January 24, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE ADMINISTRATIVE LAW JUDGE IVAN W. SMITH

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

LICENSEE'S RESPONSE TO MOTIONS BY THE COMMONWEALTH OF PENNSYLVANIA, UCS AND TMIA TO DISQUALIFY ADMINISTRATIVE LAW JUDGE IVAN W. SMITH

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The Commonwealth of Pennsylvania (Commonwealth),1/ the Union of Concerned Scientists (UCS)2/ and Three Mile Island Alert (TMIA)3/ have each filed motions requesting Administrative Law Judge Ivan W. Smith to disqualify himself from further participation in this proceeding. TMIA has further requested that the remanded management hearings be reheard before a

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

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

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

newly-constituted Atomic Safety and Licensing Board. Licensee opposes the motions.

We first discuss below the standards for disqualification of a judge and then proceed to examine in the light of those standards the matters asserted by other parties as a basis for disqualification.

I. Standards for Disqualification

A. Applicable Rules and Regulations

Section 2.704(c) of the NRC Rules of Practice sets out the procedure for the disqualification of a board member or presiding officer in a licensing proceeding:

> If a party deems the presiding officer or a designated member of an atomic safety and licensing board to be disqualified, he may move that the presiding officer or the board member disqualify himself. The motion shall be supported by affidavits setting forth the alleged grounds for disqualification. If the presiding officer does not grant the motion or the board member does not disqualify himself, the motion shall be referred to the Commission or the Atomic Safety and Licensing Appeal Board, as appropriate, which will determine the sufficiency of the grounds alleged.

The Nuclear Regulatory Commission (the "Commission") has long held that there are five grounds for disqualifying an administrative trier of fact:

(1) if he has a direct, personal, substantial pecuniary interest in a result;

(2) if he has a "personal bias" against a participant;

(3) if he has served in a prosecutive or investigative role with regard to the same facts as are in issue;

(4) if he has prejudged factual - as distinguished from legal or policy - issues; or

(5) if he has engaged in conduct which gives the appearance of personal bias or prejudgment of factual issues.

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-777, 20 N.R.C. 21, 33-34 (1984); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-101, 6 A.E.C. 60, 65 (1973). The Commonwealth, TMIA, and UCS (collectively "Movants") have moved under section 2.704(c) to disqualify Judge Smith, charging that he is in violation of parts 2, 4 and 5 of the above standard.

Relatedly, Movants invoke the federal judicial recusal statutes, 28 U.S.C. §§ 144/ and 455/ and Canon 3C of the

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4/ § 144. Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

* * * *

5/ § 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or 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) Where he has a personal bias or prejudice

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ABA's Code of Judicial Conduct,6/ which is codified by section 455. 7/ They allege that Judge Smith has violated these statutes and Canon by exhibiting bias against the Movants, by prejudging factual issues in favor of the Licensee, and by engaging in conduct which would lead a person reasonably to question his impartiality.

B. The Bias Must Stem from an Extrajudicial Source

A principal limitation enunciated in the NRC and federal case law on application of the disqualification standards is that the information giving rise to the bias or prejudice must have come from an extrajudicial source. United States v. Grinnell Corp., 384 U.S. 563, 583 (1966); Houston Lighting and

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> concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.
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> * * * *

6/ 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.
> >
> > * * * *

7/ The Commission has made it clear that Licensing Board members are governed by the disqualification standards that apply to federal judges. Public Service Electric & Gas Co. (Hope Creek Generating Station, Unit 1), ALAB-759, 19 N.R.C. 13, 20 (1984).

Power Co. (South Texas Project, Units 1&2), CLI-82-9, 15 N.R.C. 1363, 1365 (1982). To be disqualifying, the alleged bias or prejudice "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." Grinnell, 384 U.S. at 583; South Texas, CLI-82-9, 15 N.R.C. at 1365.

Movants continually display confusion as to the meaning and proper application of the "extrajudicial" requirement.8/ They repeatedly assert that the question of a judge's disqualification turns on whether he has engaged in extrajudicial conduct or action -- i.e., conduct or action not occurring in the course of the immediate proceedings. Contrary to their framing of the issue, the forum in which the allegedly biased statements are made is irrelevant; only the source of the purported bias is germane to the disqualification/recusal inquiry.

Movants' reliance on In re International Business Machines Corp. ("IBM"), 618 F.2d 923, 927-28 (2d Cir. 1980), is misplaced. The IBM court makes clear that only conduct at trial stemming from extrajudicial information provides a basis for disqualification.9/

8/ See, e.g., UCS Motion at 5, 7; TMIA Motion at 10, 13 n.6, 23.

9/ The court declares:

> IBM has not shown and does not purport to establish or identify any personal connection, relationship or extrajudicial inci-

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The only significance of the context -- i.e. judicial or extrajudicial -- in which the allegedly biased viewpoints are expressed is that courts have counseled against disqualification based solely on conduct or rulings at trial, except in extreme cases, so as not to hamstring the judge's governance of the proceeding. As stated in Crandell v. United States, 703 F.2d 74, 78 (4th Cir. 1983), a court must be "cautious not to

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> dent which accounts for the alleged personal animus of the trial judge. IBM's claim of prejudice is based completely on Chief Judge Edelstein's conduct and rulings in the case at hand. These we have repeatedly held form no basis for a finding of extrajudicial bias. Thus in King v. United States, 576 F.2d 432, 437 (2d Cir. 1978), we stated:
>
> > "The grounds urged for disqualification are for the most part rulings made by [the trial judge] during the course of his judicial duties . . . . Nothing of this kind, what the judge has learned from or done in the proceedings before him, is any basis for disqualification; to be sufficient for disqualification the alleged bias or prejudice must be from an extrajudicial source."
>
> This language highlights TMIA's erroneous framing of the "extrajudicial" issue. They attempt to distinguish IBM, in which recusal was denied, by noting that the Floyd letter here provides the "extrajudicial incident" absent in IBM. TMIA Motion at 13 n.6. Thus, TMIA ignores the crucial source/conduct distinction drawn by the IBM court.

fetter unduly the necessary governing function of trial court judges."

The insignificance of the context or forum in which allegedly biased comments are made is well illustrated by In re Corrugated Container Antitrust Litigation, 614 F.2d 958 (5th Cir. 1980), in which such comments were made by the judge in the course of a golf game with an attorney friend -- plainly a forum unrelated to the trial proceedings. The court found no evidence of extrajudicial bias, noting that "while these thoughts were voiced in an extra-judicial setting . . . the informational source upon which they drew -- the judge's experience as a judge -- was distinctly judicial." Id. at 967, quoting United States v. Haldeman, 559 F.2d 31, 136 (D.C. Cir. 1976).

In parallel to the federal courts, NRC tribunals have also adopted the requirement that alleged prejudice must stem from an extrajudicial source to be disqualifying. See, e.g., South Texas, CLI-82-9, 15 N.R.C. at 1365-66; Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-749, 18 N.R.C. 1195, 1200 (1983). In South Texas, the Appeal Board had disqualified a Licensing Board judge on the basis of the judge's written statement accompanying his denial of a motion to recuse himself. The Appeal Board found that the statement, among other things, included a "series of direct attacks of [the Judge's] own upon 'the representatives for [the movant],' cast for the most part in extremely pejorative terms," and that

these statements reflected a "lack of sensitivity for the role that a judge must necessarily play in any adjudication." South Texas, ALAB-672, 15 N.R.C. at 682 (footnote omitted).

The Commission reversed the Appeal Board and reinstated Judge Hill on the ground that the allegedly disqualifying prejudice was not extrajudicial. Citing United States v. Grinnell Corp., 384 U.S. 563 (1966), and IBM, the Commission reiterated that alleged 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 has learned from his participation in the case." South Texas, CLI-82-9, 15 N.R.C. at 1565, quoting Grinnell, 384 U.S. at 583 (emphasis added). The Commission determined that Judge Hill's statement was "based solely on events which occurred during [the] proceeding, i.e., [movant's] action and behavior during the proceeding," and that "[s]ince [the Judge's] statement did not stem from an extra-judicial source, but was based solely on what he learned from his participation in the case, that statement does not provide a legally cognizable basis for disqualifying prejudice." South Texas, CLI-82-9, 15 N.R.C. at 1366, citing IBM, 618 F.2d at 928.

The Appeal Board in Seabrook reached a similar result. Movants there had alleged that the judge had exhibited such personal animosity and bias toward movant's counsel and other adverse parties during the proceeding that a further fair proceeding was impossible. In affirming the judge's refusal to

recuse herself, the Appeal Board held that no bias could be shown where the allegedly disqualifying bias did not stem from an extrajudicial source, citing South Texas. Seabrook, ALAB-749, 18 N.R.C. at 1200. As have the federal courts, the Seabrook Appeal Board made plain the distinction that it is the source, and not the setting, of the allegedly disqualifying views that must be extrajudicial:

> To demonstrate bias flowing from extrajudicial sources, a party must "identify . . . [a] personal connection, relationship or extrajudicial incident which accounts for the alleged personal animus of the . . . judge." The fact that a judge's actions are, for example, erroneous, superfluous, or even improvident, does not, without more, demonstrate bias of an extrajudicial origin. As we [have] noted . . . , rulings, conduct or remarks in response to matters that arise during administrative proceedings are not extrajudicial.

Id.

C. Movants Must Show "Pervasive Bias" in the Absence of an Extrajudicial Source

Despite courts' disinclination to disqualify judges for conduct in the course of judicial proceedings absent an extrajudicial source of bias, a narrow exception provides that "where such pervasive bias or prejudice is shown by otherwise judicial conduct as would constitute bias against a party, the bias or prejudice need not be extrajudicial in nature." Davis v. Board of School Commissioners, 517 F.2d 1044, 1051 (5th Cir. 1975) (en banc), cert. denied, 425 U.S. 944 (1976); Hamm v. Members of Bd. of Regents of State of Fla. 708 F.2d 647, 651

(11th Cir. 1983). Movants charge that Judge Smith's conduct in presiding over these proceedings reflects a pervasive bias against them and in favor of Licensee.

The Commission has observed that "[a]lthough some courts have stated such an exception to the general rule that bias must be extrajudicial, the courts have been hesitant to invoke that exception except in the most extreme cases." South Texas, CLI-82-9, 15 N.R.C.at 1366 (emphasis added). To warrant disqualification, a trial judge's conduct must be "egregious," significantly interfering with a party's efforts to present its case. Southern Pacific Communications Co. v. AT&T, 740 F.2d 980, 996-97 (D.C. Cir. 1984).

In South Texas, the Commission found that there was no such pervasive bias, notwithstanding the Appeal Board's finding that Judge Hill's remarks demonstrated personal hostility toward the movants and a lack of sensitivity for the proper role of a judge. The Commission elaborated on the reasons for such a strict standard for showing "pervasive" bias in the absence of an extrajudicial source:

> [A] judge is more than a passive observer in a case involving a technical and complex field; he must penetrate through the parties' posturing to decide the accuracy of their presentations. Thus, extra-record conduct such as stares, glares and scowls do not constitute evidence of personal bias. Similarly, occasional outbursts toward counsel during a long trial do not provide any basis for finding judicial bias against the party represented by counsel.

South Texas, CLI-82-9, 15 N.R.C at 1366 (footnotes omitted), citing IBM, 618 F.2d at 928-30, 932.

Cases in which reviewing courts have felt compelled to remove the trial judge have involved repeated, unmitigated episodes of overbearing, stifling, and overtly hostile conduct by the trial judge. In Crandell v. United States, 703 F.2d 74 (4th Cir. 1983), for example, the trial judge's interference with plaintiff's presentation of their case was "glaring," id. at 76, and "fell far short," id. at 78, of the standards governing judicial conducts; "the court simply assumed the role of an advocate," id. at 77. Similarly, in Reserve Mining Co. v. Lord, 529 F.2d 181 (8th Cir. 1976), the judge's conduct "reflect[ed] great bias" against one party, id. at 185; the judge "seem[ed] to have shed the robe of the judge and to have assumed the mantle of the advocate," id.

When Movants' allegations of impropriety by Judge Smith are compared to the conduct of the judges in Crandell, Reserve Mining, and other cases in which recusal was ordered, e.g., United States v. Ritter, 540 F.2d 459 (10th Cir.), cert. denied, 429 U.S. 951 (1976), the insufficiency of the present claims is apparent. By no stretch of reasoning can Judge Smith's actions be found to constitute the "partisan zeal" mandating disqualification. See Hamm v. Members of Bd. of Regents of State of Fla., 708 F.2d at 751; Knapp v. Kingsey, 232 F.2d 458, 467 (6th Cir.), cert. denied, 352 U.S. 892 (1956).

Finally, it should be noted that bias -- pervasive or otherwise -- must be directed against (or in favor of) a party,

to be grounds for disqualification. Thus, to the extent that Movants claim that Judge Smith had predisposed views on certain issues, see, e.g., TMIA Motion at 20-21, 23; UCS Motion at 12, these allegations cannot support a charge of personal bias.10/

D. The Objective "Appearance of Partiality" Test

As Movants correctly observe, 28 U.S.C. § 455(a) replaced the old subjective test for judicial bias with an objective "appearance of partiality" test. However, it is firmly established that the "appearance of partiality" test is subject to the same "extrajudicial source" requirement as the personal bias test of 28 U.S.C. § 144. South Texas, CLI-82-9, 15 N.R.C at 1367; Johnson v. Trueblood; 629 F.2d 287, 290 (3d Cir. 1980) ("both statutes [§ 144 and § 455(a)] require the same type of bias for recusal").

In South Texas, the Commission rejected a charge of bias against Judge Hill, finding that the alleged bias stemmed from no extrajudicial source. As to movant's claim that recusal was mandated under the objective standard of section 455(a), the Commission stated that "[t]he same policy reasons which limit disqualification to extra-judicial conduct have been held to similarly limit recusal under section 455(a)." 15 N.R.C at 1367. Thus, even though the Commission did not question the Appeal Board's finding that Judge Hill's conduct could have led a

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10/ The question of prejudgment is discussed in Section I.E. infra.

reasonable man to question his impartiality, because the source of the alleged bias was not extrajudicial, the Commission held that there were no grounds for recusal.

It should be stressed that the burden is on Movants to establish that a judge's actions provide grounds to question his impartiality. Section 455(a) does not -- as Movants declare -- require a judge to recuse himself if there is any question about the propriety of his sitting. Although section 455(a) may have supplanted the "duty to sit" doctrine, see Blizard v. Frechette, 601 F.2d 1217, 1220-21 (1st Cir. 1979), it has not replaced that doctrine with a presumption of disqualification. Id. at 1221. Rather, "[a] trial judge must hear cases unless some reasonable factual basis to doubt the impartiality or fairness of the tribunal is shown by some kind of probative evidence." Id. (emphasis added).

E. Prejudgment of Factual Issues

Movants charge that Judge Smith is guilty of prejudging some of the issues remaining to be decided in the current proceedings. Although it is true that a judge does not render a judgment until all parties have had an opportunity to present all of their evidence, there is absolutely nothing improper about a judge forming some preliminary assessments on the basis of the evidence he has heard or giving voice to those assessments. South Texas, CLI-82-9, 15 N.R.C at 1365, citing Commonwealth Edison Co. (La Salle County Nuclear Power Station,

Units 1 and 2), CLI-73-8, 6 A.E.C. 169 (March 2, 1973);11/ see also Whitehurst v. Wright, 592 F.2d 834, 837-38 & n.5 (5th Cir. 1979). "[A] judge's comment is disqualifying only if it connotes a fixed opinion -- 'a closed mind on the merits of the case.'" United States v. Haldeman, 559 F.2d at 136, quoting United States v. Grinnell Corp., 384 U.S. at 583.

Furthermore, it must be stressed that only the prejudgment of factual issues provides grounds for disqualification. Judges who have expressed views on legal or policy issues are not thereafter barred from sitting in cases in which those issues are implicated. See Ass'n of Nat'l Advertisers v. FTC, 627 F.2d 1151, 1171 (D.C. Cir. 1979), cert. denied, 447 U.S. 921 (1980); Smith v. Danyo, 441 F. Supp. 171, 179-80 (M.D. Pa. 1977), aff'd, 585 F.2d 83 (3d Cir. 1978). So long as a judge is not biased against a party, the fact that he holds firm "crystallized" legal or policy views cannot justify recusal. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-777, 20 N.R.C. 21, 34-36 (1984).

11/ As stated in LaSalle, "[p]reliminary assessments, made on the record, during the course of an adjudicatory proceeding - based solely upon application of the decision-maker's judgment to material properly before him in the proceeding - do not compel disqualification as a matter of law." 6 A.E.C at 169-70.

F. Stage of Proceeding

In determining whether to exercise its discretion to remove a judge, the Commission has been influenced by whether the hearing is at an early or an advanced stage. For example, in South Texas, after finding no legal basis for disqualification, the Commission additionally refused to order recusal as an exercise of its discretionary authority over pending adjudications. The Commission stated that "[t]he proceeding is now well along and the judge has acquired a valuable background of experience." 15 N.R.C at 1367, citing IBM, 618 F.2d at 934.

Relatedly, and in contrast, in Public Service Electric and Gas Co. (Hope Creek Generating Station, Unit 1), ALAB-759, 19 N.R.C. 13 (January 25, 1984), an Appeal Board again noted the relevance of the stage of the proceeding. In that case, the Appeal Board disqualified a Licensing Board member due to his prior involvement with technical studies at issue in the proceeding. The Appeal Board referred to the above consideration voiced by the Commission in South Texas, and noted that, in contrast, the Hope Creek proceeding was at a very early stage - no evidentiary hearings in the matter had yet begun. Thus, the Appeal Board reasoned that the Board member replacing the disqualified judge would not be at a disadvantage. Hope Creek, ALAB-759, 19 N.R.C at 25 n.42.

The remanded hearing on the mailgram and training issues has been completed. Thus, any replacement for Judge Smith on the Licensing Board would be at a severe disadvantage, lacking

both the extensive knowledge and background Judge Smith has now acquired, and the opportunity to observe and assess the credibility and demeanor of the witnesses.

II. Judge Smith's Letter to Judge Rambo

All of the Movants complain of a letter written by Judge Smith to District Judge Sylvia H. Rambo on December 27, 1984. The letter requested leniency for James R. Floyd who had been convicted in Judge Rambo's court of a violation of a federal criminal statute in cheating on a Company-administered training examination. Judge Smith based his plea for leniency in part on his view that severe punishment is not necessary as a deterrent to future cheating and that deception in the future is very unlikely. The moving parties all emphasize Judge Smith's statement that deception in the future is very unlikely and read into it a prejudgment of issues pending at that time before the Board in the TMI-1 remanded training hearing.

In Licensee's view, the moving parties misread the meaning and intent of Judge Smith's letter. The full text of the relevant portion of that letter follows:

> My second reason for hoping for lenient treatment for Mr. Floyd is that severe punishment is not necessary as a deterrent. I recognize that, whatever his motive, cheating on the requalification examination was a very serious matter and cannot be condoned or appear to be condoned. However, Mr. Floyd's damaged career and public humiliation will be seen by others as too high a risk and price for any gain from cheating.

> More important, however, a severe criminal penalty against Mr. Floyd, is in my personal view, not needed to insure the integrity of the NRC operators' licensing process at Three Mile Island, nor would it be useful. The civil regulatory scheme presently administered by the NRC is exceedingly thorough. It is adequate to assure that the operators of Three Mile Island are persons of competence and, in fact, hearings on that very issue are still in progress. I have confidence that the NRC administrative regulatory process, with extensive public participation, will provide an orderly and reliable mechanism for assuring that any problems caused by deception respecting Three Mile Island will have been identified and resolved. Deception in the future is very unlikely. A severe sentence for Mr. Floyd would add nothing.

Judge Smith's letter does not, as TMIA for example would have it, represent a determination that the GPUNC training program is adequate or a prejudgment of any other issues in the proceeding. Certainly, the statement in the Floyd letter that "[d]eception in the future is very unlikely" does not connote a fixed opinion on the adequacy of the training program. Rather, when read in context, as it must be, this observation is more an expression of confidence in the capacity of the NRC to identify and resolve the problem of deception than it is an endorsement of licensee's training program. Indeed, this statement is most fairly read to mean that Licensee's program will be accepted only if it is adequate to prevent future cheating and will be rejected if it does not provide such an assurance. As such, the statement reflects nothing more than a general confidence that the hearings will be fair and will achieve

their purpose -- a view that plainly evidences neither bias nor prejudgment. United States v. Haldeman, 559 F.2d at 135-36. Moreover, a statement so unspecific in import cannot support a motion to recuse. See United States v. Peltier, 529 F. Supp. 549, 551 (C.D. Cal. 1982).

Even read as the moving parties would have it read, however, the letter is not grounds for disqualification. It represented at most a preliminary assessment of the evidence the Board had already heard. As demonstrated above in our discussion of the legal standards for disqualification, such preliminary assessments, when made on the basis of facts properly before the Board in the hearing, are not grounds for disqualification.

At the time of Judge Smith's letter the Board had received the proposed written testimony of all the parties' witnesses and completed three days of hearing which included the testimony of Licensee's principal panel of witnesses, the Reconstituted OARP Committee, and cross-examination of that panel's testimony by all of the other parties. That testimony included a description of the elaborate procedures Licensee had put in place to prevent cheating on examinations. No party, either in the cross-examination of the Reconstituted OARP Committee, or for that matter at any later time in the hearing, questioned the adequacy of those procedures. The panel also testified on other matters which could have a bearing on the likelihood of cheating, such as the adequacy of training

materials and instruction and the format and content of examinations. Judge Smith had ample basis for making a preliminary assessment of the evidence.

TMIA's attempt to characterize Judge Smith's personal opinions respecting, for example, the motives of Mr. Floyd as extrajudicial, because not directly reflected on the record, is without merit. 12/ Indeed, UCS explicitly ratifies Licensee's

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12/ TMIA cites two examples concerning Judge Smith's attribution of motive to Mr. Floyd which it believes are not stated in the Licensing Board's earlier Partial Initial Decision, LBP-82-56, 16 N.R.C. 281 (1982), or supported by the record of that earlier proceeding - namely "that Mr. Floyd's deception was 'an impulsive act and . . . not motivated by personal ambition'" and "Mr. Floyd 'neglected his examination responsibility out of a misguided but altruistic effort to attend to matters of perceived greater urgency.'" TMIA Motion at 11.

> The Licensing Board stated in that earlier decision that Mr. Floyd "didn't attend FSR classes and therefore was given a closed-book take home exam which he didn't return. Because of a grace period, it wasn't until July 1, 1979 that he finally faced suspension from licensed duties. By then he was desperate. On the evening of July 1, 1979 he was faced with an absolute deadline, and he was also faced with vacation plans beginning the next day. After work VV [Floyd] induced O to help him." 16 N.R.C 281, 344. Further the Licensing Board stated "An equally likely explanation is that VV, eager to go on vacation, simply took a chance. The latter explanation would be consistent with VV's known impatience with training assignments." Id. at 346 (emphasis added).
>
> Clearly, there is a sufficient predicate in the Licensing Board decision for Judge Smith to state his belief that Mr. Floyd's action was "impulsive."
>
> Mr. Floyd testified that he was aware of the potential impact to himself for submitting responses prepared by Mr. O (see Tr. 26,660 and Tr. 26,667-68) and he did not rewrite the work performed by Mr. O by copying it in his own handwriting. See Tr. 26,661. Rather than being a case of

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contention that Judge Smith's views arose from no extrajudicial source, but instead were "based upon judgements he had made in the adjudicatory proceeding." UCS Motion at 7. Similarly, the Commonwealth expressly observes that Judge Smith's views in the Floyd letter are "based solely on his judicial role in evaluating Mr. Floyd's testimony at the NRC hearings." Commonwealth Motion at 5.

But the important point is that, whether or not the portrayal of Floyd was based on extrajudicial sources of information, and whatever the propriety or wisdom of Judge Smith's plea for leniency, it has no impact on the remanded hearing, prejudges no issues and exhibits no bias toward any party.

Movants charge that Judge Smith's letter seeking leniency for Floyd violated Canon 2 of the Code of Judicial Conduct,

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"personal ambition", Mr. Floyd testified that his reason was his personal safety and the safety of his family while driving the next day on vacation, stating, "I let my family come before my job that night." Tr. 26,661.

Judge Smith could certainly conclude that Mr. Floyd's actions were not motivated by "personal ambition." Mr. Floyd had significant competing interests for his time during the period he had reached the deadline to turn in the exam -- post-accident work at TMI-2 and his family. Tr. 26,661 and Tr. 26,662. See also Tr. 23,725 and Tr. 23,762-63). Judge Smith, from the record of the proceeding, certainly had sufficient foundation for forming an opinion, particularly when reviewed in light of Mr. Floyd's awareness of the potential consequences of his action, that Mr. Floyd placed the requirements upon him arising out of the then current status of TMI-2 and the needs of his family ahead of his own self interest.

which forbids a judge to testify as a character witness.13/ They then argue that conduct in violation of a Canon so taints the proceedings as to mandate recusal, but, not surprisingly, they offer no authority in support of this proposition. The only Canon relating to disqualification is Canon 3C, and it does not cite violation of any other Canon as conduct warranting disqualification. The case law is clear that violation of a Canon is irrelevant to the disqualification question unless the conduct in question is encompassed by Canon 3C. In re Corrugated Container Antitrust Litigation, 614 F.2d at 968 (violation of Canons 3A(6) and 3B(2)); United States v. Haldeman, 559 F.2d at 134 n.306 (violation of Canon 3A(6)).

III. Judge Smith's Remarks Concerning the Treatment of Husted and G and H

The Commonwealth and UCS cite as a basis for disqualification remarks by Judge Smith in the course of the remanded training hearing relating to the treatment of Mr. Charles Husted, who at the time of the earlier cheating hearing was a licensed operator and training instructor, and of Messrs. G and H, both former reactor operators.

13/ Licensee's counsel has been unable to find case law or other legal opinions on the applicability of this canon to presentencing advice as opposed to character testimony in court prior to conviction. However, in each case, very different considerations obviously are involved.

In its initial cheating decision the Board had found that Husted had a poor attitude toward, and had been uncooperative with, the NRC investigation into possible cheating incidents and had given incredible testimony before the Special Master in explanation of his behavior. While the Board condemned Husted's attitude and behavior, it did not recommend that he lose his license or that he be removed from his position as a training instructor. It did require that Licensee monitor closely Husted's future performance in his job as a training instructor. The Board also found that G and H had both cheated on Company-administered requalification examinations and recommended that Licensee suspend each of them for two weeks without pay. It did not recommend removal of their operator licenses.

The Commonwealth appealed the Board's decision, including the Board's failure to remove Husted and G and H from their positions. The appeal was withdrawn on the basis of a settlement agreement between Licensee and the Commonwealth in which Licensee agreed that Husted, G and H would no longer be allowed to operate TMI-1 and that Husted would no longer serve as a supervisor of licensed reactor operator training.14/

Judge Smith's comments on the treatment of Husted, and to a lesser extent G and H, reflect both his view that these

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14/ Licensee subsequently promoted Husted to be the supervisor of nonlicensed operator training. The Appeal Board disapproved of this promotion and directed as a license condition that Husted be removed from any supervisory duties in the training of either licensed or nonlicensed operators.

individuals had been treated unfairly, possibly to the point of depriving them of due process, and his criticism of both the Licensee and the Commonwealth for the stipulation which resulted in their loss of operator licenses.15/ They reflect in addition a deep-seated concern that NRC license proceedings might be used as a basis for unfair actions outside of the proceeding, resulting possibly in a loss of respect for NRC licensing proceedings or even in resentment among plant personnel which might interfere with safe operation of the plant. Tr. 32,317-18; 33,058-86. One need not agree with Judge Smith's conclusions on fairness to the particular individuals involved to acknowledge that concern for fairness and due process is both a natural and a desirable trait in a judge and lawyer.

It is true that Judge Smith is not charged in this proceeding with protecting the interests of Licensee's employees. Nevertheless, his aversion to seeing their rights trampled in the course of these proceedings is a policy concern of a sort commonly held by judges. A judge cannot and should not be expected to hold no views of this kind.

It has long been recognized that "philosophic or professional attitudes or similar generalized mental attitudes do not constitute disqualifying bias." Long Island Lighting Co.

15/ Concern over the question of whether Mr. Husted was deprived of due process is not peculiar to Judge Smith. The Commission itself has evidenced a similar concern by requesting parties to the TMI-1 restart proceeding to brief the due process question. CLI-84-18, 20 N.R.C. 808, 810-11 (1984).

(Shoreham Nuclear Power Station, Unit No. 1), 4 A.E.C. 441, 446 (1970). Judge Smith's desire to protect the interests of Licensee's employees stems from this sort of philosophic or professional attitude. It is not grounds for disqualification unless his mind is "irrevocably closed" on the issues presented in this case. Southern Pacific Communications Co. v. AT&T, 740 F.2d 980, 991 (D.C. Cir. 1984); see also Hortonville Joint School District No. 1 v. Hortonville Education Assn., 426 U.S. 482, 493 (1976).

UCS's attempt to recharacterize Judge Smith's policy views into a prejudgment against any outcome to the hearing which would have an adverse impact on Licensee's employees will not be approved is a rhetorical chimera. Thus, for example, in Southern Pacific, the trial judge's views that AT&T's telephone monopoly was in the public interest and that the antitrust laws did not and should not apply to AT&T could be equated to a factual prejudgment that no remedy for AT&T's anticompetitive conduct was warranted. Nevertheless, both the court and the appellant recognized that the judge was not guilty of prejudging the factual issues in the case. Id. at 990.

Movants argue that Judge Smith's statements would at least lead a reasonable observer to believe that he had prejudged some of the issues raised in these proceedings. Again, however, it must be stressed that Judge Smith's views stem from his analysis of the evidence advanced in the hearings and not from any extrajudicial source. Moreover, his words would not

generate the required "firm impression" of prejudgment in such an observer. Commonwealth Edison Co. (LaSalle County Nuclear Power Station, Units 1 & 2), ALAB-102, 6 A.E.C. 68, 71 (1973), rev'd CLI-73-8, 6 A.E.C. 169 (1973).

The Commonwealth and UCS seek disqualification on different grounds. The Commonwealth sees Judge Smith's remarks as evidence of partiality and bias against the Commonwealth. The fact is that, as evidenced by his questioning of Licensee's witness, Dr. Long, Judge Smith was no more critical of the Commonwealth than he was of Licensee for entering into the stipulation. Tr. 32,318-22. Additionally, his remarks had nothing to do with issues now pending before the Board and do not reflect bias toward any party with respect to those issues. There is nothing in Judge Smith's remarks to suggest that he will not decide the issues currently before the Board with complete impartiality.

UCS does not argue that Judge Smith has shown bias toward UCS, nor are there any grounds for such argument.16/ Instead, UCS argues that his "obsession" with fair play toward individuals results in a "bias" that will prevent him from making decisions or imposing license conditions, otherwise justified by the facts, which might result in what he believes to be unfair treatment of reactor operators.

16/ UCS does not have standing to seek disqualification based on alleged bias to another party. Puget Sound Power & Light Co. (Skagit Nuclear Power Project, Units 1 & 2), ALAB-556, 10 N.R.C. 30, 32-33 (1979).

To begin with, UCS's speculation is not justified by Judge Smith's remarks. Judge Smith did express concern over actions which he considered unfair which were taken as a result of the restart hearing but outside that hearing. He also indicated that if the Board had known of such actions in advance, the Board might have imposed different conditions or taken other actions. Tr. 33,088-90. He further requested the parties to advise him whether further actions outside the remanded proceeding were planned with respect to Licensee personnel because it could affect the conditions the Board might impose and the results it might come to. Tr. 32,212-13; 33,097. However, it is understandable that a Board might wish to adjust its decision to settlements reached by parties on contested issues. It is understandable that a Board might wish to be aware of the use parties intend to make of findings of fact reached by the Board so that the Board's decision is written and therefore construed by the parties and the public in the manner it was intended by the Board. In any event, there is no basis whatsoever for concluding that Judge Smith would not vote to impose any condition which was justified by the record and necessary in the interest of public health and safety.

In any event, observations of a judge on a matter of law or policy which may be inconsistent with the position of one of the parties are not grounds for disqualification. Bias as a basis for disqualification means personal bias against a party. Even if Judge Smith's remarks are viewed as a prejudgment on

matters of law and policy, this is not a basis for disqualification. See Ass'n of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1171 (D.C. Cir. 1979), cert. denied, 447 U.S. 921 (1980). If UCS believes that the Board's forthcoming decision on the remanded training issue fails to impose conditions which UCS believes are justified by the record, its proper remedy is an appeal after the facts have been developed and the Board's decision is known, not disqualification of a judge on the basis of speculation that he may commit legal error.

IV. Additional Arguments by Movants

TMIA asserts that Judge Smith should be removed "for the pervasive bias and prejudice he has demonstrated on the record in this proceeding." TMI [illegible]otion at 14.17/ Furthermore, TMIA

17/ Most of TMIA's complaints relate to occurrences during the hearing on the mailgram issue and a prehearing conference which preceded it. They are untimely and should be dismissed on that ground. A disqualification motion must be filed at the earliest moment after the moving party obtains knowledge of the facts on which it bases its disqualification claim; failure to do so amounts to a waiver of the objection. Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-101, 6 A.E.C. 60, 63 (1973). TMIA, however, does not even address this issue, presumably because it also bases its claim on other more recent occurrences. Yet Commissioner Palladino has stressed that courts will "scrutinize carefully any claim by a moving party that the motion's untimeliness should be excused because evidence forming the basis of the motion developed cumulatively. In such cases, courts will be particularly strict in assuring that the motion was filed at the earliest possible moment after the necessary information was obtained." Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), slip op. at 34 n.52 (Sept. 21, 1984) (unpublished), citing Duplan Corp. v. Deering Milliken, Inc., 400 F. Supp. 497, 510 (D.S.C. 1975).

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seeks the extraordinary remedy that the reopened proceeding on the mailgram and training issues, which is now complete, be reheard. TMIA Motion at 1.

Licensee denies that Judge Smith has demonstrated any bias toward TMIA, let alone "pervasive bias and prejudice." Rather, as discussed below, the instances referred to by TMIA reflect nothing more than rulings adverse to TMIA, occasional impatience by the Board with TMIA's failure to exhaust its argument or with TMIA's reargument of Board rulings, and in some instances admonishment by the Board for disrespectful and unprofessional behavior exhibited by TMIA's attorney.

Licensee also strongly opposes TMIA's extraordinary request that the completed portions of the remanded hearing be reheard. Licensee submits that TMIA is attempting to exploit improperly Judge Smith's letter and bootstrap into its motion for recusal a frivolous attack on the existing record -- particularly with respect to the Dieckamp mailgram issue upon which Judge Smith's letter has no bearing. TMIA offers no

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Indeed, TMIA's failure even to provide a reason for the untimeliness of its claims runs afoul of the requirement that, as a first proposition, any such late claim should include an explanation for the delay. See Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-757, 18 N.R.C 1356, 1363 (1983); Puget Sound Power and Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-556, 10 N.R.C. 30, 32 n.6 (1979) (citing "unexplained delay").

justification whatsoever for the relief it seeks; nor is there in any of the instances referred to by TMIA the slightest indication that TMIA has been prejudiced. TMIA's request that the remanded proceeding be reheard has no basis in law or fact and should be rejected.

TMIA first refers to statements made by Judge Smith on November 21, 1984 and January 2, 1985. TMIA Motion at 14. TMIA states that it joins in the Commonwealth's argument that these statements were not related to the subject matter of the proceeding. This argument, however, is simply false. In the statements made on November 21, 1984, Judge Smith was ruling on a motion by TMIA for sequestration. Although Mr. Dieckamp had already testified, TMIA asked that the sequestration order apply to Mr. Dieckamp and suggested that even his presence at the proceeding might have a chilling effect on other witnesses. Tr. 29,082. Judge Smith ruled that fairness demanded that a person accused of misconduct be permitted to attend the hearing in which his conduct was being adjudicated, absent some compelling demonstration of the need for sequestration.18/ Tr. 29,083; Tr. 29,091-93. His remarks also responded to TMIA counsel's insensitive reply that Mr. Dieckamp was not on trial (Tr. 29,083); in response to this remark, Judge Smith pointed out that the adjudicatory decision could indeed have a profound

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18/ TMIA again raises these remarks on pages 20-21 of its motion and callously suggests that Judge Smith had no business being concerned with the due process rights of individuals.

effect on an individual's career. Judge Smith's comments reveal no prejudice, but rather a real concern with fairness in the very adjudicatory proceeding he was conducting. Moreover, the suggestion now that Judge Smith's comments were not related to the subject matter of the proceeding is the type of representation by TMIA which has prompted objection by the parties and admonition by the Licensing Board.19/

With respect to Judge Smith's remarks on January 2, 1985, Judge Smith was examining Licensee's witness, Robert Long, on the substance of his direct testimony. Mr. Long's testimony addressed how Licensee had treated Mr. Husted (Long, ff. Tr. 32,202, at 16-18), a fact noted by Judge Smith at the outset of his Board examination (Tr. 32,318). Moreover, whatever criticism might be inferred from Judge Smith's questions was directed principally at Licensee and its witness. TMIA was not mentioned and the Commonwealth was mentioned only incidentally. See Tr. 32,318-19. Judge Smith's questioning was related to direct testimony in the training hearing and did not evince prejudice or bias against either TMIA or the Commonwealth.

TMIA next states that "Judge Smith attacked TMIA's witnesses on matters which were unrelated to the subject matter of the proceeding." TMIA Motion at 15. TMIA, however, refers

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19/ See, e.g., Tr. 27,573; 27,575-76; 27,961; 28,797-806; 28,835-57; Notification by Licensee of Intended Joint Mailgram Exhibit References and Deposition Stipulations (Nov. 27, 1984), ff. Tr. 30,105; and Tr. 30,319-23.

only to one witness -- David Gamble; and astonishingly, TMIA refers to Judge Smith's rulings on whether Mr. Gamble's testimony was relevant and probative. Licensee cannot conceive how statements made in this context are "unrelated to the subject matter of the proceeding."

Nor does the Board's evidentiary ruling evidence bias. Mr. Gamble's testimony as originally prefiled was in large part a general criticism of the NUREG-0760 investigation. Faced with motions to strike the testimony, TMIA first argued that the testimony was relevant to the weight the Board should give to the conclusions in NUREG-0760. Tr. 29,011. When the Board replied that it did not intend to rely on the conclusions in NUREG-0760 but would make its own conclusions, Tr. 29,015, TMIA changed tack and asserted that Gamble's testimony was really being offered as relevant to the weight to be assigned to NUREG-0760 interviews. Tr. 29,018. TMIA could not, however, identify any interviews that were individually deficient or any particular facts that were not elicited, and TMIA admitted that it intended to draw information from the interviews. Tr. 29,023, 29,033. Addressing this new argument, the Board stated to TMIA:

> [Y]ou are offering Mr. Gamble, it seems to me, as a general indifferent criticism, across-the-board as to the weight to be given all interviews. And to that, I just don't believe it is appropriate, reliable, or helpful.

Tr. 29,029.

> You haven't persuaded us. . ., because we still don't know what Mr. Gamble -- what you would make do with it. You are going to pick and choose what is reliable. We told you the standards that we would apply would be traditional standards. And that is, where we see a witness and we are convinced that the preponderance of the evidence favors the witness' point of view, then we would accept it even though it's inconsistent with a witness summary in the report. The witness summar[y] [of] factual data in this report is [not] binding on us when we have better evidence before us.

Tr. 29,034.

When TMIA's counsel then argued that some witnesses would not appear before the Board, the Board explained that Gamble's testimony would still not be helpful because it did not indicate which interviews might be defective.

> [W]e cannot tell you in advance what weight we give one over another. Mr. Gamble is not helpful. Mr. Gamble's testimony is rather naive and simple. And it's not instructive to us. He has a mechanical approach to how Boards weigh evidence I believe. So with that you have not made a case for Mr. Gamble's testimony.

Tr. 29,034-29,035.

Once again, it is obvious that Judge Smith's comments are addressing a matter in this proceeding -- the relevance and probativeness of a piece of testimony. That his ruling was adverse to TMIA does not indicate prejudice; and his remarks concerning Gamble's testimony merely indicate that the Board found that the testimony in question had no probative value.

TMIA argues that the next day Judge Smith "recognized the imprudence of his remarks." TMIA Motion at 15. The remarks to

which TMIA refers, however, do not indicate that Judge Smith believed his determination to have been in error. Rather, he expressed concern that his comments might be construed as deprecatory of Mr. Gamble. As Judge Smith stated:

> After we adjourned last night I became concerned that I may have been unfair to Mr. Gamble in my characterization of his testimony. I have reviewed the transcript and I believe that in fact I have been unfair.
>
> I disparaged in general terms his testimony calling it rather naive and simpl[e]. I don't think that is a fair comment. One, the testimony appears to me to be directed as an overall criticism of the investigation, and, as such, it is not as I characterized it.
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> My concern is the application of his view of it to this particular adjudication is not instructive to us because of the expressly limited nature of the issue.
>
> So I think it is unfortunate because Mr. Gamble has gone to some trouble to come forward and express his views, and that should not be discouraged by disparagement by any means. He should be encouraged to express his vie[w]s when he feel[s] that they are important, as he does. So for that we are appreciative.

Tr. 29,059 (emphasis added). Far from showing bias, the comments, which address a Board ruling, display considerable sensitivity to Mr. Gamble and the hearing process.

TMIA also states that later "Judge Smith again attacked Mr. Gamble, this time for what he perceived was Mr. Gamble's unethical or illegal failure to inform interviewees in the NUREG-0760 investigation of their Miranda rights." TMIA Motion at 15. TMIA's pejorative characterization of the exchange, however, is refuted by the record.

Mr. Gamble had testified that his role as a member of the NUREG-0760 investigative team was to protect the interest of the Department of Justice. The Staff witness, Norman Moseley, however, had described Gamble's role as one to prevent encroachment in criminal matters -- to prevent inquiry into potentially criminal matters. Tr. 29,828-29. TMIA's counsel referred Mr. Gamble to Mr. Moseley's testimony and asked if it were correct. Mr. Gamble explained that his role was not to limit the investigation but rather to ensure that areas of the investigation whose result might have value for criminal purposes were pursued and conducted in the best manner, in order that the results could be used for criminal prosecution. Tr. 30,682-83. At this point, Judge Smith perceived an inconsistency in the logic of Gamble's testimony and therefore sought clarification. Judge Smith asked how information developed without the interviewees having been advised of this criminal aspect of the investigation could be used for criminal prosecution. Tr. 30,688. Judge Smith explained that one could reasonably infer from the assignment of an OIA investigator to the I&E team that the purpose of the assignment was in fact to prevent an inquiry that might frustrate a subsequent Department of Justice investigation because of due process considerations. Tr. 30,869. Judge Smith was clearly pursuing what he perceived to be a contradiction in Gamble's testimony. As Judge Smith further explained:

> [Mr. Gamble] testified earlier that he was not there [as --] [a]s a matter of fact, he objected to the language that he was a working member of the [investigative] group and he wanted to make clear that no, he was not a working member of the group for an I&E enforcement action. He was there as a criminal investigator for the Department of Justice, and that was his only purpose there and that's all he did. And now somehow it is retreated, that he was not there to expand it beyond enforcement purposes, not to do anything inconsistent with that, and yet the two ideas are mutually exclusive.

Tr. 30,695. Judge Smith did not, however, permit further inquiry because he felt the inquiry had digressed. Id.

TMIA claims that Judge Smith admitted that his questioning of Mr. Gamble was improper. TMIA's Motion at 16. However, Judge Smith merely indicated he had digressed, having been intrigued by the legal issue. Judge Smith did not state that his questioning was improper, but rather stated that his purpose in its initial pursuit was improper. See Tr. 30,767. That Judge Smith initially pursued a legal issue because it intrigued him hardly shows bias or prejudice. Moreover, Judge Smith stated quite clearly that the questioning had relevance, id., although he ruled that it had been sufficiently pursued. Tr. 30,770.

TMIA next refers, in particularly untimely fashion, to the Board's ruling during a prehearing conference on November 9, 1984 on the admissibility of a deposition of former Commissioner Bradford. TMIA states that Judge Smith "attacked the motives of TMIA" in calling Commissioner Bradford. TMIA's Motion at 17.

The Board, however, was not "attacking the motives of TMIA." It was considering whether Commissioner Bradford's appearance, as a witness on behalf of TMIA, would violate the Ethics in Government Act. It was the Board's conclusion that the Ethics in Government Act embodied a principle that former Government officials should not be permitted to act as witnesses where their sole value to their sponsor was the impression and influence that their status would have on the adjudicatory tribunal. See Tr. 27,842-44. The Board therefore carefully scrutinized Commissioner Bradford's testimony for significant factual testimony, but as TMIA itself explained, Commissioner Bradford's testimony was being offered only for his opinion whether Mr. Dieckamp had made sufficient inquiry into the facts prior to sending his mailgram and whether the type of information that existed at the time the mailgram was sent constituted evidence. Tr. 27,836-37. Given that those were both legal questions which TMIA could argue and the Board decide, the Board, after repeatedly seeking justification for the admission of the testimony from TMIA, ruled:

> [I]t is our view in looking at the entire package which you presented with respect to former Commissioner Bradford that the principal purpose and perhaps the only purpose we can infer from your package is that you are offering him because of his status. That reason flies right in the face of the Ethics in Government Act.

Tr. 27,841-42. See also Tr. 27,851.20/ TMIA subsequently

20/ In its Motion, TMIA states that it has never represented or implied that it intended to call former Commissioners be-

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sought and was denied interlocutory review of this ruling. ALAB-791, 20 N.R.C. ___ (slip op. December 3, 1984)

With respect to the November 9, 1984 Prehearing Conference, TMIA states that Judge Smith "also implied that TMIA was somehow deceiving the two former Commissioners whom TMIA proposed to call of the purpose and use to be made of their testimony." TMIA's Motion at 17 (emphasis added). TMIA's artfully-worded suggestion is unfounded.

The Board was ruling on a motion to subpoena Dr. Gilinsky. It was, therefore, inquiring into the relevancy of the testimony that Dr. Gilinsky might give, as outlined in three vague sentences on page four of TMIA's Motion for Leave to Present Testimony of Victor Gilinsky on Dieckamp Mailgram Issue Without Prefiling Written Testimony (Nov. 1, 1984). TMIA, however, declined to elaborate on the testimony that Dr. Gilinsky might provide and therefore failed to make a showing of its relevancy and probative value.21/ Judge Smith's entire statement, of which TMIA quotes but a portion, simply indicates the Board's

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cause of their status. TMIA Motion at 17 n. 9. The Board did not say that TMIA had but only that the Board, when given no other explanation, could infer no other purpose. Significantly, TMIA has never denied that the status of the former Commissioners was instrumental in their decision to call these individuals as witnesses.

21/ In this regard, TMIA states in footnote that the Board "accused" TMIA of "withholding information." TMIA Motion at 18 n. 10. This is simply a mischaracterization of the Board's ruling. See Tr. 27,857-69.

inability to determine (and TMIA's failure to show) whether Commissioner Gilinsky possessed relevant and probative information.

> JUDGE SMITH: I would like to add to the Board's consideration with respect to Dr. Gilinsky and the factual area. We are not comfortable that Dr. Gilinsky has been fully informed concerning the use that is being made with your views of his views.
>
> We were taken with the total lack of information that former Commissioner Bradford had about the issues as to which he was being deposed and we are not confident that given the accuracy of your statements one through three, that Dr. Gilinsky is thoroughly informed as to what the narrowness of our issues are and what we are allowed to do. That is part of the problem.
>
> We cannot read with any sense of certainty or even of being reasonably assured that Dr. Gilinsky is sitting out there with information which would be important to our determination. If we had that feeling, it would be a different matter but we don't have that feeling. We don't have confidence, any confidence, I do not have any confidence in your presentation.

Tr. 27,870. No "deceit" was "implied."

TMIA states that Judge Smith "attacked" TMIA for the position it had taken on the training issue "past and currently." TMIA continues by stating that Judge Smith attributed to TMIA and Louise Bradford responsibility for poor attitude and morale at TMI. TMIA Motion at 18.

With respect to the statements to which TMIA refers, those statements were again made in the context of an evidentiary ruling. TMIA had proffered as an exhibit a document which

reflected GPU Nuclear's concerns after the cheating proceeding about how to encourage people to cooperate with inquiries and come forward with information. TMIA Training Exh. 6. See Tr. 32,384-85. An attachment to the document contained brainstorming session comments concerning morale problems created by the 1981 cheating proceeding. In ruling on the admissibility of the document, the Board was faced not only with multiple hearsay, Tr. 32,393, but also with a document of dubious relevance and probative value. The Board was particularly perturbed by TMIA's claim that the morale problem created by the cheating proceeding evidenced that management was not responsive to operators' needs during training. See Tr. 32,395. The Board was concerned that TMIA's argument was circular -- that an attendant but unfortunate impact of the adjudicatory proceeding on cheating was being used by TMIA as self-fulfilling prophecy. Such possibility quite properly raised questions of fairness. The Board's ruling, however, ultimately turned on the infirmities in the document's reliability. Tr. 32,401-02.

The Board's statements made no reference to TMIA's past "position" on training, and the Board attributed the morale problem mentioned in TMIA Training Exh. 6 not to TMIA alone, but to the cheating proceeding in general, in which TMIA was a participant. The Board's concern with TMIA's argument did not evidence bias, and the wholly separate evidentiary basis for the Board's ruling negates any claim that TMIA might have been prejudiced.

TMIA continues on page 20 of its Motion by asserting that Judge Smith has attempted to prevent TMIA counsel from conferring by admonishing them not to confer during the hearings. TMIA's assertion is deceptive and misleading. As the citation to which TMIA refers reveals, Judge Smith's "admonishment," to the extent it might be construed as such, is prompted by TMIA's counsel talking while being addressed by the Board. Tr. 30,958. TMIA's lone citation, however, does not reveal the true extent of the consistent pattern of disrespectful behavior that was displayed by TMIA in this proceeding. TMIA on a number of other occasions laughed at the Licensing Board or at witnesses or talked when being addressed by the Board. The Board admonished TMIA for such conduct at least twice off the record and a number of times on the record. See Tr. 28,298-99; 29,039; 29,798; 30,150; 30,506; 30,687; 30,958; and 31,708.

TMIA next states that Judge Smith has attacked TMIA counsel when she was attempting to put objections on the record, and cites Tr. 31,707-10. TMIA Motion at 20. Judge Smith's comments at these pages do not constitute such an attack. At page 31,707 to 31,708, Judge Smith does admonish Ms. Bernabei, but for making sarcastic comments while Judge Smith was instructing the parties to file proposed findings. On page 31,712, after hearing TMIA's objections to a format for proposed findings offered by Licensee, Judge Smith permits TMIA to

organize its proposed findings in whatever manner it wishes.22/

On page 20 of its Motion, TMIA also argues that Judge Smith's bias was manifest in the prior partial initial decisions on management issues. TMIA offers no explanation why these decisions evince bias, nor any explanation why such untimely assertions should be revived literally years later. As TMIA acknowledges, such claims were briefed in TMIA's exceptions to the prior decisions. Their rejection is res judicata.

Additionally, TMIA claims that on several occasions Judge Smith "signaled to witnesses the correct answers to questions so that their answers would appear credible." TMIA's Motion at 22 (emphasis added). TMIA's use of the word "signaled" is once more deceptive and misleading, and the implication is false. Judge Smith "signaled" to nobody. After being informed by Licensee at a bench conference that a witness's answer (to quite a minor question, whether the witness had confirmed a letter on his own initiative) might be incorrect, Judge Smith again put the question to the witness. The witness admitted that his recollection might be faulty, but stated that he did not remember anybody asking him to confirm the letter. Tr. 31,454-60. Judge Smith did the same when another witness did

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22/ TMIA's misperception of Judge Smith's comments is obvious from the transcript. In fact, Judge Smith's views on the format for findings were expressly intended to aid the parties, including TMIA, and to ensure no party's views were overlooked by the Board in preparing its decision. See Tr. 31,708-10. See also Tr. 33,536-37.

not initially remember being asked to confirm a similar letter.23/ Tr. 31,562-67. Judge Smith's questions in both instances were responsible actions designed to complete and preserve the integrity of the record.

In sum, none of the specific instances referred to by TMIA, individually or cumulatively, indicate pervasive bias or prejudice. To the contrary, they show no more than Judge Smith's reasoned rulings on matters in the proceeding and concern for an orderly and fair proceeding. Moreover, nowhere in its motion does TMIA indicate any manner in which it has been prejudiced or indicate the slightest need for the remanded hearings to be reheard.

Movants also allege that Judge Smith's actions create at least an appearance of partiality, mandating recusal under 28 U.S.C. § 455(a).

As demonstrated above, Judge Smith's alleged prejudice does not stem from any extrajudicial source. It follows that the objective "appearance of partiality" test is not the proper standard by which to evaluate the propriety of Judge Smith's actions. South Texas evidences that the proper test under such circumstances is only whether the court finds that pervasive bias has infected the entire proceeding. The evidence in the present case falls far short of establishing pervasive bias.

23/ TMIA states that Robert Boyer testified that he understood he made a mistake when he reviewed his questionnaire and spontaneously sent his corrections to Licensee's licensing manager. TMIA mischaracterizes the testimony. See Tr. 31,557-67.

Even if the "appearance of partiality" test were applicable here, Movants have failed to establish that a reasonable man possessing all the facts would conclude that Judge Smith is biased in favor of the Licensee or against any of the Movants. See Fredonia Broadcasting Corp. v. RCA Corp., 569 F.2d 251, 257 (5th Cir. 1978).

The principal piece of evidence advanced by Movants in support of their allegation that a public perception of bias has resulted from Judge Smith's actions is an editorial appearing in the Philadelphia Inquirer on January 10, 1985. TMIA Motion, Exhibit 3. Admittedly, an editorial may have the effect of swaying public opinion, but the test under section 455(a) mandates an inquiry governed by a standard of reasonableness. Application of the "appearance of partiality" standard must turn on the perceptions of a fair-minded individual possessing the material, publicly available facts concerning a proceeding, and not the perception of a public swayed by editorial opinion.24/ The drafters of the recusal statutes could

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24/ C.f. Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), slip op. (September 21, 1984) (unpublished) where, in discussing public perceptions formed on the basis of allegations in the disqualification request itself, Commissioner Palladino stated:

> "That is not to say that an observer who did not know the facts, and who was not aware of the circumstances, might not be swayed by the mass of allegations in the disqualification request, if that observer were to accept those allegations at face value. But the standard for disqualification is not how artfully a

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not have meant to bestow upon a single editorial writer the power to bring about the recusal of judges at will. Indeed, Canon 3A(1) of the Code of Judicial Conduct explicitly counsels that a judge "should be unswayed by partisan interests, public clamor, or fear of criticism."

V. Discretionary Commission Action

In the final section of its Motion, TMIA states that "regardless of applicable legal standards" the Commission may order recusal as an exercise of its discretionary supervisory authority over pending adjudications. TMIA Motion at 23. The Commission should exercise that authority in this case, TMIA argues, to recover the legitimacy of the adjudicatory process. Id. at 24. This is necessary, according to TMIA, to restore public confidence in the integrity and impartiality of the licensing process which has been lost due to Judge Smith's actions.

Licensee agrees that the integrity and impartiality of the licensing process is of fundamental importance. The Three Mile Island Unit 1 Restart Proceeding is unique in its length and in its high public profile and in its importance to the

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> motion can distort the public record; rather, the standard relates to reality, and to the perception of reality by an informed, disinterested, reasonable observer." Id. at 28 (emphasis added).

participants as well as the future of nuclear regulation. The hearing transcript now spans more than 33,000 pages. The proceeding has been the subject of literally thousands of public comments, news articles and expressed political interest. At stake is the future of a company, its thousands of employees and hundreds of thousands of ratepayers and stockholders, and the confidence of an industry and public that is viewing this decision-making process. It is crucial that the independence, impartiality and integrity of the process be preserved under these circumstances, taking into account the interest of all parties.

TMIA rests its position for discretionary removal of Judge Smith on grounds that the citizens of Pennsylvania and their elected representatives have lost confidence in Judge Smith's impartiality, citing a Philadelphia Inquirer editorial and a Wall Street Journal article. TMIA Motion at 24. Neither of these sources in fact supports TMIA's position. Nor should either of these articles provide grounds for removal of Judge Smith.

The Wall Street Journal article of January 5, 1985, reports on Judge Smith's letter to Judge Rambo concerning Mr. Floyd. There is no report on the views of the citizens of Pennsylvania regarding Judge Smith. In fact the only views expressed in the article (other than by Judge Smith) are those of two of the three Movants in this case. The Philadelphia Inquirer editorial citing Judge Smith's letter to Judge Rambo

characterizes the NRC proceeding as a "sham perpetrated on a public that believed the NRC was serious about determining whether Unit 1 was safe."25/ To read this editorial and observe the reliance placed on it by TMIA, one might believe that an impartial, objective media source which otherwise viewed the NRC process as fair and competent was particularly troubled by Judge Smith's letter and felt compelled to criticize NRC's process because of it. Nothing could be more out of sorts with reality. Judge Smith's letter did not first prompt the Inquirer to its characterization of the NRC process as a "sham". Earlier this same year the Inquirer stated:

> For five years, the NRC has engaged in investigations and hearings designed to convince the public that it is addressing the problems [at TMI] seriously. That activity has been an outrageous sham.

It can hardly be said that the Philadelphia Inquirer editorial on Judge Smith's actions represents any special outcry. To the contrary, it rather appears to be business as usual for the Inquirer whose position was already well established.

The Commission should not delude itself into believing that removal of Judge Smith will enhance credibility or will silence critics of the agency or of the TMI-1 Restart Proceeding. To the contrary, removal will be viewed simply as an admission by the Commissioners of an improper ingredient in this five-year-long proceeding which taints the entire process.

25/ Philadelphia Inquirer, January 10, 1985, at 20-A.

TMIA's motion recounting that party's views that Judge Smith was biased throughout the proceeding serves notice of how removal would be viewed and subsequently characterized.

The Commission should be particularly judicious in its consideration whether to remove Judge Smith -- not despite the fact that one of the Movants represents the Commonwealth of Pennsylvania and the fact that a large newspaper editorially challenges NRC, but rather because of those factors. The Commission should strive to make its adjudicatory process as fair and as impervious to political pressures as feasible. An NRC judge should not feel constrained in criticizing the action of a political entity (any more than any other party's actions) lest he be removed due to subsequent political pressures. Nor should newspaper editorials manage the adjudicatory process. At the heart of a fair adjudicatory system is a principled, independent and fair-minded judge whose actions must in turn be judged fairly in keeping with established legal standards and principles and independently from political pressures. This is particularly the case in a proceeding as widely viewed and chronicled as the TMI-1 Restart Proceeding. Consideration for the integrity, impartiality and independence of the process should weigh heavily in any decision whether to remove a judge, and particularly so in this case. Licensee believes these factors support Judge Smith's retention.

VI. Conclusion

For all of the above reasons, Licensee requests that the Motions by the Commonwealth, UCS and TMIA to disqualify Administrative Law Judge Ivan W. Smith be denied.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

George F. Trowbridge, P.C.
Ernest L. Blake, Jr., P.C.

Counsel for Licensee

Dated: January 24, 1985

March 6, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
METROPOLITAN EDISON COMPANY	)	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 "Licensee's Response to Commission Order Dated February 20, 1985," dated March 6, 1985, were served upon those persons on the attached Service List by deposit in the United States mail, postage prepaid, or where indicated by an asterisk (*) by hand delivery, this 6th day of March, 1985.

George F. Trowbridge, P.C.

Dated: March 6, 1985

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