have a high degree of confidence that the issues indeed are resolved on that basis by judges free from actual or apparent bias and prejudice. We therefore conclude that, notwithstanding the Staff's confidence in Judge Smith's impartiality, certain of Judge Smith's actions, based on extra-judicial matters, give the appearance of bias, prejudgment or an inclination to decide issues other than by a strict, objective assessment of the evidentiary record. Consequently, the standards for

disqualification have been satisfied. Furthermore, the extremely close question presented by the motions to disqualify Judge Smith should be resolved in favor of disqualification in order to further assure public confidence in the objective resolution of important TMI-1 restart issues.

D. Remedy

UCS, the Commonwealth and TMIA all ask that Judge Smith disqualify himself from further participation in this proceeding. UCS Motion at 12; Commonwealth Motion at 9; TMIA Motion at 24. TMIA further moves that the portion of the remanded hearings over which Judge Smith has presided "be reheard before a newly-constituted Atomic Safety and Licensing Board, impartial and free from prejudice and bias." TMIA Motion at 24-25. Phrasing it slightly differently, TMIA seeks to have the hearings reheard by a newly-constituted Licensing Board "untainted by Judge Smith's prejudice and bias." Id. at 1. Because, as described above, the Staff believes that there is the appearance that Judge Smith is biased and has prejudged certain issues, the Staff believes that he should recuse himself from further participation in this proceeding. The Staff does not believe, however, that there are any grounds for a rehearing of litigated issues by a newly constituted Board.

10 C.F.R. § 2.704(d) provides, in pertinent part, that:

> (d) If a presiding officer or a designated member of an atomic safety and licensing board ... becomes unavailable after the hearing has been concluded: (1)(i) The Commission may designate another presiding officer to make the decision; or (ii) The Chairman of the Atomic Safety and Licensing Board Panel or the Commission, as appropriate, may designate another atomic safety and licensing board member to participate in the decision.

Thus, the Commission's Rules of Practice provide that when a presiding officer or other licensing board member becomes unavailable due to

disqualification "after the hearing has been concluded" but before the decision, another presiding officer or board member is designated "to make the decision" or "to participate in the decision." No other remedy being provided by the Commission's Rules of Practice, the Staff submits that if Judge Smith recuses himself or is disqualified, then another presiding office or board member should be designated to serve in Judge Smith's place and that newly-constituted board should render a decision on the basis of the existing evidentiary record. 21/

With respect to TMIA's request for a rehearing before a newly-constituted board "untainted" by Judge Smith's alleged bias and prejudice, two comments are warranted. First, as noted above, there is no provision in the Commission's rules for a rehearing on the basis of the disqualification of the presiding officer (or one board member) after the hearing but before the decision. In fact, the rules specifically address that situation and provide only that the newly designated member participate in the decision.

Secondly, TMIA does not state precisely what it means by a "newly-constituted" board "untainted by Judge Smith's prejudice and bias". This could mean simply a board comprised of the two existing board members other than Judge Smith and a newly-designated member who replaces Judge Smith. Alternatively, TMIA may believe that the present members of the

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21/ The Staff notes that Judge Sheldon Wolfe is an alternate Chairman of this Licensing Board "qualified in the conduct of administrative proceedings." See § 191a of the Atomic Energy Act of 1954, as amended. Thus, the option exists to appoint another administrative judge to serve either as Chairman or simply as another (non-Chairman) member of the Licensing Board.

board other than Judge Smith are "tainted" by Judge Smith's alleged bias and prejudice and, therefore, an entirely new board is sought.

This latter interpretation should be rejected summarily for two reasons. First, if TMIA intended this meaning and actually seeks the appointment of three new board members, it had the burden to clearly, specifically and unambiguously make such a request. TMIA's failure to do so should result in the immediate rejection of such a suggestion. Secondly, no party has even alleged any basis, and indeed there is none to Staff's knowledge, for the disqualification of either Judge Wolfe or Judge Linenberger. It follows that the only relief to which any party is entitled if Judge Smith is disqualified is a designated substitute for Judge Smith for the purpose of rendering a decision on the basis of the existing evidentiary record and the conducting of any further hearings on issues yet to be litigated.

III. CONCLUSION

The Staff has carefully considered the motions to disqualify Judge Smith on the grounds of alleged bias and prejudice. Although some of the asserted grounds do not provide a legally cognizable basis for disqualification, other grounds do raise a substantial question as to whether Judge Smith should be disqualified. Specifically, Judge Smith's letter to Judge Rambo in conjunction with his on-the-record statements which suggest that he has a bias or prejudice against findings or conclusions which might adversely affect individuals create the appearance that Judge Smith is biased, has prejudged issues, or will be inclined to decide issues on a basis other than an objective assessment of the evidentiary

record. The Staff therefore concludes that, notwithstanding the Staff's confidence in Judge Smith's impartiality, the standards for disqualification have been satisfied and, consequently, the motions to disqualify Judge Smith should be resolved in favor of disqualification in order to further assure public confidence in the objective resolution of important TMI-1 restart issues.

Respectfully submitted,

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Counsel for NRC Staff

Dated at Bethesda, Maryland
this 29th day of January, 1985.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE ADMINISTRATIVE LAW JUDGE IVAN W. SMITH

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

CERTIFICATE OF SERVICE

I hereby certify that copies of ""NRC STAFF'S RESPONSE TO COMMONWEALTH OF PENNSYLVANIA, THREE MILE ISLAND ALERT, AND UNION OF CONCERNED SCIENTISTS MOTIONS TO DISQUALIFY JUDGE IVAN SMITH" 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 deposit in the Nuclear Regulatory Commission's internal mail system, or, as indicated by double asterisks, by hand deliver, this 29th day of January, 1985:

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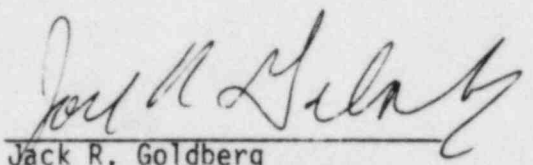

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