

TMIA 2/13/85

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE ADMINISTRATIVE LAW JUDGE IVAN W. SMITH

'85 FEB 14 A10:59

In the Matter of)
)
METROPOLITAN EDISON COMPANY)
)
(Three Mile Island Nuclear)
Station, Unit 1))

Docket No. 50-289)
(Restart -- Management)
Phase)

OFFICE OF THE CLERK
DOCKETING & SERVICE
BRANCH

THREE MILE ISLAND ALERT'S MOTION FOR LEAVE TO FILE
REPLY, AND REPLY TO LICENSEE AND NUCLEAR REGULATORY
COMMISSION STAFF'S RESPONSES TO COMMONWEALTH OF PENNSYLVANIA,
THREE MILE ISLAND ALERT AND UNION OF CONCERNED SCIENTISTS
MOTIONS TO DISQUALIFY JUDGE IVAN SMITH

Three Mile Island Alert ("TMIA") requests leave to submit the following reply to Licensee and Nuclear Regulatory Commission ("NRC" or "Commission") Staff responses to Commonwealth of Pennsylvania, TMIA and Union of Concerned Scientists' ("USC") motions to disqualify Judge Ivan Smith.¹

I BACKGROUND.

The Commonwealth of Pennsylvania, TMIA and UCS have moved that Chairman Ivan W. Smith be removed from this case on the

¹ TMIA's Findings of Fact and Conclusions of Law on the Dieckamp Mailgram Issue were submitted on February 8, 1985. Therefore, TMIA counsel has not had an opportunity at any prior time to submit a reply to Licensee and NRC Staff responses to TMIA's motions to recuse. The NRC Staff's response was received by TMIA counsel on January 30, 1985. Licensee's response was received on January 28, 1985.

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ground that he has demonstrated a bias in favor of licensee and prejudged issues currently pending before him. Licensee has opposed these motions. The NRC Staff supported the motions to disqualify on the ground that 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. NRC Staff Response at 22.

TMIA requests leave to file this reply to respond to the following points raised by Licensee and the NRC Staff:

1) TMIA's complaint that Judge Smith has demonstrated a pervasive bias and prejudice during the hearings is not supported by the record, Licensee Response at 27-42; NRC Staff Response at 15-20;

2) TMIA's complaint that Judge Smith has demonstrated throughout the current remanded hearings on management integrity, and during prior hearings, a pervasive bias and prejudice, is untimely, Licensee Response at 27-28, n.18; NRC Staff Response at 17, n.18;

3) The Commonwealth, TMIA and UCS have failed to establish that a reasonable person possessing all the facts would conclude that Judge Smith is biased in favor of Licensee or prejudiced against any other party, Licensee Response at 43-47;

4) TMIA has not demonstrated the need or legal basis for rehearing on those issues heard by Judge Smith, or for reconstitution of the Atomic Safety and Licensing Board to rehear those issues tainted by Judge Smith's bias or prejudice, Licensee Response at 28-29, NRC Staff Response at 23-25.

II. THE RECORD SUPPORTS TMIA'S CLAIM THAT JUDGE SMITH HAS DEMONSTRATED PERVASIVE BIAS AND PREJUDICE THROUGHOUT THE RESTART HEARING.

A. TMIA'S CLAIM IS TIMELY.

TMIA cited Judge Smith's rulings and conduct in the original or main hearings on management competence, his conduct in the hearings on the Dieckamp Mailgram issue, and his conduct in the most recent remanded hearings on training, as demonstrative of the pervasive bias and prejudice he has exhibited as Chairman of the Atomic Safety and Licensing Board ("Licensing Board") for the TMI-1 restart hearings. TMIA Motion to Disqualify at 14-23.

Licensee contends that any claim that Judge Smith exhibited bias during an earlier phase of these hearings is untimely. However, TMIA has in fact argued that the Licensing Board, which Judge Smith chaired and which he clearly dominated, was biased for the Licensee and prejudiced against TMIA during the main hearings. Among the arguments TMIA made in TMIA's Brief in Support of Exceptions to Partial Initial Decisions of August 27, 1981 and July 27, 1982 Management Issues and Reopened Proceedings, are the following:

1) The Board blamed TMIA for not adequately litigating certain questions and for not cross-examining certain witnesses, even when TMIA's limited resources and expertise prohibited them from developing the record further;

2) The Board often criticized intervenors on the record and gave deference to licensee and licensee witnesses;

3) The Board violated intervenors' due process rights by

forcing TMIA to present its case first on TMIA Contention 5 concerning deferred maintenance on safety-related items;

4) The Board arbitrarily rejected TMIA's exhibits or accepted them only for limited purpose, but in similar circumstances accepted licensee and NRC Staff exhibits. See TMIA Brief in Support of Exceptions (Sept. 30, 1982), at 2-5, 27-28.

TMIA also raised all objections of bias or prejudice listed in its Motion to Disqualify on the record during the hearings on the Dieckamp Mailgram issue. However, it was not possible to make an argument that Judge Smith had demonstrated a pervasive bias or prejudice or had engaged in a pattern of conduct prejudicial to TMIA until after a substantial portion of the hearings were completed and such a "pattern" was evident.

It was only near the completion of the hearings that Judge Smith's obsession with the rights of licensee employees became apparent, even though he had mentioned it on various prior occasions. For instance, Judge Smith expressed his overriding concern with employees' rights when TMIA moved for sequestration of witnesses, Tr. 29,092; when David Gamble testified as to deficiencies in the IE investigation into and report on information flow during the TMI-2 accident, Tr. 30,687; and when Judge Smith refused to sustain objections to leading questions by licensee counsel of Herman Dieckamp, on the ground that although the questions were leading, the Board would "simply have to tolerate leading questions...This man is entitled to get these points out." Tr. 28,946.

It was only after a number of such incidents that a pattern of bias could be proven. This pattern of conduct culminated in

Judge Smith's letter to Judge Rambo, in which he expressed his continuing concern over the effect his judicial actions may have had on James Floyd.

Therefore, TMIA contends that it has been timely in its documentation of the bias and prejudice of Judge Smith, both in the main hearings and in these remanded hearings on management integrity.

B. THE RECORD SUPPORTS TMIA'S CLAIM THAT JUDGE SMITH HAS DEMONSTRATED PERVASIVE BIAS AND PREJUDICE.

The NRC Staff claims that the instances cited by TMIA do not prove Judge Smith's lack of judicial temperament, but rather "may be prompted by his need to determine the truth"; are Judge Smith's immediate reactions to material properly before him; and, in any event, are not generally reflective of Judge Smith's judicial demeanor. NRC Staff Response at 18-19.

Licensee claims that the cited instances are only "rulings adverse to TMIA, occasional impatience by the Board with TMIA's failure to exhaust its arguments...and ...admonishment by the Board for disrespectful and unprofessional behavior exhibited by TMIA's attorney." Licensee's Response at 28.

The instances cited by TMIA do not reflect Judge Smith's careful consideration of the evidence properly before him, but in most cases are attempts to prevent TMIA from developing a record in support of its case. For example, in its motion, TMIA cited only one instance of Judge Smith's attempt to prohibit counsel from conferring during the hearing. Tr. 30,958. However, the record contains further instances where Judge Smith similarly attempted to prohibit discussion between counsel, which would

effectively inhibit full representation of their client TMIA. These are described as follows:

1) Judge Smith comments on TMIA counsel conferring with each other even though counsel clearly understand Judge Smith's ruling and have not impeded the progress of the hearing in any manner, Tr. 29,039;

2) Judge Smith admonishes TMIA counsel from conferring during the examination of Gary Miller, and as a punitive gesture strikes a portion of Miller's testimony elicited upon cross-examination, Tr. 30,150;

3) Judge Smith admonishes TMIA counsel for "chatting" during the hearing while TMIA counsel were attempting to determine whether there had been any prior requirement to prefile rebuttal testimony on the Dieckamp Mailgram issue, and counsel obviously understand everything that Judge Smith previously stated, Tr. 30,506-508;

4) Judge Smith attempts to prohibit TMIA counsel from placing on the record their objections to NRC Staff witness Moseley's testimony, and in the course of this discussion, admonishes TMIA counsel who are conferring in an attempt to provide the Licensing Board with citations to the record to support TMIA's position, Tr. 29,796-799.

Moreover, Judge Smith's frequent interruption of counsel's questioning is clearly an attempt to disrupt TMIA's cross-examination of licensee witnesses and in some cases signal to witnesses the answer the Board would prefer to hear. In addition to the examples cited in the brief TMIA points to the following

additional examples of Judge Smith's demonstrated bias:

1) Judge Smith allowed Dieckamp to read portions of his prior interview at the hearing even though they were not relevant to the question TMIA had posed, Tr. 28,797-806;

2) Licensee counsel was permitted to interrupt TMIA's cross examination of Dieckamp in order to read portions of Joseph Chwastyk's prior interview into the record. Judge Smith, instead of attempting to maintain an orderly proceeding, directed TMIA's counsel to accept licensee's use of Chwastyk's interview as well as the interruption of TMIA's questioning of licensee's chief witness Dieckamp, Tr. 28,835-837;

3) Judge Smith permitted licensee counsel to interrupt TMIA's cross-examination of John Herbein to ask about the intended purpose of counsel's line of questioning. When TMIA counsel objected to the interruption, Judge Smith admonished her for making "no effort to give a cross-examination that really reflects the data that [she is] using. Tr. 30,319. There was no evidence on the record that TMIA counsel was misstating the record or that licensee counsel had any valid objection to TMIA's line of questioning. ²

TMIA counsel, the following day, explicitly stated on the record TMIA's objection to Judge Smith's continuing interruption of cross-examination and insistence that TMIA prove other parties' cases as well as that of TMIA's. Tr. 30,354-363.

² Judge Smith had at no time interrupted licensee or NRC Staff counsel to insist that they read into record large portions of depositions, or make points for the other parties in the proceeding.

Further, Licensee claims that Judge Smith's order that all parties file their proposed findings in the form proposed by licensee, was "intended to aid the parties and to ensure no party's views were overlooked by the Board in preparing its decision." Licensee's Response at 41, n.22. In fact, a dispassionate review of the transcript reveals that Judge Smith was attempting to prohibit TMIA counsel from placing on the record TMIA's objections to licensee's proposed outline for Proposed Findings of Fact and Conclusions of Law. When counsel persisted in doing so, Judge Smith admonished counsel for being "impertinent" and ordered TMIA to file findings on all issues heard during the hearing. Tr. 31,708.

Further, Judge Smith put extraordinary burdens on TMIA which were not grounded in law, in order to prevent TMIA from developing the record to prove its case. An egregious example was when TMIA attempted to question Dieckamp, the central witness on the Dieckamp Mailgram issue, on whether Herbein and Miller's removal from nuclear operations was due to their failings during the accident, including any reporting failings. TMIA counsel wished to question Dieckamp through use of his sworn testimony to the NRC's Office of Investigations.

First, Smith stated that TMIA could not ask Dieckamp any questions to which TMIA counsel did not already know the answer, and then required the answer to be directly relevant to the issue before the Board. Tr. 28,893-894. He then changed his opinion and demanded that the proposed series of questions be submitted to the Board for pre-approval. Tr. 28,896.

After the lunch break Judge Smith told TMIA that it could

ask only two out of the three questions reviewed by the Board. Judge Smith did this after unsuccessfully pressuring TMIA counsel to disclose the questions to Dieckamp. Tr. 28,913-917. When TMIA counsel attempted to ask these questions, Judge Smith stopped her and demanded that she ask only the last or third question on the list. Tr. 28,917-919. Judge Smith made this ruling in response to Dieckamp's objection to answering the question. Ibid. TMIA counsel then stopped all questioning on this point, since it was clear that her cross-examination had been effectively destroyed. Tr. 28,919-28,921.

In sum, on the three occasions, described above, Judge Smith prohibited TMIA counsel from pursuing a legitimate line of cross-examination with no legal justification for doing so. This action as the others cited demonstrate his prejudice against TMIA and its case.

III. TMIA HAS DEMONSTRATED THAT A REASONABLE PERSON WITH KNOWLEDGE OF ALL THE CIRCUMSTANCES WOULD QUESTION JUDGE SMITH'S IMPARTIALITY.

Licensee argues that the newspaper articles cited by TMIA and USC do not support a finding that Judge Smith's impartiality might reasonably be questioned, since the position of The Philadelphia Inquirer is already well-known, and because the stated opinions of parties to the TMI-1 restart proceedings about the erosion of public confidence in the NRC adjudicatory process cannot be credited. Licensee fails entirely to recognize that this position is also held by the citizens of the Commonwealth of Pennsylvania, represented by a party in this proceeding, led Governor Richard Thornburgh, the elected representative of the

people of Pennsylvania. The Commonwealth's motion reflects the Governor's opinion of his constituents' perception of the NRC process, and deserves the greatest weight.

TMIA would also note that in addition to all parties in the TMI restart proceedings, other than licensee, other public officials have also requested the removal of Judge Smith as well. See, e.g., Letters from Congressman Robert W. Edgar and State Rep. Bruce Smith; Resolution passed by Lower Swatara Township Board of Commissioners, attached and incorporated herein as Exhibits 1, 2 and 3, respectively. The Commission has at no other time, and in no other case heard such immediate public outcry against continuation of an NRC Licensing Board judge in his current position. It is hard to imagine a more extreme erosion of public confidence than has been created by Judge Smith's conduct in this case.

IV. THE LICENSING BOARD MUST BE RECONSTITUTED ONCE JUDGE SMITH IS REMOVED AND AT LEAST SOME OF THE PRIOR DECISIONS IN WHICH HE PARTICIPATED MUST BE DECLARED VOID TO REMOVE THE TAIN OF PREJUDICE AND BIAS WHICH HE IMPORTED TO THE HEARINGS.

The NRC Staff, although supporting the removal of Judge Smith from further participation in the TMI-1 restart hearings, opposes any rehearing of litigated issues by a newly-constituted Board. The Staff cites 10 CFR 2.704(d) to support an argument that the only remedy provided for under the NRC regulations is for designation of another board member to serve as a Board member or Chairman, even in the event that all hearing issues are litigated and the evidentiary record closed. NRC Staff's Response at 23-24.

TMIA believes that if Judge Smith is removed due to disqualifying bias or prejudice, his past decisions must be invalidated to the extent that his conduct during those hearings demonstrated bias in favor of the licensee and prejudice against the other parties. A newly-constituted Atomic Safety and Licensing Board must provide a rehearing on those issues which Judge Smith's prejudicial conduct is determined to affect.

The courts have established that administrative hearings, no less than court proceedings, demand as an element of due process an unbiased judge. Morgan v. United States, 304 U.S. 1, 14-15 (1983); Lloyd Carr & Co. v. Commodity Futures Trading Commission, 567 F.2d 1193, 1196 (2nd Cir. 1977); Helena Laboratories Corp. v. National Labor Relations Board, 557 F.2d 1183, 1188 (5th Cir. 1977). Further, courts have held that where a judge's conduct satisfies the disqualification standard under the statutory recusal provisions, 28 U.S.C.144, 455, due process requirements of a fair trial before a fair tribunal are also necessarily violated. United States v. International Business Machines Corp., 475 F.Supp. 1372,1390 (S.D.N.Y. 1979). Accord United States v. Haldeman, 559 F.2d 31,130 n.276 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977); United States v. Conforte, 457 F.Supp. 641, 659 n.13 (D.Nev. 1978).

Here it is clear that Judge Smith's prejudice against TMIA, TMIA witnesses, and TMIA counsel have prevented TMIA, and other parties, from fully developing a record on the issues before the Board, both in the original management hearings and during these reopened proceedings. Therefore, most if not all of the decisions

in which Judge Smith maintained a dominant role must be examined to determine if they should be invalidated.

It is obvious from the showing made by the parties in their motions to recuse, that the Dieckamp Mailgram and training issues should be reheard. Clearly if a judge is biased, obstructs a fair and full development of all parties' cases, and violates the parties' due process rights, a rehearing or retrial is necessary. Leverett v. Town of Limon, 567 F.Supp. 471, 474-475 (D.Colo. 1983)(citation against plaintiffs stricken when zoning board improperly biased); Hall v. Small Business Administration, 695 F.2d 175,180 (5th Cir. 1983)(judgment in sex discrimination action vacated and case remanded for retrial when magistrate's disqualification required); Roberts v. Bailar, 625 F. 2d 125, 129-130 (6th Cir. 1980)(judgment vacated and action remanded when judge should have been disqualified because reasonable person might question his impartiality); Commonwealth Coatings Corp. v. Continental Casualty Co, 393 U.S. 145 (1968) (arbitration award vacated where there was evident partiality in one arbitrator); Loeb v. Nassau Electric Railroad Co., 240 App. Div. 912 (N.Y. 1933).

Moreover, it is clear that in this case the grounds on which Judge Smith's removal is sought are mandatory, 28 U.S.C. 455 (a), (b)(1).³

³ Section 455 provides, in relevant part, as follows:

Disqualification of justice, judge, magistrate, or referee in bankruptcy

(a) Any justice, judge, magistrate, or referee in
(footnote continued on next page)

Therefore, under the historic common law governing disqualification, the past decisions of Judge Smith must be declared void if his disqualification is deemed mandatory and not able to be waived by the parties. Potashnick v. Port City Construction Co., 609 F.2d 1101, 1115 (5th Cir. 1980); State v. Thomson, 34 N.W. 2d 80,89 (N.D.Sup.Ct. 1948); Harrington v. Hayes County, 81 Neb. 231, 115 N.W.773,773 (1908); Case v. Hoffman, 100 Wis. 314, 74 N.W. 220,222 (1898).

It is clear that the provisions under which the Commonwealth, TMIA and UCS have moved for Judge Smith's removal are mandatory and as such require a reexamination of all his past decisions to determine if all are void. It is clear that once Judge Smith's removal is determined to be required under 28 U.S.C. 455, all his past decisions which are infected by his bias and prejudice, must be declared void.⁴ In light of the fact that

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bankruptcy 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) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

(emphasis added)

⁴ If it is determined that 28 U.S.C. 455(a), which requires disqualification when a judge's "impartiality might reasonably be questioned," may be waived by 455(e), Judge Smith's prior decisions should still be declared void because no such waiver can be found on this record.

If it is determined that because waiver of disqualification

the provisions under which Judge Smith's removal is sought are mandatory, his past decisions are void, not merely voidable.

The NRC Staff argues that in the event Judge Smith is disqualified from further participation in these proceedings, the other two members of the Board may decide the issues currently pending before the Licensing Board, based on the current evidentiary record. However, it is clear that Judge Smith's bias and prejudice have severely obstructed TMIA and other parties from developing a full record to support their positions. Therefore, without some type of rehearing and opportunity for additional discovery, the parties will be denied their right to fully develop their cases. ⁵

A good example occurred within the last several weeks, after TMIA filed its motion to remove Judge Smith. Judge Smith had led counsel for all parties to believe that after hearing the stated position of the NRC Staff, he would rule on joint motion by TMIA and Licensee counsel to admit the interview of Karl Plumlee as Joint Mailgram Exhibit No. 145. Tr. 33,118.⁶

is permitted by 455(a), that Judge Smith's prior decisions are not void, TMIA relies on 455(b)(1) to support the position that Judge Smith's prior decisions must necessarily be declared void, since this provision, finding actual bias and prejudice of a judge, cannot be waived. See Potashnick v. Port City Construction Co., supra, 609 F.2d at 1114.

⁵ See State v. Bradish, 70 N.W. 172 (Wis.Sup.Ct. 1897).

⁶ TMIA and Licensee made this motion by means of a December 21, 1984 letter, attached and incorporated herein as Exhibit 4. This letter, drafted by TMIA counsel and modified at the suggestion of licensee counsel, was sent to licensee for signature on December 21, 1984. Although licensee counsel apparently signed it at or near that date, he did not return the copy of the letter to TMIA
(footnote continued on next page)

The NRC Staff stated that it had no problem with the admission of the Plumlee interview if other interviews could be admitted as well. Ibid. TMIA stated that it did not have access to those interviews and would like an opportunity to review the interviews prior to making a decision. Tr. 33,318.

Two weeks later, on January 25, TMIA received from the NRC Staff a copy of those interviews which the NRC Staff wished introduced in conjunction with the Plumlee interview. Because of the late date of receipt of these interviews, TMIA informed both licensee and the NRC Staff that it would not consider adding these interviews but would request simply that Judge Smith rule on the pending joint motion for admission of the Plumlee interview.

Contrary to his previous rulings, Judge Smith, on January 29, determined that he would not rule on the motion, then in the form of a letter, and instead required TMIA to submit a formal written motion if it wished to have the request considered by the Board. Memorandum and Order (Jan. 29, 1985). Since TMIA was then in the process of writing its findings and understood that it was already effectively foreclosed from submitting a motion in a timely fashion, it simply chose not to submit such a motion.

TMIA was thereby forced to forego reliance on the Plumlee

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counsel for service on the other parties until the first week of January, 1985. At that time licensee and TMIA counsel determined that the letter could be served along with a copy of the Plumlee interview during the hearings then ongoing in Harrisburg.

TMIA counsel, present again for the first time in Harrisburg on January 9, 1985, brought up the issue for consideration by the Board. Tr. 33,050.

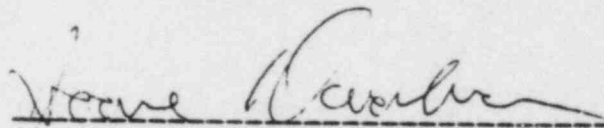
interview in its findings.

Clearly Judge Smith's change in position and requirement that TMIA submit a formal written motion to request admission of the Plumlee interview unfairly prejudiced TMIA.

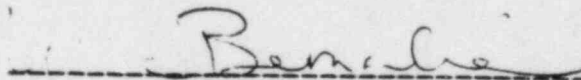
V. CONCLUSION.

For the above reasons, TMIA requests that Judge Smith be removed from further participation in the TMI-1 restart proceedings, that his past decisions be declared void, that rehearing be set on the management issues decided by the Licensing Board which he chaired, and that comments be solicited by the parties on the schedule for rehearing.

Respectfully submitted,



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Attorneys for TMIA

Dated: February 13, 1985

ROBERT W. EDGAR

11th DISTRICT PENNSYLVANIA

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EXHIBIT 1

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DEL. CC. EXCHANGE (215) 826-7000
PHILA. EXCHANGE (215) 726-4111

Congress of the United States

House of Representatives

Washington, D.C. 20515

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OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

January 15, 1985

SERVED JAN 16 1985

50-2895P

The Honorable Nunzio J. Palladino
Chairman, Nuclear Regulatory
Commission
1717 H Street, NW
Washington, D. C. 20555

Dear Chairman Palladino:

As a member of the Pennsylvania Congressional delegation, I have followed with interest the Commission's progress in hearings on the Three Mile Island (TMI) nuclear plant near Harrisburg, Pennsylvania. It is my understanding that the Commission will meet in the near future to consider a possible restart of TMI Unit 1.

I am deeply concerned by the recent revelation that Ivan W. Smith, chairman of the Atomic Safety and Licensing Board responsible for judging the case for restart, has compromised his impartiality by intervening on behalf of a TMI supervisor found guilty of cheating on a reactor operator license test. As you are no doubt aware, Mr. Smith sent a letter to US District Court Judge Sylvia Rambo asking for special consideration for the supervisor.

Mr. Smith's actions clearly make him ineligible to continue his service on the Licensing Board, and his removal as chairman and board member should be immediate. Moreover, his actions may have invalidated the fairness and impartiality of the entire proceeding.

In this environment, I frankly find it amazing that the Commission is moving towards a vote on the restart of Unit 1. Throughout the hearing process, questions have been raised as to how well the safety of the people of Pennsylvania is being protected. Now we are faced with an act which has compromised an entire section of the process, yet the Commission blithely ignores the event. The replacement of Mr. Smith and a thorough review of the Board's work must precede any decision on restart.

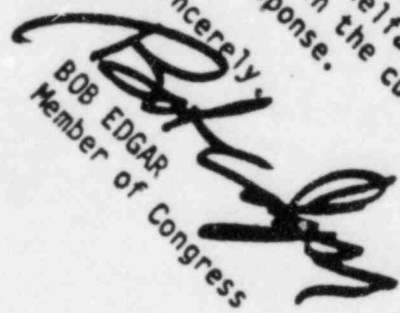
I hope that you will suspend any plans to vote on a TMI restart so as to

able Nunzio J. Palladino

ry 15, 1985

Fulfill your duty to protect the health and welfare of the people of my state.
No decision on TMI can be considered fair in the current climate of bias and
partisanship. I look forward to your response.

Sincerely,


BOB EDGAR
Member of Congress

BE/da
cc: Commissioner Bernthal
Commissioner Roberts
Commissioner Asselstine
Commissioner Zech

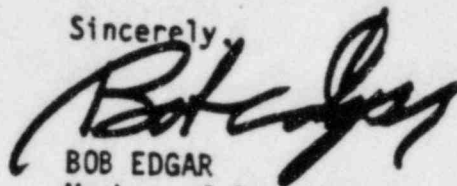
The Honorable Nunzio J. Palladino

Page 2

January 15, 1985

fulfill your duty to protect the health and welfare of the people of my state. No decision on TMI can be considered fair in the current climate of bias and partisanship. I look forward to your response.

Sincerely,



BOB EDGAR
Member of Congress

BE/da

cc: Commissioner Bernthal
Commissioner Roberts
Commissioner Asselstine
Commissioner Zech



OFFICE OF THE
COMMISSIONER

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

EXHIBIT 2

DOCKET NUMBER
PROD. CONTROL NO.

50-289 SP

January 10, 1985

DOCKETED
USNRC

MEMO TO: William L. Clements, Chief
Docketing and Service Branch

'85 JAN 10 P1:49

FROM: Patricia R. Davis, Legal Assistant PD
Office of Commissioner Asselstine

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

SUBJECT: TMI-1 Restart

SERVED JAN 10 1985

Please serve the attached letter on the parties to the TMI-1 Restart proceeding.

cc: Chairman Palladino
Commissioner Roberts
Commissioner Bernthal
Commissioner Zech
OGC

BRUCE SMITH MEMBER
R.D. #1
LETTERS, PENNSYLVANIA 17319

P.O. BOX 14
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COMMITTEES
FINANCE
GAME AND FISHERIES

HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

CHIEF

DOCKETER
USNRC

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OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

January 8, 1985

James Asselstine, Commissioner
Nuclear Regulatory Commission
1717H Street, Northwest
Washington, D.C. 20555

Dear Commissioner Asselstine:

I hereby respectfully request the immediate dismissal and replacement of Ivan Smith as Chairman of the Atomic Safety and Licensing Board considering the possible restart of Unit 1 Reactor at Three Mile Island. Under no circumstances should Ivan Smith represent the Nuclear Regulatory Commission in the Harrisburg area due to the recent publicity which resulted from his letter to Judge Sylvia Rambo. The Harrisburg Evening News featured details of the letter on page one on Friday, January 4, 1985.

As you well know, any Nuclear Regulatory Commission official, decision or recommendation is well publicized in the Central Pennsylvania area. Administrative Law Judge Ivan Smith is therefore well known in the Harrisburg area because of overseeing two special hearings relating to Three Mile Island. For that very reason, any statement made by Ivan Smith is automatically interpreted as a mirror for Nuclear Regulatory Commission policies. It is impossible to separate his personal views from his Nuclear Regulatory Commission decisions. Both elected and appointed public officials accept this concept when serving the public in any capacity.

Ivan Smith's letter to Judge Sylvia Rambo is a violation of his public trust. Judge Smith has displayed his personal opinions in the area of Three Mile Island when he was supposed to be impartial. Mr. Floyd was tried and found guilty by a jury of Central Pennsylvania citizens. Federal officials like Ivan Smith should not appear to intimidate or to influence Judge Rambo in her deliberations regarding just punishment for Mr. Floyd.

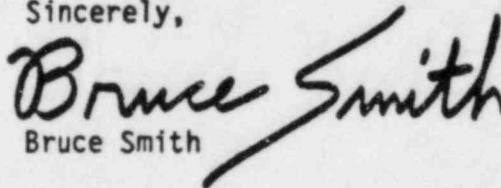
James Asselstine, Commissioner

January 8, 1985

Page 2

Due to Ivan Smith's unprofessional and unethical conduct, I urge the Nuclear Regulatory Commission to replace him immediately. Citizens of Central Pennsylvania currently associate him and his name with interference in the fair administration of justice. His letter to Judge Sylvia Rambo cannot be retracted due to his status and position; therefore, he must be replaced. Ivan Smith has disqualified himself by becoming personally involved in the very case that he is supposed to decide.

Sincerely,


Bruce Smith

BS:kat

Lower Swatara Township Board of Commissioners

Franklin D. Linn, Sr., President
George D. Hinkle, Jr., Vice President
George W. Hickernell
Charles E. Ash
Janet B. Wells

1499 Spr

EXHIBIT 3

DOCKET NUMBER
PROD. & UTIL. FAC. 50-289 SP

January 31, 1985

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The Nuclear Regulatory Commission
7920 Norfolk Avenue
Washington, D.C. 20555

LEWIS
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SERV
ANCH

Gentlemen:

SERVED FEB 7 1985

On behalf of the Lower Swatara Township Board of Commissioners, Dauphin County, Pennsylvania, we strongly support the position taken by Governor Richard Thornburgh in calling for the removal of Nuclear Regulatory Commission Administrative Law Judge Ivan W. Smith as head of a three-member federal panel considering the restart of Three Mile Island's Unit I reactor.

Mr. Smith's appeal for leniency in sentencing a former TMI employee, James R. Floyd, convicted on two counts of cheating, totally transcends professional and ethical strictures and has impaired Mr. Smith's capabilities of rendering a fair and impartial decision when considering the subject of restart. We as elected officials cannot condone personal viewpoints that have even the slightest semblance of potential conflicts of interest. The appearance of capitulating to special interests and issues of epidemic impact affecting the safety and welfare of millions of people cannot and should not be tolerated from any official serving in a public capacity.

Mr. Smith should voluntarily resign as chairman of the Atomic Safety and Licensing Board or be removed by appropriate action of the Nuclear Regulatory Commission.

Sincerely,

Franklin D. Linn Sr.
Franklin D. Linn, Sr.
President
Board of Commissioners

FDL:jh

CC: Governor Richard Thornburgh

GOVERNMENT ACCOUNTABILITY PROJECT
1555 Connecticut Avenue, N.W., Suite 202
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(202) 232-8550

December 21, 1984

Administrative Judges
Ivan W. Smith, Chairman
Sheldon J. Wolfe
Gustave A. Linenberger, Jr.
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Administrative Judges;

Mr. Blake and I agreed to add to the Modified Joint Mailgram Stipulation the following document: NRC Interview of Karl Plumlee (May 30, 1979). This document is being added for Mr. Plumlee's discussion of hydrogen. To the extent that Mr. Plumlee's discussion of hydrogen is a subject of proposed findings by TMIA, TMIA will not object to Licensee referring in reply findings to item 139 of Part C of Joint Mailgram Exhibit 1.

We would jointly move that the record be reopened to permit admission of this interview insofar as the Board considers the record closed for this purpose.

This document should be considered Item 145 of the Joint Mailgram Exhibit 1(c).

Thank you for your prompt consideration of this matter.

Sincerely yours,

Lynne Bernabei
Lynne Bernabei
Counsel for TMIA

Seen and Agreed:

Ernest L. Blake
Ernest L. Blake

cc: service list

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

Before the Atomic Safety and Licensing Board

85 FEB 14 AM 11:00

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

OFFICE OF THE SECRETARY
DOCKETING & SERVICE

I hereby certify that a copy of the foregoing Three Mile Island Alert's Motion for Leave to Reply to Licensee and NRC Staff's Responses to Commonwealth, TMIA and USC Motions to Recuse has been served this 13th day of February, 1985, by mailing a copy first-class, postage prepaid to the following:

Service List

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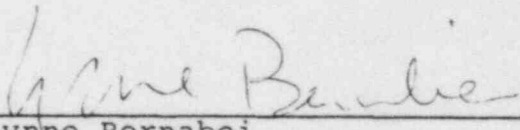
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*Hand Delivered