UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

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UNION OF CONCERNED SCIENTISTS OPPOSITION TO MEMORANDUM AND ORDER DENYING MOTIONS TO DISQUALIFY

On February 20, 1985, Judge Ivan Smith denied motions made by the Commonwealth of Pennsylvania, TMIA and UCS that he disqualify himself from presiding in this proceeding. The NRC Staff has also called for Judge Smith's recusal. The Commission ordered the parties to respond directly to it, rather than to the Appeal Board, within five days.

UCS attaches and incorporates hereto "Union of Concerned Scientists' Motion to Disqualify Administrative Law Judge Ivan Smith and Answer to the Commonwealth's Motion to Disqualify," January 14, 1985. Rather than repeat the arguments contained therein, the instant pleading will supplement it by responding to the most important of Judge Smith's arguments.

1. It is inaccurate to suggest that the moving parties do not sufficiently understand the demands placed on the TMI operators.

Judge Smith begins the substance of his decision with a section labelled "Historical Perspective." Memorandum and Order Denying Motions to Disqualify," February 20, 1985, pp. 5-9 (hereinafter "Memorandum"). After describing the

"compartmentalization" of issues which has characterized this case, Judge Smith expresses the concern "that none of the Counsel for movants fully appreciate how much is asked of the men and women who would operate TMI-1." (Id. at 8).

On the contrary, one of UCS's major concerns throughout this proceeding has been precisely this: that the design and procedures of TMI-1 place unwarranted and undue burdens on its operators, to the potential detriment of safety. See e.g. Union of Concerned Scientists Comments on Report of The Special Master May 18, 1982, particularly p. 18; Union of Concerned Scientists Comments Subsequent to Preliminary Hearing of March 18, 1982, Concerning the "Martin Report," March 26, 1982, particularly pp. 9-10; Union of Concerned Scientists' Brief on Exceptions, March 12, 1982, April 14, 1982, pp. 11-12, 19, 16, 45, 65-67, 71-75, 100-101. That is one reason why, in our view, operator training is such a crucial issue in this case. ALAB-772, 19 N.R.C. 1193, 1208, 1239, n. 61, 1279. Judge Smith is well aware of this. While UCS General Counsel was not present in Harrisburg during the remanded hearings, UCS was represented there by her law partner. All decisions regarding conduct of the case were made jointly, discovery was undertaken jointly and all written pleadings have likewise been collaborative efforts. UCS General Counsel has also been the author of the lengthy submissions to the Commission in July and October, 1984, detailing at length the state of the record and extra-record material in this

proceeding. There has been no discontinuity in UCS's case or in its representation. It is UCS's recognition of the demands placed on these operators -- which are, in our opinion, unjustifiably exacerbated by confusing procedures and poor design -- which underlies UCS' position.

2. The letter to Judge Rambo is extrajudicial

Judge Smith argues that the portions of the letter to Judge Rambo commenting on Mr. Floyd's conduct were "entirely derived from the official record." Memorandum, p. 21. While the bare facts concerning the events surrounding Mr. Floyd's cheating do stem from the record, the opinions put forward by Judge Smith regarding Mr. Floyd's motivations and character and the need for deterrence are speculations which do not stem from the record.[1] It is precisely these judgements which constitute the operative portions of the letter. Judge Rambo is fully aware of the bare facts of the case; Judge Smith's views are clearly offered in the context of indicating that extenuating circumstances exist militating against a strict sentence. In that context, Judge Smith offers two opinions: first, that Mr. Floyd acted impulsively and was not motivated by personal ambition, second, that there is no need for a strict sentence to deter similar conduct in future. These opinions are speculation that is not supported by the record.

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[1] As Judge Smith notes: "It is important to recall that Mr. Floyd's conduct, as such, was never an issue before the Licensing Board." Memorandum, p. 19.

On the contrary, with regard to Mr. Floyd's motivations and character, the record is clear that Mr. Floyd had months to do his last-chance take-home exam and never took it home to do it. Indeed, he had then been under an obligation for almost two years to demonstrate proficiency in several areas where his test scores were under 80%.[2] Because he did not attend clssses, he was given take-home exams. He never took them home despite being granted yet another grace period. 16 N.R.C. at 344. Instead, on the very day that he would have finally been suspended from licensed duties, with his vacation scheduled to start the next day, Mr. Floyd had a subordinate complete portions of his examination. Id. at 344-348.

Such conduct can not fairly be described as "impulsive." While the decision to cheat may have been made at the last minute, Mr. Floyd's cheating stems from a course of conduct of two years duration of disregarding his obligations, which he could have fulfilled at almost any time during that period. Moreover, the record does not contain support for Judge Smith's related opinion that Mr. Floyd "neglected his examination responsibilities out of a misguided but altruistic effort to attend to matters of perceived greater urgency." Mr. Floyd was

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[2] Mr. Floyd had demonstrated deficiencies in a total of four sections of the so-called "Fundamentals and System Review" on two separate examinations in 1977 and 1978. 16 N.R.C. at 344. This performance is at odds with Judge Smith's opinion as expressed to Judge Rambo that "he could have passed easily without deception."

excused from attending classes, which freed him to attend to matters of perceived greater urgency. He had only to take his exam home and complete it on his off-duty hours. While perhaps an annoying inconvenience, a take-home exam can not be seen as posing any conflict with Mr. Floyd's activities on-site, no matter how urgent. His failure to complete his exam in the months provided him was in no sense impulsive nor was his conduct altruistic. Indeed, it confirms the view of Mr. Arnold regarding Mr. Floyd's "poor judgment" in various areas. 16 N.R.C. at 346.

Nor does Judge Smith's opinion that a strict sentence is not needed for deterrence stem from the official record. There is no evidence on the record concerning the value of or need for a strict sentence in this case, with the possible exception of the evidence indicating that neither Mr. Floyd nor other TMI operators considered Mr. Floyd's reassignment after being caught cheating as disciplinary. 16 N.R.C. at 346-347 (¶ 2282). That evidence does not support Judge Smith's conclusion.

In sum, with regard to the two crucial opinions concerning Mr. Floyd's conduct offered by Judge Smith to Judge Rambo as relevant to sentencing, neither stems from the public record. They are therefore extrajudicial.

3. Judge Smith's actions have been inconsistent with the Code of Judicial Conduct.

Canon 2 B provides as follows:

> B . . . [A judge] should not lend the prestige of his office to advance the private interests of other; . . .He should not testify voluntarily as a character witness.

Judge Smith argues that his letter "was neither testimony nor did it relate to Mr. Floyd's character." Memorandum, p. 24. On the latter point, we do not see how it can be argued that the letter does not relate to Mr. Floyd's character. The purpose of the third paragraph is to relay Judge Smith's view that Mr. Floyd is hard-working, motivated in his bad moment by impulse rather than personal ambition, even "altruistic" and dedicated. In other words, that while he had a lapse, he is overall of good character and therefore, "leniency is appropriate."

Judge Smith argues that "the important test is whether I have employed the prestige of my office to advance Mr. Floyd's private interests." Memorandum, p. 24. His negative response to that question is based on two premises that cannot withstand scrutiny.

First, Judge Smith states that "no prestige of office was involved", Id. at 25. Common sense tells us, on the contrary, that Judge Smith's letter was solicited by Mr. Floyd's attorney in the hope that Judge Rambo would give it consideration precisely because of the "prestige" of Judge Smith's position. Second, Judge Smith argues that the letter was not sent to advance Mr. Floyd's private interest. While we understand that, as in any case, the ramifications of a sentence may extend beyond the individual directly affected (indeed, one of the purposes of any sentence is to deter others), the fact is that the person whose private interest will be directly affected by Judge Rambo's sentencing decision is Mr. Floyd. Thus, Judge Smith's letter presents a conflict with the Code of Judicial Ethics.

4. The Memorandum and Order confirms that Judge Smith has determined that he will not make any decisions, however justified by the facts, that might result directly or indirectly in what he believes to be unfair treatment of reactor operators.

UCS argues in its motion that Judge Smith has demonstrated an unshakeable unwillingness to take action which might, directly or indirectly, result in action adverse to individual operators although the evidence may require such a decision. UCS Motion to Disqualify. . . . pp. 7-12. The NRC Staff concurs generally that this is the appearance which has been created. The Memorandum and Order provides further confirmation.

Judge Smith states that "the movants do not seem to understand why the Board is concerned about the perception of unfairness by the licensed personnel" (Memorandum, p. 38) and goes on to discuss in particular Mr. Husted and H. A strong charge is then made:

> Messrs. Husted and H never had such a hearing [before removal of their licenses] nor an opportunity for one; they were bargained away. They have not been treated in accordance with the law." Id, emphasis added.

The charge is not supported in this record. For one thing, as Judge Smith recognizes, GPU is entitled under the law to withdraw its sponsorship of a license. Id. at 38, n. 24. Moreover, the most that either man was entitled to under the law was an opportunity to request a hearing. Considering that both the Special Master and the Licensing Board concluded that H had cheated extensively and that his continued denials, under oath in testimony to the Special Master, were not truthful (See 16

N.R.C. 303-309), H's failure to request a hearing was eminently rational and in his own self-interest. He was given another job within GPU and the two-weeks pay for his original suspension was returned. UCS Training Exhibits 17-20, Tr. 31936. Under the circumstances, it must be concluded that he knowingly and wisely waived any right to a hearing.

The same can be said for Mr. Husted, a licensed operator instructor during the time of the cheating. It should be recalled that Mr. Husted first refused to answer the questions of the N.R.C. investigators, later claimed to have remembered relevant information, but continued to withhold information within his knowledge. 16 N.R.C. at 318-319. Both the Special Master and the Licensing Board found his answers to the investigator "not believable" and his continued testimony in the hearings similarly "incredibly inconsistent." Id. at 318-319. Judge Smith himself found: "if Mr. Husted is representative of the TMI-1 training department, his attitude may be a partial explanation of why there was disrespect for the training department and the examinations." Id at 319. However the Licensing Board imposed no sanction on Mr. Husted. Id. at 320.

Subsequently, the Commonwealth entered into an agreement with GPU under which Mr. Husted was removed from licensed duties. ALAB-772, 19 N.R.C. 1193, 1222 (1984). GPU then assigned Mr. Husted as Supervisor of Non-licensed Operator Training. The Appeal Board found both the Licensing Board's nonaction and the agreement insufficient in view of the evidence on this record and barred Husted from supervisory responsibilities for

training. Id. at 1224. He has since been assigned to the Nuclear Safety Assessment Department, where GPU believes his knowledge can be used "very advantageously." Long and Coe, ff. Tr. 32,202 at 18. Under these circumstances, Husted's failure to request a hearing was also obviously rational, and in his own self-interest.

While Judge Smith recognizes that his repeated remarks in the reopened hearings concerning Mr. Husted "may seem to be inconsistent with the Appeal Board holdings" (Memorandum, p. 42), he believes they were for an "appropriate purpose." Id. at 43. We can find no such appropriate purpose.[3] The fact that, even in this latest Memorandum, Judge Smith asserts without qualification the Mr. Husted and H were treated unlawfully is further evidence of his closed mind and his unwillingness to take action in this case, even if warranted, if the result might be directly or indirectly adverse to individual operators.

In this connection, Judge Smith raises a new issue: That something may have been lost by Mr. Husted's removal from licensed duties:

> What do we know about his replacement? What has been lost? What is the basis for assuming that safety has been improved by his dismissal from licensed duties? Memorandum, p. 39.

In fact, the qualifications and competence of GPU's corps of licensed operators and instructors is precisely the issue in the

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[3] Judge Smith states that the appropriate purpose relates to his responsibility to develop a complete and accurate record. Memorandum, p. 43. The issue is res judicata, as he acknowledges there is no responsibility to nor any purpose in developing a record on an issue that has been finally determined.

remanded training hearing and a great deal of evidence has been taken on the subject. The Licensing Board not only may but is obligated to resolve any doubts it may have about the competence of Mr. Husted's replacements as licensed operator instructors in that context. Any hearing requested by Mr. Husted would not have yielded information approaching the depth of that which is now before the ASLB on the subject of Judge Smith's safety concern; indeed it would not have dealt with the competence of his replacement at all.

Conclusion

As Judge Smith correctly notes, the current situation is uncomfortable for all of the parties involved. UCS does not question Judge Smith's assurance that he bears no personal animosity towards the parties. However, the Judge's actions and words, viewed in their totality, establish that he has reached prejudgment on issues central to this proceeding. He should therefore be disqualified.

Respectfully submitted,

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date: March 1, 1985

TMI OFFICE

January 14, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE ADMINISTRATIVE LAW JUDGE IVAN SMITH

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

UNION OF CONCERNED SCIENTISTS' MOTION
TO DISQUALIFY ADMINISTRATIVE LAW JUDGE IVAN SMITH
AND ANSWER TO THE COMMONWEALTH'S MOTION TO DISQUALIFY

The Union of Concerned Scientists moves that Ivan Smith disqualify himself from further participation on the Atomic Safety and Licensing Board presiding over the remanded proceeding with respect to training issues at Three Mile Island, Unit No. 1. This motion is based upon two developments, both of which involve matters that arose outside this proceeding and the jurisdiction of this Board:

1. In a letter of December 27, 1984, to U.S. District Judge Sylvia H. Rambo, Judge Smith urged leniency in the criminal sentencing of James Floyd, who had been convicted in connection with his having cheated on a company-administered licensing examination. In the next to last sentence of that letter, Judge Smith stated, "Deception in the future is very unlikely." This extrajudicial statement creates at least the appearance that Judge Smith has prejudged one of the factual issues of this remanded proceeding.

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2. Judge Smith's letter reflects a concern on his part that individuals may have been unfairly treated as a result of the TMI-1 restart proceeding, over which he has presided. Further statements that Judge Smith made during the remanded training hearing, but that relate to matters that occurred entirely outside the hearing over which he presided, reveal at least the appearance that Judge Smith has developed a bias and reached a prejudgment. In particular, Judge Smith's statements create the appearance that he may not reach findings urged by the parties and dictated by the evidence if those findings might adversely affect individuals in a way that Judge Smith has decided is unfair, despite the fact that Judge Smith may have no jurisdiction over any actions that might be taken.

UCS does not make this motion lightly. In a sense, Judge Smith's letter to Judge Rambo was an action that he perceived to be humane, and it was clearly important to Judge Smith that he take such an action where the criminal sentencing of an individual would result in part from findings originally made by Judge Smith. While UCS disagrees with Judge Smith's assessment of that situation, we are loathe to criticize any action that seeks to inject some humanity into the adjudicatory process.

Nonetheless, for the reasons stated by the Commonwealth of Pennsylvania, and as more fully argued below, the particular

extrajudicial statements made by Judge Smith, and his statements during the hearing about the extra-judicial actions of the parties create an irreparable appearance of bias and prejudgment. A public perception of fairness and impartiality is vital not only to the administrative process in general and to this particular hearing, but to the very well-being of those who lived through the TMI-2 accident. In light of what the people of the TMI area have already been through, it is essential that the integrity and impartiality of decisions in the restart proceeding not be tainted by even the appearance of bias.

A. Standards for Disqualification

The Commonwealth of Pennsylvania has accurately stated the standards that govern a motion to disqualify. Commonwealth Motion at 2. UCS adopts the Commonwealth's discussion of these standards.

Of the five bases for disqualification, three apply here. A judge must disqualify himself if (1) he has a "personal bias" against a participant, (2) he has prejudged factual issues, or (3) he has engaged in conduct giving the appearance of personal bias or prejudgment of factual issues. Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), 20 N.R.C. ____ (July 20, 1984); Commonwealth Edison Co. (LaSalle County Nuclear Station, Units 1 & 2), 6 A.E.C. 169, 170.

In applying these standards, the issue is "whether the reasonable person,knowing all of the surrounding circumstances, would consider the judge to be impartial." United States v. Norton, 700 F.2d 1072, 1076 (6th Cir.), cert. denied, 103 S. Ct. 1885 (1983).

> "[I]f there is a reasonable factual basis for doubting the judge's impartiality, . . . the judge "should disqualify himself and let another judge preside over the case." Even where the question is close, the judge whose impartiality might reasonably be questioned must recuse himself from the trial.

Roberts v. Bailar, 625 F.2d 125, 129 (6th Cir. 1980), quoting H.R. Rep. No. 93-1453, 93rd Cong., 2d Sess. (1974) at 5-6. Recusal does not depend upon whether the judge actually biased, or whether the judge believes that that the facts create an appearance of partiality, but upon whether the facts might lead a reasonable man to question the judge's impartiality. United States v. Cowden, 545 F.2d 257, 265 (1st Cir.), cert. denied, 97 S. Ct. 1181 (1977). "A judge should exercise his discretion in favor of disqualification if he has any question about the propriety of his sitting in a particular case." Hall v. Small Business Administration, 695 F.2d 175, 178 (5th Cir. 1983), citing Potashnick v. Port City Construction Co., 609 F.2d 1101, 1111 (5th Cir.), cert. denied, 449 U.S. 820 (1980).

A major limitation on the application of these standards is that "the alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge has learned from his participation in the case." Houston Lighting and Power

Company (South Texas Project, Units 1 & 2), CLI-82-9, 15 N.R.C. 1363, 1365 (1982), citing United States v. Grinnell Corp., 384 U.S. 563, 583 (1966). However, "there is an exception where such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party," and "the single fact that the judge's remarks were made in a judicial context does not prevent a finding of bias." United States v. Holland, 655 F.2d 44, 47 (5th Cir. 1981), quoting Davis v. Board of School Commissioners, 517 F.2d 1044 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976), and Whitehurst v. Wright, 592 F.2d 834, 837 (5th Cir. 1979).

As revealed by the facts discussed below, this motion does not run afoul of this limitation. Judge Smith's actions and the source of his views were either extrajudicial in nature or they fall within the exception to that limitation..

B. Discussion

1. Judge Smith's Letter to Judge Rambo

The evidentiary hearings on the remanded training issues began on December 19, 1984. On December 27, 1984, Judge Smith sent a letter to Judge Rambo requesting leniency in the sentencing of James Floyd. (This letter is attached to the Declaration of William S. Jordan, III, which accompanies this Motion.) On January 2, 1985, the next day of the remanded hearing on training issues, Judge Smith handed copies of his letter to all parties participating in the hearing.

Mr. Floyd was a TMI-2 operator convicted of cheating on an company-administered examination that was essential to maintaining his NRC license as a reactor operator. The evidentiary hearings concerning Mr. Floyd's actions were presided over by a Special Master. Judge Smith then reviewed the findings of the Special Master in reaching his conclusions about Mr. Floyd's actions as they are stated in the Board's decision. 16 N.R.C. 281, 344-355 (1982). This remanded proceeding concerns issues that the Appeal Board held must be resolved in light of Mr. Floyd's cheating and cheating by other individuals.

Judge Smith's letter to Judge Rambo has attracted substantial public attention, including a strongly negative editorial in the Philadelphia Inquirer of January 10, 1985, which termed the NRC hearing process for Three Mile Island a sham. There is no doubt that Judge Smith's letter has, in fact, resulted in a perception of bias and prejudgment by some members of the public.

UCS is primarily concerned, however, with the specific language used by Judge Smith. In support of his view that a severe criminal penalty against Mr. Floyd is not necessary to insure the integrity of the NRC process for licensing reactor operators, Judge Smith stated that, "Deception in the future is very unlikely."

In the wake of the cheating incidents themselves, this is precisely one of the issues now before the Board. For example, the Appeal Board specifically raised the question of whether "the format and content of the examinations encourage cheating."

Metropolitan Edison Co. (Three Mile Island Nuclear Generating Station, Unit No. 1), ALAB-772, ___ N.R.C. ___ (May 24, 1984), slip op. at 63. Thus, in the midst of receiving evidence on this point, and well before the evidence was completed, Judge Smith took an extrajudicial action that demonstrates a prejudgment that precautions against cheating at Three Mile Island, including presumably the format and content of examinations, are adequate to deter cheating.

From the language used by Judge Smith, this appears to be an actual prejudgment. Even if it is not, however, the inescapable public impression among unbiased observers must be that Judge Smith has prejudged the issue, and thus cannot fairly reach a decision in the remanded proceeding.

2. Judge Smith's Bias In Connection With Rulings That May Affect Individuals

Judge Smith's letter to Judge Rambo reveals a concern on his part that individuals may be unfairly treated in other forums as a result of actions that he has taken in the TMI-1 restart proceeding. In that particular instance, the concern was great enough for Judge Smith to take extrajudicial action based upon judgments he had made in the adjudicatory proceeding.

During the remanded proceeding on training, Judge Smith has further revealed that concern through his reaction to the extrajudicial treatment of Mr. Husted and of individuals found to have cheated during the operator licensing process. Judge Smith was particularly critical of the actions of the company and the

Commonwealth in reaching a settlement that, in his view, was unfair. See Tr. 29,092-3 (strongly criticizing a settlement in which an operator was treated in a manner that Judge Smith viewed as harsher than the Board had intended), 32,317-23 (strongly criticizing a settlement between the Commonwealth and the company in which Mr. Husted was removed from nuclear duties), 33,083-97 (further criticizing the settlement with respect to Mr. Husted and raising concerns as to whether individuals may be treated unfairly as a result of actions that Judge Smith might take in the remanded proceeding).

Judge Smith's concern with the possible impact of his actions on individual operators or other GPUN employees was so great that at one point he demanded to know what actions parties might take outside the context of the proceeding as a result of decisions that might be reached in the proceeding. Tr. 32212-3. This demand and the related discussions reveal a near obsession on the part of Judge Smith with the need to prevent the company, the Commonwealth, and presumably anyone else, from treating operators in a way that Judge Smith perceives to be unfair.

Judge Smith has demonstrated, or at least created the indelible impression, that he does not want any decisions that he may make in the context of the training hearing to result in such treatment outside the hearing itself. Thus, he seeks control over what the parties might do, and even commitments that they do not intend to do something outside the proceeding. He even goes so far as to state that "if we make these (apparently referring

> of and ability to impart to others a certain quantum of information. We reject that notion in favor of one that recognizes teacher competence to include the ability to communicate effectively a sense of responsibility as well as information.

Id. at 42 (emphasis added).

> We seriously question licensee's judgment in promoting Husted to an important position with management responsibilities, given his documented past failure to cooperate with the NRC in its cheating investigation. We therefore require, in addition to those commitments reflected in the stipulation with the Commonwealth and the conditions imposed by the Licensing Board should restart be authorized, that Husted have no supervisory responsibilities insofar as the training of non-licensed personnel is concerned.

Id. at 46 (second emphasis added).

Thus, Judge Smith has taken the Commonwealth to task for actions actually found too weak by the Appeal Board to ensure the protection of the public health and safety. This constituted evidence that Judge Smith has unilaterally predetermined that we will not take actions or make findings when the result might be adverse to individuals, even in the fact of an opinion of the appellate tribunal finding such actions necessary to protect the public health and safety.[1]

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[1] It should be clear from the above that the Judge's characterization of Mr. Husted's sole offense as showing disrespect for the U.S. Government is incorrect. The Licensing Board itself found that Husted gave "unbelievable" testimony under oath to the Special Master:

> His testimony on the matter was not only unbelievable, but it gave the sense that he didn't care whether he was believed or not.

LBP-82-56, 16 N.R.C. 281, 319 (1982).

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[1] It should be clear from the above that the Judge's characterization of Mr. Husted's sole offense as showing disrespect for the U.S. Government is incorrect. The Licensing Board itself found that Husted gave "unbelievable" testimony under oath to the Special Master:

> His testimony on the matter was not only unbelievable, but it gave the sense that he didn't care whether he was believed or not.

LBP-82-56, 16 N.R.C. 281, 319 (1982).

UCS agrees that operators should not be treated unfairly. The difficulty here is that findings about the quality of the training program necessarily involve findings, or at least discussions, about the quality of people in that program and the treatment of those people. Although UCS does not currently intend to seek specific action by the company with respect to particular individuals, UCS has been and will be critical of the company's handling of certain individuals, such as Mr. Frederick, who was continued as Supervisor of Licensed Operator Training after failing an examination, and Mr. Olive, who was maintained in the program despite a series of problems and examination failures. UCS intends to use these as examples of flaws in the GPUN training program. UCS will seek remedies that would alleviate those flaws. Even if particular individuals are not singled out in the remedies sought, those remedies might well affect the individuals in question. In addition, although UCS does not currently intend to seek a settlement based upon actions with respect to these individuals, it would certainly consider one if one were suggested.

If company policies and procedures must be changed, as UCS will argue, the Board must make that finding regardless of how it might affect individuals who did not appear before the Board. The Board may not, as Judge Smith has indicated he would do, Tr. 33,089-90, come to a different conclusion on the evidentiary record, nor may it impose conditions that it would not otherwise have imposed on the basis of the record.

In this case, it is too late for Judge Smith to participate in the Board's decision. His reaction to the extrajudicial actions taken with respect to Mr. Husted and others creates the impression of pervasive bias such that he will not make decisions, however justified they may be by the facts, that might result in what he believes to be unfair treatment of reactor operators. Thus, if Judge Smith believes that Mr. Olive, for example, should not be removed without appearing himself, Judge Smith presumably will not require GPUN to adopt procedures that would have the result of removing Mr. Olive. Since the need for tighter procedures that might well result in the removal of Mr. Olive (although UCS will not argue specifically for his removal) is a major part of UCS' case, Judge Smith must be disqualified from participating in that decision.

C. Conclusion

For these reasons, UCS urges Judge Smith to disqualify himself from further participation in the Atomic Safety and Licensing Board presiding over the remanded hearing on training issues.

Respectfully submitted,

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Ellyn R. Weiss

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Dated: January 14, 1985

January 14, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE ADMINISTRATIVE LAW JUDGE IVAN SMITH

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

DECLARATION OF WILLIAM S. JORDAN, III

1. I have served as trial counsel for the Union of Concerned Scientists during the remanded hearings on training issues.

2. On January 2, 1985, Judge Smith distributed the attached letter to the parties in the remanded hearings.

3. On January 10, 1985, I read an editorial in the Philadelphia Inquirer that termed the NRC hearing process for Three Mile Island a sham. On that day I also saw other articles in the press in Pennsylvania concerning questions about Judge Smith's impartiality in light of his letter to Judge Rambo.

4. The facts stated in UNION OF CONCERNED SCIENTISTS' MOTION TO DISQUALIFY ADMINISTRATIVE LAW JUDGE IVAN SMITH AND ANSWER TO THE COMMONWEALTH'S MOTION TO DISQUALIFY are true and correct to the best of my knowledge and belief.

I declare on that the above facts are true and correct to the best my knowledge and belief.

William S. Jordan, III

11125 Powder Horn Drive
Potomac, Maryland 20854
December 27, 1984

Honorable Sylvia H. Rambo
U.S. District Judge
℅ Robert Ruth, Probation Officer
U.S. Probation Office
Federal Building
3rd and Walnut
Harrisburg, Pennsylvania 17108

Re: United States v. James R. Floyd
Crim. No. 84-00099 (M.D. Pa.)

Dear Judge Rambo:

I hope that the Court will be lenient with James R. Floyd. As an administrative law judge with the Nuclear Regulatory Commission, I have served since August 1979 as the Chairman of the Atomic Safety and Licensing Board presiding over the proceeding considering the proposed restart of Three Mile Island Unit No. 1. Much of this proceeding has involved issues of the integrity and competence of the managers and operators of Three Mile Island Nuclear Station. I have been informed that the recommendation contained in the Board's decision of July 27, 1982 (16 NRC 281, 344-55) brought about the investigation and subsequent indictment of Mr. Floyd.

While serving as Chairman of the Three Mile Island Licensing Board I have had an excellent opportunity to gain some insight into the events and the affected persons following the 1979 accident at the station. I hasten to add, however, that I know nothing about Mr. Floyd except the information produced on the public hearings most of which is set out in our July 1982 decision. Also, my comments are personal and I do not speak for the Nuclear Regulatory Commission or for any other person.

I have basically two grounds for believing that leniency is appropriate. The first pertains to the background against which Mr. Floyd's actions should be judged. Mr. Floyd worked very hard in the months following the accident. He possesses excellent technical skills. Management depended very heavily upon him in addressing the many problems needing solution on the island. I have always felt that Mr. Floyd's deception was an impulsive act and that it was not motivated by personal ambition. He could have sought relief from his other duties in order to train properly for the requalification examination, to his personal benefit. He could have passed easily without deception. One senses he neglected his examination responsibilities out of a misguided but altruistic effort to attend to matters of perceived greater urgency. In addition, he apparently felt that he was well qualified notwithstanding his licensing status.

Exhibit 1

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 integrity. Many weeks of public NRC hearings have been devoted to the issue of TMI management integrity and operator 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.

Sincerely,

Ivan W. Smith

cc: William J. Fulton, Esq.
Herzel E. Plaine, General Counsel, NRC
Parties to TMI-1 proceeding

UCS - October 30, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Nuclear Regulatory Commission

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

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