

PA - March 6, 1985

DOCKETED
USNRC

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

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Docket No. 50-289 : CELESTY
(Restart) DOCKETING SERVICE
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STATEMENT BY THE COMMONWEALTH OF PENNSYLVANIA
IN SUPPORT OF ITS MOTION TO DISQUALIFY
ADMINISTRATIVE LAW JUDGE IVAN W. SMITH

The Commonwealth of Pennsylvania ("Commonwealth") respectfully requests the Commission to disqualify Administrative Law Judge Ivan W. Smith from further participation in the TMI-1 restart proceedings.

I. BACKGROUND

On January 11, 1985, the Commonwealth filed a Motion before Judge Smith requesting Judge Smith to disqualify himself. The Commonwealth made this Motion because of two substantial defects in Judge Smith's conduct, each of which cast doubt upon the integrity and impartiality of the Commission ordered TMI-1 restart proceedings:

1. Judge Smith had lent the prestige of his judicial office to support the character of Mr. James Floyd before the U.S. District Court in a manner that created at least the appearance of impropriety and bias.

2. Judge Smith had interjected in the proceeding issues related to his personal concern about the treatment of certain licensed operators without notice to, and in a manner prejudicial to, the Commonwealth.

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On February 20, 1985, Judge Smith issued a memorandum and order ("Memorandum and Order") denying all motions to disqualify.¹ By two orders dated February 20, 1985, the Commission took the unusual step of direct review of the matter, without the intermediate review by the Atomic Safety and Licensing Appeal Board, and directed parties to file statements by March 6, 1985.

For the reasons stated herein, after careful review of Judge Smith's Memorandum and Order, the Commonwealth renews its request that the Commission disqualify Judge Smith from further participation in the TMI-1 restart proceedings. The statements by Judge Smith both on the record of and outside this hearing can only lead to the conclusion that his impartiality might reasonably be questioned. The proceedings concerning the restart of Three Mile Island Unit No. 1 are crucial to the safe restart and operation of TMI-1, and to the restoration of investor and public confidence in the nuclear industry and in the NRC regulatory process, and require the highest standards of judicial impartiality and a clear lack of bias. The mere appearance of personal bias or prejudice as to issues in this matter undermines public confidence in the integrity of NRC decisions. Because Judge Smith's conduct both within and outside the hearings has created such a strong appearance of bias, the ability of the present Atomic Safety and Licensing Board panel to reach a fair and impartial decision in the present case is irreparably compromised as long as Judge Smith sits on the panel.

¹Other parties to the TMI-1 restart proceeding--Three Mile Island Alert, and Union of Concerned Scientists--have also filed Motions to Disqualify. The NRC Staff has filed a Response, which generally supports the position of the Commonwealth. Licensee has filed a Response opposing the Motions.

II. STANDARDS FOR DISQUALIFICATION

The Commission's Rules of Practice provide that 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 board member disqualify himself. The Rules of Practice further provide that this motion shall be supported by affidavits setting forth the alleged grounds for disqualification. 10 C.F.R. §2.704(c). The Commonwealth has fulfilled those requirements. Motion and Affidavit (attached hereto).

It is well settled before the Commission that a board member may be disqualified if he:

- (1) has a direct, personal, substantial pecuniary interest in the result;
- (2) has a "personal bias" against a participant;
- (3) has served in a prosecutive or investigative role regarding the same facts as are at issue;
- (4) has prejudged factual--as distinguished from legal or policy-- issues; or
- (5) has engaged in conduct giving the appearance of personal bias or prejudgment of factual issues.

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), 20 NRC _____
(July 20, 1984); P.S.E. & G. Co. (Hope Creek Generating Station, Unit 1), 19 NRC

13, 20 (1984); Nuclear Engineering Co., Inc. (Sheffield, Ill. Low-Level Radioactive Waste Disposal Site), 8 NRC 299, 201 (1978); Consumers Power Co. (Midland Plant Units 1 & 2), 6 AEC 60, 64-65 (1973).

The Commission has also declared that federal judicial disqualification standards are applicable to the NRC's adjudicatory proceedings. Houston Lighting and Power Co. (South Texas Project, Units 1 & 2), 15 NRC 1363, 1365-67 (1982). Under 28 U.S.C. §455, a federal judge must disqualify himself in any proceeding in which his impartiality might reasonably be questioned, or in which he has an actual personal bias or prejudice. 28 U.S.C. §455 states:

Section 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 concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings.

* * *

Subsections (a) and (b) provide alternative grounds for disqualification. A moving party is not required to show both that the judge's impartiality might reasonably be questioned and that the judge has a personal bias or prejudice. Judge Smith's opinion confuses the two bases for disqualification. (Memorandum and Order at 12-17). The opinion blurs the distinction between Section 455(a) and Section 455(b). Under Section 455(a), a moving party is not required to bias-in-fact, an extrajudicial source of bias, or prejudgment of factual issues.

The Commonwealth believes that Judge Smith's conduct creates an impression that his impartiality might reasonably be questioned and meets the test of Section 455(a). Therefore, no further inquiry is necessary into Section 455(b). In applying 28 U.S.C. §455(a), the federal courts have held that a judge should exercise his discretion in favor of disqualification if he has any question about the propriety of sitting in a particular case. Hill v. Small Business Administration, 695 F.2d 175 (5th Cir. 1983); Matter of Searches Conducted on March 5, 1980, 497 F.Supp. 1283 (D.C. Wisc. 1980).

Additionally, it is well settled that a federal administrative law judge is subject to the canons of ethics of the bar, the federal government and his agency. Ruhlen, Manual for Administrative Law Judges, p. 59 (1974). Judge Smith's basis for ignoring the ABA Code of Judicial Conduct--that administrative law judges "typically do not preside over matters involving their communities." (Memorandum and Order at 24-25, n. 18)--has no relevance to the applicability of the Code. The Code was drafted to insure public confidence in the integrity of the judiciary, regardless of where the judges preside. In an administrative proceeding such as the TMI-1 restart proceeding, judicial impartiality is equally necessary.

Judge Smith's conduct violates Canon 2 of the ABA Code of Judicial Conduct. Canon 2A states that a "judge ... should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 2B states that a judge "should not testify voluntarily as a character witness." Judge Smith has effectively testified in his letter to Judge Rambo. It makes no difference whether Judge Smith testified in a

courtroom or submitted a testimonial through a letter. The rationale for this rule, as stated in the Commentary to Canon 2, is applicable to both situations:

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. He must expect to be the subject of constant public scrutiny. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

The testimony of a judge as a character witness injects the prestige of his office into the proceeding in which he testifies and may be misunderstood to be an official testimonial.

In addition, Canon 3A(6) provides:

A judge should abstain from public comment about a pending or impending proceeding in any court This subsection does not prohibit judges from making public statements in the course of their official duties or explaining for public information the procedures of the court.

Contrary to what Judge Smith suggests, Judge Smith's conduct falls within the ABA Code of Judicial Conduct. Judge Smith's conduct is precisely the type of conduct that the Code was designed to restrain.

III. THE LETTER CONCERNING MR. FLOYD

In the midst of hearings on the remanded training issue, Judge Smith sent a letter dated December 27, 1984, to Judge Sylvia Rambo of the United States District Court for the Middle District of Pennsylvania, requesting leniency in the sentencing of Mr. James Floyd. Mr. Floyd was the TMI-2 licensed operator convicted of cheating on his NRC examination. Judge Smith revealed to the parties the contents of the letter on January 2, 1985, when NRC hearings resumed in Harrisburg. Judge Smith's letter states, in part:

I hope that the Court will be lenient with James R. Floyd.

* * *

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.

* * *

I have always felt that Mr. Floyd's deception was an impulsive act and that it was not motivated by personal ambition.

* * *

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.

These observations are mere speculations concerning Mr. Floyd's motives and actions. This letter demonstrates that Judge Smith has a significant personal bias on matters presently before the Board, which include the issues closely tied to those involved in the Floyd case, the training, competency, and integrity of TMI-1 operators. It raises serious questions about Judge Smith's regard for NRC licensing exams. It implies that violations of NRC rules are excusable. Without even referring to the ABA Code of Judicial Conduct, a reasonable person could easily conclude that Judge Smith's impartiality in this proceeding might be questioned.

Although Judge Smith states that his comments in the letter are personal, he also makes it clear that he holds a judicial office within the NRC and that his views are based solely on his judicial role in evaluating Mr. Floyd's testimony at the NRC hearings.

Judge Smith's letter of December 27, 1984 to Judge Rambo, on its face, does not comport with the circumspect conduct expected of judges. The letter to Judge Rambo concerning Mr. Floyd was, as Judge Smith admits, an extrajudicial

statement. Its purpose was to express a personal hope that the court would be lenient with Mr. Floyd in sentencing. Memorandum and Order at 18. Judge Smith's primary reason for sending the letter was that he had "potentially useful information to impart." Id. at 28. It was not written in response to an official summons and was not solicited by the Court.

In addition, his letter contains opinions which are not a mere summation or reiteration of evidence in the record. ("I have always felt that Mr. Floyd's deception was an impulsive act and that it was not motivated by personal ambition ... One senses he neglected his examination out of a misguided but altruistic effort to attend matters of greater urgency.") Judge Smith's letter is rife with speculation about Mr. Floyd's motives. As such, Judge Smith's letter does not consist of information derived from a judicial record, but is a personal assessment of the character of a man who appeared before him--an assessment which may not be shared by other members of the Atomic Safety and Licensing Board. Judge Smith's letter, however, is framed in such a way that one is led to conclude that Judge Smith's statements are entirely found in the record. In fact, they are not.

Judge Smith's attempt to diminish the impact of his letter ("No prestige of office was involved. It was a judge-to-judge communication--not testimony before a jury." Memorandum and Order at 25) is entirely unsatisfactory. In offering an opinion based on his evaluation of the record of the ASLB proceeding, Judge Smith most certainly used the prestige of his office to support his personal opinion of Mr. Floyd's character. Indeed, Canon 2B draws no distinction between testifying before a jury and testifying before a judge. The

fact of the matter is that Judge Smith's letter was not subject to cross-examination or interrogation--the tests of trustworthiness and accuracy in an adversary proceeding. The fact that it was written communication to a judge rather than oral testimony at a hearing does not make it more credible.

Judge Smith's letter not only states his opinion concerning the character of Mr. Floyd, but also makes a statement concerning the issues before the Licensing Board. Judge Smith stated:

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. [emphasis added]

Whether deception is likely or unlikely in the training program for TMI-1 operators is clearly an issue in this proceeding. By stating that deception in the future is unlikely, Judge Smith's letter would lead a reasonable observer to conclude that Judge Smith may have prejudged facts and issues in advance of this proceeding. In essence, Judge Smith stated to Judge Rambo that she need not concern herself with the deterrent value of Mr. Floyd's sentence because the NRC proceedings would assure that the operators are persons of competence and integrity.² This represents more than a statement of confidence in the regulatory process, made in the context of a social or informal setting. This

²See discussion infra. The record does not show that Judge Smith actively sought to identify any such problems.

statement represents a formal extrajudicial statement designed to influence the conduct of a U.S. District Court judge. The cases cited by Judge Smith, In re: Corrugated Container Anti-trust Litigation, 614 F.2d 958 (5th Cir. 1980), United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976), and United States v. Conforte, 457 F.Supp. 641 (D. Nevada 1978), differ in that the offending statements were made in an informal setting and were not intended to influence an important decision. Here Judge Smith is explicitly attempting to influence a court decision. Thus the context of Judge Smith's statement places the extrajudicial nature of the statement in a harsher light. Although Judge Smith purported not to be speaking for the NRC, he offered an opinion concerning the validity of the NRC administrative process, with the hope that his statement would be given special weight precisely because the author is an NRC Administrative Law Judge.

Judge Smith's comment constitutes a violation of Canon 3A(6). It is a public comment about pending proceedings before him and before Judge Rambo. The likelihood of deception in the future is certainly an issue before Judge Smith. The Appeal Board specifically directed the Licensing Board to determine whether the structure of the training program encouraged cheating. ALAB-772, (May 24, 1984) 19 N.R.C. at 1232. In addition, the deterrent value of criminal sanctions is an issue before Judge Rambo. Judge Smith has stated extrajudicial views on two important public issues pending in two different forums. His comment clearly indicates a lack of judicial restraint and raises reasonable questions about his impartiality.

Judge Smith suggests that by releasing his statement to the public, he has served a public purpose. The letter itself had a private purpose. Release

of the letter to the public did not embody it with a public purpose. Judge Smith's explanation merely points to a lack of sensitivity to the requirements of impartiality.

The contents of Judge Smith's letter, therefore, cannot simply be seen as an innocent, benign effort to urge judicial leniency toward an operator who has suffered enough. The statements made by Judge Smith in the letter go far beyond this. The statements offer an opinion of Mr. Floyd's character. This opinion is not found in the ASLB record, is cloaked with the dignity of the office of an Atomic Safety and Licensing Board judge, and is related to issues in litigation.

As stated in 28 U.S.C. §455(a), supra, the standard of review here is not whether it can be proved that Judge Smith has a bias in this proceeding, but whether Judge Smith's impartiality might reasonably be questioned. Contrary to the analysis of the case law suggested by Judge Smith, a moving party is not required to show that the judge's impartiality might reasonably be questioned and that the judge has a personal bias or prejudice. The former is a sufficient basis for disqualification.

The facts and circumstances surrounding the letter to Judge Rambo show clearly that Judge Smith's impartiality in this proceeding can reasonably be questioned.

IV. CONCERN FOR CERTAIN OPERATORS

In addition to the conduct related to the letter, other conduct by Judge Smith in the remanded hearings warrants disqualification. Judge Smith has

attempted to interject into the hearings an issue not remanded to the Licensing Board by the Appeal Board, the issue of concern for certain other operators. Judge Smith has mischaracterized the history of the proceeding in order to arrive at his conclusion of "unfair" treatment of certain operators. Upon analysis, Judge Smith's purported "concern" for licensed operators actually shows a marked bias against intervenors' concern for the safety of TMI-1.

For example, Judge Smith has on at least three occasions criticized the Commonwealth for entering into a 1983 Stipulation Agreement with General Public Utilities. In each instance, his criticism has been designed to undermine a valid Stipulation that keeps certain operators, whose conduct had been questioned, from operating TMI-1. Over eighteen months after this settlement was voluntarily reached by the parties and nine months after this settlement was approved by the Appeal Board, Judge Smith made it abundantly clear that he disagreed with the settlement. On November 21, 1984, Judge Smith sua sponte launched into an attack on the Stipulation Agreement. He stated:

"I understand that after the hearing that one of the operators named G or H was removed from his career as a licensed operator, although that was not the Board's intention. But it was a product of this hearing and was something agreed upon by the Commonwealth and the Licensee.

I think that's an absolute violation of that man's due process, and I won't be a party to that type of activity unless it is absolutely necessary for a broader ruling on the public safety." (Transcript p. 29,093)

This outburst came unexpectedly and without justification. It was irrelevant to the proceedings at hand. No witnesses and no counsel had mentioned the Stipulation Agreement.

On January 2, 1985, Judge Smith used an opportunity to question Licensee's witness Dr. Long on the circumstances of Mr. Husted's removal from training activities. Judge Smith practically put words in the witness's mouth:

JUDGE SMITH: And one of the things that sticks out in your testimony is the treatment of Mr. Husted, which seems to me, as I recall the facts, I haven't read the decision on him for some time, but as I recall the only thing Mr. Husted was ever found to have failed in was an attitudinal problem. Is that correct?

WITNESS LONG: Yes, sir. An attitudinal problem in particular circumstances.

JUDGE SMITH: And that was an attitudinal problem as expressed to the U.S. Government.

WITNESS LONG: Yes, sir.

JUDGE SMITH: And my concern was that when the time comes that a person's career is damaged because he didn't show the proper respect to agents of the U.S. Government, then I want to make sure that my participation in that process does not add to that effect.

Was the deal made with Governor Thornburgh, was that based upon anything in addition to that, do you know?

WITNESS LONG: No, sir; it was not.

JUDGE SMITH: It was that Mr. Husted did not show proper courtesy to government agents. He lost his job and his license.

WITNESS LONG: He didn't lose his job, sir. He was changed from that particular assignment.

JUDGE SMITH: He lost his license.

WITNESS LONG: Yes, sir.

JUDGE SMITH: And he had been at that time a career nuclear person?

WITNESS LONG: Yes, sir.

* * *

JUDGE SMITH: Let me ask again. As I understand it, the only thing Mr. Husted did was express resentment to U.S. Government agents. That is the only thing that man did.

WITNESS LONG: Yes, sir.

JUDGE SMITH: He didn't disobey the law.

WITNESS LONG: There were three instances.

JUDGE SMITH: He did not disobey the law. He did not demonstrate incompetence. He didn't cheat. He demonstrated displeasure with the U.S. Government, and he lost his license because of that?

WITNESS LONG: Yes, sir.

Transcript pp. 32,318-32,319;
32,322

Judge Smith's characterization of the sanctions against Mr. Husted's performance was not only irrelevant; it was wrong. The questions surrounding Mr. Husted's performance transcended his attitude toward cooperating with government agents. The questions dealt with his candor and credibility with investigators concerning his knowledge of, and possible assistance in, improper use of information during operator examinations; these are questions that go to the heart of his ability to serve as an operator and training instructor. See ALAB 772, at 40-46.

Judge Smith then turned to counsel for the Commonwealth and asked him to assess the "fairness" of the facts that Judge Smith had just adduced. Not only was the subject matter outside the scope of hearing, the merits of sanctions against Mr. Husted had been already decided by the Appeal Board. ALAB 772, at 45-46. It is clear that Judge Smith simply did not agree with the Stipulation and the facts described by the Appeal Board and was trying to impose his view on these subjects upon the witness.

Judge Smith's questioning concluded with an emotional outburst against the lawyers who were involved in the settlement:

JUDGE SMITH: He didn't reflect the necessary attitude that authorities would have liked.

Well, I am concerned that the lawyers in this hearing have accepted that. You can continue your cross examination. I would have expected lawyers to have gagged, to have gagged on that treatment.

(Transcript p. 32,323)

This intemperate conduct by Judge Smith created a strong implication of bias and prejudice and undermines confidence in his ability to fairly decide the issues in this proceeding.

Judge Smith now asserts in his Memorandum and Order that certain statements made by him concerning the treatment of Mr. Husted, G and H were derived first from safety considerations (i.e. presumably that the loss of experienced operators would affect the safe operation of TMI-1), secondly from a dedication to the rule of law, and thirdly from the belief that these two considerations were complementary.

Judge Smith thus has created a new issue for the Board to adjudicate--a concern for "the treatment of the TMI-1 licensed personnel." This issue, as framed by Judge Smith, is not before the Atomic Safety and Licensing Board due to the remand by the Appeal Board (ALAB-772) and had not been identified by Judge Smith in any pre-hearing conference or in any pre-hearing orders he issued concerning the scope of the proceeding before him. Judge Smith's latest Memorandum and Order is the first instance in which he attempted to relate plant-design-and-procedure concerns with licensed-operator training concerns. (Memorandum and Order at 8). Nowhere in the record of the present remand on license operator training is there a statement by Judge Smith of this relationship.

The nature of the proceeding before Judge Smith is limited. The Appeal Board remand of issues related to licensed operator training was precise, and did not extend to whether Mr. Husted, or others, was fairly treated. The Appeal Board disagreed with the conclusions Judge Smith reached with regard to the significance of the cheating incidents. The Appeal Board stated:

The Licensing Board correctly framed the issue: 'is the instruction adequate to prepare the operators to operate the plant safely?' Id. at 363 (¶ 2343). We disagree with the Board, however, on its affirmative answer to that question. The deficiencies in operator testing, as manifested by the

cheating episodes, may be symptomatic of more extensive failures in licensee's overall training program. Whether those deficiencies still exist or have been sufficiently cured is not evident from the record. Indeed, the record in the reopened proceeding perhaps has raised more questions than it has answered satisfactorily.

ALAB-772, at 63-64

It is evident that the Appeal Board was directly critical of the way Judge Smith examined the evidence related to the cheating incidents in arriving at the conclusion that the Licensee's training program was "comprehensive and acceptable." See ALAB-772, at 63-77.

The Appeal Board framed discrete questions to the Licensing Board to answer in connection with the remand. The remand was not intended to address the "fairness" of the treatment of employees who had been implicated in the cheating incidents. That matter was settled by the Appeal Board. The Appeal Board specifically discussed the actions taken with respect to Mr. Husted, G and H, and approved the actions taken with respect to each. See ALAB-772, at 23-24, 40-46.

Judge Smith's anger was directed against the Commonwealth for entering into a Stipulation with the Licensee, in which Stipulation the Licensee agreed to remove Mr. Husted, G and H from the reactor operation activities of TMI-1. By contrast, Judge Smith did not censure the Licensee for proposing the Stipulation. Judge Smith further incorrectly stated that the Stipulation was not presented to any board for approval. Memorandum and Order at 32. In fact, the Stipulation was presented to the Appeal Board, and the Appeal Board approved the Stipulation. ALAB-772, at 2, n. 1.

Judge Smith's questions and concern at the hearing were not directed toward any safety consideration. For example, Judge Smith's examination of Dr. Long (Vice President, Nuclear Assurance Division), supra, was not designed to elicit probative information concerning safety issues. Instead, the examination was designed to make the point that the treatment of Mr. Husted was unfair in itself. Tr. 32,318-23. The "facts" that Judge Smith attempted to elicit through Dr. Long were contradicted by the facts as the Appeal Board viewed them in ALAB-772, at 40-45. Nevertheless, Judge Smith insisted upon imposing his view of these "facts" on the witness.

Surprisingly, Judge Smith did not ask Dr. Long whether the loss of Mr. Husted affected the efficiency of the training program or the safe operation of the reactor, the purported basis of his concern. The only item that Judge Smith was interested in was whether this action was fair.

Similarly, when it was learned at the hearing that Mr. Frederick was removed by Licensee management due, in part, to a commitment by GPU management not to employ a former TMI-2 operator in the TMI-1 training program, Judge Smith did not inquire into whether the loss of Mr. Frederick would harm the Training Department at TMI-1, or whether it would affect the safe operation of TMI-1. Instead, his concern was over how the parties might use the information on Mr. Frederick outside the proceeding. Judge Smith turned to counsel and asked if there were a hidden "agenda" to use the record in this proceeding for another purpose.³ The fact that Licensee management removed Mr. Frederick's license did not trouble Judge Smith at all. Judge Smith did not protest to the Licensee that Mr. Frederick had been treated unfairly.

³This concern is particularly ironic, since Judge Smith, in his letter to Judge Rambo, used information obtained from the record for an extrajudicial purpose--

Judge Smith has interjected into the hearing diffuse issues relating to the treatment of certain licensed operators without notice to the parties. He has acted in a manner prejudicial to the Commonwealth and other parties. This conduct does not promote public confidence in the integrity and impartiality of the judiciary. This conduct, in addition to his letter to Judge Rambo, provides a substantial basis for disqualification.

V. SERVICE ON THE BOARD

The Commonwealth understands and appreciates Judge Smith's long service to the Commission related to the difficult TMI-1 restart proceedings. However, notwithstanding the extended statement by Judge Smith concerning the history of the TMI-1 restart proceeding, the Commonwealth believes Judge Smith is in error concerning the unique perspective that he purports to hold in the proceeding. The Commonwealth has been an interested party in all the TMI-1 proceedings, and has been represented in all the proceedings over which Judge Smith has presided. Although the particular Commonwealth representative in the proceedings may have changed, the senior Commonwealth officials who have review of these proceedings have not. Therefore, Judge Smith can neither logically nor factually assert that the Commonwealth has no institutional memory of the rulings of the Atomic Safety and Licensing Board during the course of the proceedings. Indeed, the Commonwealth has been involved in a greater number of TMI-1 related proceedings than has Judge Smith,⁴ and thus can be said to have a broader perspective of the TMI-1 restart matter than Judge Smith.

to advance the interest of Mr. Floyd.

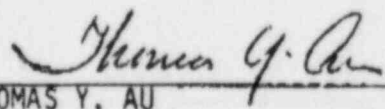
⁴For example, Judge Smith was not involved in the Steam Generator Tube Repair Proceeding (Docket No. 50-289-OLA), and did not personally participate in the hearings conducted by Special Master. LBP-82-348, 15 N.R.C. 918 (1982).

The other parties' participation at these proceedings has also been extensive. Three Mile Island Alert has participated in nearly every hearing since the Commission issued its August 9, 1979 order. (CLI-79-8; 10 N.R.C. 141). The Union of Concerned Scientists has selectively participated in issues since 1980. The NRC staff and the Licensee have participated in each hearing. Thus it cannot be fairly asserted that but for Judge Smith's participation in these proceedings, the parties would lack the broad perspective on the course of events in these proceedings. Judge Smith's long service on the Board does not provide him with a "unique" status, and does not provide a basis for avoiding disqualification.

VI. CONCLUSION

For the reasons stated above, and in accordance with the Commission's directive that the matter be referred directly to the Commission rather than to the Atomic Safety and Licensing Appeal Board, the Commonwealth respectfully urges the Commission to disqualify Administrative Law Judge Smith from further participation in the TMI-1 restart proceedings.

Respectfully submitted,



THOMAS Y. AU
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 Commonwealth of Pennsylvania

THOMAS D. REES
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 Office of General Counsel
 Commonwealth of Pennsylvania

Dated: March 6, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of: -

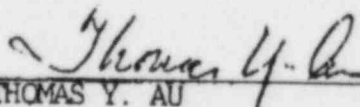
METROPOLITAN EDISON COMPANY,)

(Three Mile Island Nuclear)
Station, Unit No. 1))

Docket No. 50-289
(Restart)

CERTIFICATE OF SERVICE

I hereby certify that copies of the Commonwealth of Pennsylvania's Statement in Support of its Motion to Disqualify Administrative Law Judge Ivan W. Smith have been served on the persons listed on the attached Service List by First Class U.S. Mail* this 6th day of March, 1985.



THOMAS Y. AU
Assistant Counsel

Addressees marked by "" are being served by Federal Express, next day delivery.

NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of:

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

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