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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE NUCLEAR REGULATORY COMMISSION

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

THREE MILE ISLAND ALERT'S APPEAL OF JUDGE IVAN W. SMITH'S ORDER DENYING MOTIONS TO DISQUALIFY HIM

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Pursuant to the Nuclear Regulatory Commission's ("NRC" or "Commission") orders of February 21 and 22, 1985, Three Mile Island Alert ("TMIA") requests that the Commission reverse Judge Ivan W. Smith's order of February 20, 1985 and order his removal from this case for his demonstrated and extreme bias in favor of Licensee General Public Utilities Nuclear. TMIA requests further that the Commission vacate all prior decisions rendered by Judge Smith as Chairman of the Atomic Safety and Licensing Board ("Licensing Board") and order a rehearing on the remanded issues on the ground that these proceedings have been so infected by his bias that they do not form a fair and reliable basis for decision.

I. BACKGROUND

The Commonwealth of Pennsylvania, the Union of Concerned Scientists ("USC") and TMIA have moved that Judge Smith disqualify himself from serving in the Three Mile Island Unit 1

restart proceeding, established by Commission Order of August 9, 1979, 10 NRC 141 (1979), on the ground that he is biased in favor of Licensee and has prejudged issues pending before him in Licensee's favor. The NRC Staff has supported disqualification of Judge Smith because certain of Judge Smith's actions, based on extrajudicial matters, have given the appearance of bias, prejudgment, or an inclication to decide issues other than by an objective assessment of the evidentiary record. Licensee alone has opposed Judge Smith's disqualification on the ground of actual or perceived bias.

All movants cite Judge Smith's December 27, 1984 letter to United States District Court Judge Sylvia H. Rambo, requesting leniency in the sentencing of former TMI-1 Supervisor of Opertations James R. Floyd, recently convicted of violating federal criminal statutes by cheating on NRC licensed operator requalification examinations. Movants argued that the letter indicates that Judge Smith has prejudged the issues in the remanded training hearing now before him, and his actions would lead a reasonable person with knowledge of all the circumstances to question Judge Smith's impartiality.

Movants also argued that Judge Smith's professed concern for the due process rights of the company's employees is so extreme that it constitutes a bias in favor of Licensee and would lead a reasonable person to question his ability to decide even-handedly the training issues before him if his decision would impact adversely on company employees.

TMIA argued additionally that during the main restart

hearings and the remanded hearings on Licensee management capabilities, Judge Smith demonstrated a pervasive bias in favor of Licensee which requires his removal as presiding official in these proceedings.

On February 20, 1985, Judge Smith issued a Memorandum and Order in which he refused to disqualify himself. By order of February 21, 1985, the Commission took direct review of Judge Smith's order.[1/] On February 22, 1985, the Commission ordered that all parties submit comments on Judge Smith's order by close of business on March 6, 1985.

TMIA requests that the Commission disqualify Judge Smith from any further involvement in these proceedings, and in addition, that it vacate all decisions rendered by Judge Smith as TMI-1 Restart Licensing Board Chairman, and order rehearing on the remanded issues. Judge Smith's bias has prevented the intervening parties from fully developing their cases and from prevailing on any issue in the proceedings before him.

Moreover, Judge Smith's explanation of his refusal to disqualify himself discloses further that he is unable to decide the issues before him impartially. His opinion provides clear evidence that his bias has prevented him from understanding and fairly deciding issues which he has considered throughout these proceedings, including those remanded to him.

Additionally, Judge Smith's decision discloses an extreme

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1. On February 21, 1985, Judge Smith also denied motions of TMIA and UCS for leave to file briefs replying to Licensee and NRC Staff responses.

personal prejudice against, and lack of respect for, all parties in this proceeding except Licensee. Despite his protestation to the contrary, Judge Smith's decision indicates that he is likely to retaliate against those who in good-faith and on a sound basis have sought his recusal.

II. LEGAL STANDARDS FOR DISQUALIFICATION

An NRC Licensing Board judge must be removed if the following disqualification standard is met:

(1) The administrative trier of fact has a direct, personal, substantial pecuniary interest in a result;

(2) he has served in a prosecutive or investigative role with regard to the same facts as are an issue currently in the case before him;

(3) he has prejudged factual, as distinguished from legal or policy issues; or

(4) 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 NRC 21, 33-34 (1984); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-101, 6 AEC 60, 65 (1973).

The Commission has determined that the statutory disqualification standards which apply to federal judges also apply to NRC Licensing Board members. Public Service Electric & Gas Co. (Hope Creek Generating Station, Unit 1), ALAB-759, 19 NRC 13, 20 (1984) ("Hope Creek"); Houston Power and Light Co. (South Texas Project, Units 1 and 2), CLI-82-9, 15 NRC 1363,1365-67 (1982), rev'd on other grounds, CLI-82-9, 15 NRC 1363 (1982) ("South Texas"). Therefore, Judge Smith may be disqualified

under either of the statutes governing judicial removal: 28 U.S.C. Section 144 and 28 U.S.C. Section 455.

Specifically, Section 144 provides, in relevant part, as follows:

> 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.

Section 455 provides, in relevant part, as follows:

> (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 proceeding.

In essence 28 U.S.C. Section 455(a) establishes an objective standard for disqualification: whether a reasonable person knowing all the circumstances would be led to conclude that the judge's impartiality might reasonably be questioned. Hope Creek, supra, 19 NRC at 22; United States v. Norton, 700 F.2d 1072,1076 (6th Cir.), cert. denied 103 S.Ct. 1885 (1983); Fredonia Broadcasting Corporation v. RCA Corp., 569 F.2d 251, 257 (5th Cir. 1978) ("Fredonia Broadcasting").2/

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2. In 1974, Congress amended Section 455 to require disqualification not only in instances of actual bias, but also in circumstances giving rise to a "reasonable appearance" of impartiality. The provision was enacted to "enhance public confidence in the

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The Commission has also adopted the federal court rule that a trial judge's bias or prejudice must stem from an extrajudicial source. South Texas, supra, 15 NRC at 1365, cited with app'l in Hope Creek, supra, 19 NRC at 22 n.29; United States v. Grinnell Corp., 384 U.S. 563,583 (1966); In Re International Business Machines Corp., 618 F.2d 923,927 (2nd Cir. 1980) ("IBM"). Movants have met their burden in demonstrating that Judge Smith's conduct, which reveals bias and prejudice, stems from an extrajudicial source.

However, the Commission should remove Judge Smith even if it determines that his conduct demonstrating disqualifiying bias does not stem from an extrajudicial source. Although the Commission has previously adopted the "extra judicial source requirement," courts in four federal circuits provide that a judge may be disqualified even if the source of his disqualifying bias is not extrajudicial. See, e.g., Rice v. McKenzie, 581 F.2d 1114, 1118 (4th Cir. 1978); United States v. Cepeda Penes, 577 F.2d 754,758 (1st Cir. 1978); United States v. Bray, 546 F.2d 851,860 (10th Cir. 1979); Roberts v. Ace Hardware, Inc., 515 F. Supp. 29, 30-31 (D.Ohio 1981) (Sixth Circuit).

In Rice v. McKenzie, supra, 581 F.2d at 1118, the Court of Appeals disqualified a district court judge from consideration of a habeas corpus case since he had participated as a member of the

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impartiality of the judicial system" by eliminating the "duty to sit" concept and replacing the subjective standard of the previous statute which required disqualification when necessary "in [the judge's] opinion." H.Rep. No. 1453, 93rd Cong., 2d Sess. (1974) at 2-6.

state's supreme court in rejection of the same claims. The court stated that since a reasonable person had a basis to question the judge's ability to provide an independent federal review, Section 455(a) required his disqualification even though the judge had not demonstrated any bias against petitioner. It found the extrajudicial source doctrine irrelevant:

> The doctrine was grounded in substantial part on the "personal bias or prejudice" language of other predecessor statutes, and there may be some question about the extent to which it applies to the objective standard created by the 1974 amendment to section 455. . . . The principle that the source of the bias or partiality must be extra-judicial, however, has always had limitations. . . . If there is actual want of impartiality there, its source was clearly not extra-judicial, but the likelihood of the presence of partiality is sufficiently great to support a rule of absolute disqualification.

Ibid.[3]/

The court in United States v. Cepeda Penes, 577 F.2d at 757-58, found that the 1974 amendment to Section 455(a) now permits disqualification of judges "even if the alleged prejudice is the result of judicially acquired information" since the purpose of the amendment was to foster public confidence in the judicial system by requiring disqualification based on a "reasonable basis for doubting the judge's impartiality."[4]/

The question of whether Section 455(a) requires that the

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3. The court also drew a convincing comparison of Section 455(a) to 28 U.S.C. Section 47, which prohibits a federal appeals judge from sitting on an appeal of a decision he rendered as a trial judge. Id.

4. The court states that something more is required to disqualify a judge than merely his participation at a prior stage of the case. One may need to demonstrate that his conduct suggests friction between the judge and the complaining party. Id. at 758.

disqualifying bias stem from an extrajudicial source has not yet been decided by the United States Supreme Court.[5] Therefore, the Commission should reexamine its prior decisions and reject the extrajudicial source doctrine in order to protect more fully public confidence in its adjudicatory process.[6]

Further, an exception to the extrajudicial source doctrine has been developed in cases where a judge's judicial conduct demonstrates "pervasive bias and prejudice." Under that circumstance, disqualification is also required. South Texas, supra, 15 NRC at 1366; United States v. Gregory, 656 F.2d 1132,1137 (5th Cir. 1981); Davis v. Board of chool Commissioners of Mobile County, 517 F.2d 1044, 1051 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976); Nicodemos v. Chrysler Corp., 596 F.2d 152, 155-156 (6th Cir. 1979); Whitehurst v. Wright, 592 F.2d 834,838 (5th Cir. 1979).

Moreover, contrary to Judge Smith's assertion at Memorandum and Order at 26, n.19, Congess has codified Canon 2 of the Code of Judicial Conduct in amending 28 U.S.C. Section 455 in 1974.

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5. The court's decision in United States v. Grinnell Corp., supra, was issued in 1966, 18 years prior to amendment of 28 U.S.C. Section 455(a), to require removal when a judge's impartiality may be reasonably questioned. Therefore, Grinnell sheds no light on the meaning of the statute's amendment which requires mandatory recusal in the even of an objective appearance of bias.

6. Commissioner Asselstine's dissenting opinion in South Texas, supra, 15 NRC 1272-76, argues in favor of an approach which would permit disqualification where there was a "reasonable doubt regarding the Board member's ability to act fairly and impartially on matters before the Board" regardless of whether "the Board member's conduct or statements were related to matters within the proceeding." Id. at 1374. See also, Separate Views of Commissioner Gilinsky, South Texas, supra, 15 NRC at 1372.

Fredonia Broadcasting, supra, 569 F.2d at 256 n.7; Overseas Private Investment Corp. v. Anaconda Co., 418 F.Supp. 107,111 n.6 (D.D.C. 1976).

Canon 2 provides, in relevant part, as follows:

> A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
>
> B. A judge...should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

Section 455 also appears to incorporate Canon 3C of the Code of Judicial Conduct. United States v. Haldeman, 559 F.2d 31, 130-131 n.284 (D.C.Cir. 1976), cert. denied, 431 U.S. 933 (1977). Canon 3C(1) reads, in relevant part:

> 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.

Finally, the Commission must disqualify Judge Smith in the exercise of its discretionary authority. As Commissioner Asselstine urged the Commission in the South Texas case, a higher standard is needed "to ensure a fair opportunity for public participation and to promote public confidence in the objectivity of our licensing process." South Texas, supra, 15 NRC at 1374-75, citing Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), 1 NRC 1, 2 (1975).

Commissioner Asselstine's views are squarely in line with those courts which have ordered disqualification even when a

judge's apparent bias derived from a judicial source. It is unlikely that the principal goal of the extrajudicial bias limitation -- that judges not fear performing their duties due to the threat of removal -- would be hurt by the Commission's adoption of this standard. In fact, the two requirements that apparent partiality be perceived by (1) a "reasonable person" and by (2) one with knowledge of all relevant facts, will ensure that removal will continue to be granted in only rare and extreme cases.

Based on the above stated legal principles, TMIA believes that Judge Smith must be disqualified on the following grounds:

1) He has a personal bias against TMIA and other intervening parties;

2) He has prejudged factual issues currently pending before him;

3) His conduct would lead a reasonable person knowing all the factual circumstances to question his impartiality in deciding the issues before him;

4) Judge Smith's actions during the main and remanded hearings, as well as his recent letter to Judge Rambo, demonstrate his pervasive bias in favor of Licensee. Furthermore, his concern that he not adversely affect Licensee employees has blinded him to the real issues before him and has reinforced his bias in favor of Licensee; and

(5) Even if not required under the relevant statutory standards, the Commission should disqualify Judge Smith in the exercise of its discretionary authority to preserve public confidence in the NRC adjudicatory process. See, South Texas, supra,

15 NRC at 1374 (Asselstine dissent); Commonwealth Edison Co. (LaSalle County Nuclear Power Station, Units 1 and 2), CLI-73-8, 6 AEC 169,170 n.4 (1973).

III JUDGE SMITH'S LETTER TO JUDGE RAMBO DEMONSTRATES A PREJUDGMENT OF THE ISSUES BEFORE HIM AND A PERSONAL BIAS IN FAVOR OF LICENSEE WHICH REQUIRES HIS REMOVAL.

Judge Smith's letter to Judge Rambo demonstrates both a prejudgment of factual issues currently pending before Judge Smith and a bias in favor of Licensee. The prejudgment, as stated by all movants, is found in his statement that the NRC's regulatory process will assure that

> any problems caused by deception respecting Three Mile Island will have been identified and resolved. Deception in the future is very unlikely....

Smith Letter at 2. The precise issue currently before Judge Smith in the remanded training proceeding, is whether or not the cheating incidents reflect deficiencies in the TMI-1 training program so severe and pervasive that there can be no assurance that the root causes responsible for the cheating incidents have been corrected or that Licensee can train operators to operate TMI-1 safely. Sent scarcely three days after the start of hearings on the training issue, the letter announces Judge Smith's premature decision that he will not find that the training program continues to have the deficiencies which originally led to the cheating incidents.

A. Judge Smith's letter indicates a prejudgment of a factual issue pending before him.

Judge Smith seriously misstates facts in support of his argument that comments in his letter do not indicate bias in favor of the Licensee or prejudgment of a factual issue before him. Memorandum and Opinion, at 18-21, 23-26, 30-32.

Specifically, he argues that the issue of Floyd's conduct does not relate to any issue pending before the Board and in fact does not even relate to issues before the Board in the "cheating"

hearings. This argument is incredible, particularly in light of the attention devoted to the VV (Floyd) and O cheating incident, and management's response to it, in the Licensing Board's July 27, 1982 Partial Initial Decision, Metropolitan Edison Co (Three Mile Island, Unit 1), LBP-82-56, 16 NRC 281 (1982) ("PID"). In the section entitled, "Management's Response to Cheating," Judge Smith examined in detail not only the VV (Floyd) and O cheating incident, but also the false certification to the NRC arising from it. Id. at 344-355.

The Appeal Board did not engage in extended discussion of the incident in its decision precisely because the Special Master and the Licensing Board devoted "substantial attention" to it. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193 (1984) at 1231. ("ALAB-772").

The Appeal Board broadly framed the remanded training issue as follows:

> 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....

Id. at 1232-33. Not only did the Appeal Board not distinguish the VV/O cheating episode from the 1981 cheating incidents, in terms of the significance to Licensee's training failures, but the Board found this cheating incident in itself of particular significance. The Board stated:

> What this whole incident highlights, however, is the fact that a serious problem existed throughout licensee's organization: formal training and the

> NRC's regulatory requirements for operator licensing and requalification were regarded rather cavalierly, from the staff level to the higher plateaus of management. Moreover, it provides another instance of an employee (VV) in a responsible supervisory position, who is considered technically proficient but who found it necessary and apparently acceptable to submit work not his own.

Id. at 1231. In light of the Appeal Board's direction, it is obvious the letter was not a "post-decisional comment," as claimed by Judge Smith. Memorandum and Order at 30.

B. Judge Smith's Letter is Evidence of a Pattern of Conduct Demonstrating A Bias in Favor of Licensee, and Prejudice to the Interests of the Other Parties and the Public Health and Safety.

In his discussion of his letter to Judge Rambo, Judge Smith argues that if indeed he has some sort of "personal sympathy" for Floyd, this "sympathy" is not transferred to Licensee as evidenced by his "severe criticism" of Licensee's management, his "imputing every adverse finding on individuals to the corporate licensee, and his taking the "strongest action against Licensee" within his power. None of his arguments are supported by the record.

First, contrary to Judge Smith's representation, he did not impute to Licensee the fault for Floyd's cheating. Rather, he imputed to Licensee fault for the company's false certification to the NRC, because of Gary Miller's August 3, 1979 letter to the NRC stating that Floyd had satisfactorily completed his requalification program. See, e.g. PID at 355, par. 2318.

Moreover, Judge Smith overruled a number of the Special Master's findings of cheating and other wrongdoing, and reduced the Special Master's recommended sanctions against those implicated, in large part and often solely for reasons of employee "due process" or employee "morale", which had been asserted neither by the indi-

viduals[7] nor Licensee.[8] As a result, Judge Smith was able to weaken seriously the overall recommendation for action to be taken against Licensee, since the factual predicate to imposing any enforcement action or imposing other conditions on Licensee had been undercut. Clearly, this illustrates a failure to place public health and safety concerns foremost in his consideration.

Further, Judge Smith's claim that he took a "tough" stance toward the company as evidenced by his imputing to the company every adverse finding the Licensing Board reached concerning individuals, is simply untrue.

The following are a few examples:

> Pars. 2087,2088: While indicating that there could be additional cheating incidents, he believed "individual due process considerations" existed which militated against reopening the proceeding.
>
> Par. 2093: He refused to endorse Judge Milhollin's recommendation for criminal prosecution of O and W, in part, because "there may be a positive and needed benefit to employee morale at TMI in putting the O and W incident into history..."

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7. The Licensing Board allowed any individual named in the Special Master's report to provide factual evidence in the form of written comments to the Board in response to the Special Master's report, whether or not they had testified. Most of those named did not choose to comment. "MM" was one who did, and on the basis of these comments, the Licensing Board reversed the Special Master's finding regarding MM's involvement in cheating with GG and W on a company administered exam. PID at 309-313. The Appeal Board agreed that this procedure was "in the abstract," a violation of TMIA's due process rights, although was not in the specific case of MM. ALAB-772 at 1226-27.

8. Even GPU President Heramn Dieckamp recently acknowledged that the response to cheating "could have been harsher." GPUN/Alleged Improper Influence by the GPU Upper Management Structure Causing Changes to be Made to their Internal TMI-2 Accident Review Report to Reflect a More Favorable Managment Viewpoint, OI-1-83-012, Exhibit 16 at 171.("OI Report").

Pars. 2110, 2116: He refused to order G and H's removal from licensed duties despite the recommendations of the Special Master, the Commonwealth, and the intervenors, and refused to support Licensee's own suggestion that license revocation proceedings be instituted for G and H pending which they would be removed from TMI-1 operations, on the grounds that Licensee should be free from "distractions" in preparing "the unit for eventual restart", and that the proceeding must be completed without further delay.

Pars. 2135, 2136: He refused to impose any sanction against GG who he found had not only cheated, but had untruthfully denied it. The Appeal Board concluded that "the Board erred" in imposing no sanction. ALAB-772 at 1228.

Par. 2144: Even though Shipman protected an undetected cheater by offering false testimony, Judge Smith determined that Shipman should not be penalized on the ground that "public policy" favored disclosures of wrongdoing and should not be discouraged.[9]

Par. 2157: He reversed the Special Master who believed the "hearsay" testimony of NRC investigator Ward that Husted had solicited an answer from P on the 1981 NRC exam, because Husted was not permitted personally to witness Ward's testimony due to the sequestration order.

Par. 2207: He determined that Ross' testimony, which Judge Milhollin found noncredible, should be given the benefit of the doubt because Ross did not know who made the charges against him or why, despite the fact that he knew the essence of the charges against him. Judge Smith determined, "[t]his is, of course, a due process consideration."

Par. 2286: He determined that the reason for VV's alleged demotion need not have been made known specifically to VV or to the operations staff because such action "would have humiliated VV" and such "humiliation would have been very

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9. The Licensing Board used similar reasoning in ultimately rejecting the conclusion that "U" was stationed in the vicinity of the exam room to help answer questions. PID at 2184. Rather than agreeing with this analysis, the Appeal Board "s[aw] it a bit differently" and simply found the evidence "on the whole ... inadequate to support a finding of wrongdoing." ALAB-772 at 1225.

destructive...to VV's effectiveness, particularly in his ability to work with others."

Pars. 2417, 2418: He expressed his disagreement with the Commission's decision that the public health and safety demanded that the training deficiencies revealed by the Unit 2 accident be fully examined, including a full reexamination of all TMI operators, which he considered an unfair "void[ing] the full-power operator licenses of all the TMI-1 control room staff without the scarcest element of due process".

Judge Smith is no more severe in his findings on senior management. For example:

Pars. 2315, 2316: Judge Smith refused to make findings on management competence or to recommend potential criminal prosecution of, Beers, Herbein, Lawyer, Miller and Zechman, for sending of the the August 3, 1979 false certification letter to the NRC. His reasoning was that that Zechman, Beers and Lawyer, who were sent courtesy copies of the letter and were specifically mentioned by Miller, did not have an opportunity to explain their roles.

Pars. 2318 ,2319: Judge Smith refused to make any finding against Miller because Miller had not had the opportunity to defend himself against the charges, even though Smith concluded that the material false statement raised questions about Miller's "ethical judgment." Judge Smith also was reluctant to deprive the Licensee of Miller's talent in start-up and testing "in the interest of safety."[10]

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10. Despite the Board's support of Miller and Miller's superior Herbein, Dieckamp recently told the NRC's Office of Investigation that "I think we probably should have come to grips more early with the realization that Herbein and Miller could not be effectively used in the nuclear operation." OI Report, Exhibit 16 at 171. Dieckamp explained this statement for the first time publicly during the recently concluded hearings on the Dieckamp Mailgram issue: "The management became increasingly aware that to maintain Jack Herbein and Gary Miller in the nuclear organization was most likely a burden that was not helping us to achieve the approval that we were seeking." Tr. 28,921-922.

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Par. 2396: Judge Smith found that company attorney John Wilson, whose investigation for Licensee on cheating was seriously defective, was simply "naive" about the cheating incidents. The Appeal Board severely criticized Licensee management for this investigation, particularly in delegating to Wilson the responsibility for inquiring into the cheating incidents. ALAB-772 at 1229.

Par. 2401: Instead of attributing any fault for the cheating incidents to management, Judge Smith found that the "integrity of the program failed" because management did not understand their particular responsibility for the program and they failed to apply principles of quality assurance.

Pars. 2402, 2403: Even though Hukill and Ross, who have day to day contact with the operations staff, accepted responsibility for operator cheating, Judge Smith refused to hold them responsible and recommended no action against them.

Pars. 2406, 2407: Judge Smith recommended no action against Dr. Long even though Judge Smith found Long failed to understand the seriousness of the failings of the training program which he headed, or that the Training Department had been the cause of these failings.

Similarly, when faced with Judge Milhollin's well-reasoned and careful analysis regarding wrongdoing by Ross, Judge Smith created an extraordinary procedure before the PID was written to overturn these findings so as to allow maximum input by Licensee. Specifically, Judge Smith issued a Tentative Final Draft of his Partial Initial Decision which contained the Board's proposed reversal of Judge Milhollin's findings on Ross. All parties were allowed to provide written comments on this opinion prior to issuance of the PID. See Memorandum and Order Regarding Licensee's

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Herbein was removed after issuance of the Special Master's report, and Miller after issuance of the July 27, 1982 PID.

Motion to Reopen the Record (May 5, 1982).

Licensee provided Judge Smith with all available avenues to defend Ross even though none of the other individuals who participated in the cheating incidents were given such privileges. This procedure demonstrates the Board's eagerness to protect Licensee managers, particulary one as key as Ross who was earlier described by Judge Smith as perhaps "the most important person of the TMI-1 operating team with respect to public health and safety." PID at Par. 2192.

In addition, it is simply not true that the Licensing Board "took the strongest action against Licensee [regarding the Floyd cheating incident] within [their] power to take." Not only could Judge Smith have referred the matter for criminal prosecution, as OI eventually did, but he could certainly have prohibited Licensee's use of Miller and others involved in the false certification, in TMI-1 operations, as TMIA urged. Further, the strongest action he could have taken would have been to recommend against restart due to a lack of management competence and integrity. 11/

In sum, Judge Smith's letter to Judge Rambo is merely one other action which confirms his bias in favor of Licensee and prejudgment that he will make no finding which could block the lifting of TMI-1's license suspension.

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11. In other instances, Judge Smith misperceived the range of remedies open to him. For example, he characterized as "extreme" a requirement that the company revamp its training and testing program, despite his findings of serious deficiencies. Denying restart was a remedy which he apparently considered beyond his authority. PID at 364-365, par. 2347.

C. Judge Smith's Letter is Improper Character Testimony Which Demonstrates a Bias in Favor of Licensee.

Judge Smith's letter to Judge Kambo constitutes improper character testimony on behalf of Licensee's former Operations Supervisor which violates the Code of Judicial Conduct, and as such, indicates further bias in favor of Licensee.

Judge Smith's first argument that the letter was not testimony and did not relate to Mr. Floyd's character is not defensible. Memorandum and Order at 24. The letter's purpose was clearly to attest to Mr. Floyd's character -- precisely what a judge focuses upon in deciding on an appropriate sentence once one is convicted of a crime. The letter itself paints Floyd as a self-sacrificing worker who neglected his training to serve a "perceived" higher purpose of assisting management in the months following the accident. The letter included a litany of extenuating circumstances described so as to place Floyd in an extremely complementary light. The letter is thus undeniably character testimony.

However, Judge Smith suggests that he had some duty to attest to Floyd's character, and analogizes his letter to a response to a summons. Ibid. This position is equally absurd. His actions were voluntary. Obviously he was not responding to a summons or other formal process.

Moreover, by examining the prior practice which led to enactment of Canon 2B of the Code of Judicial Conduct, one sees that Canon 2B was intended to prohibit judges from providing character references for individuals in judicial proceedings except pursuant to formal process. Although the Committee drafting the

Canons originally considered permitting a judge to testify as a character witness if his testimony were "essential to a just result," it ultimately rejected such an approach. The Committee concluded that the proper standard precluded a judge from being a volunteer character witness. E. Thode, Reporter's Notes to Code of Judicial Conduct (1973), at 40.12/

After Canon 2B was changed to its current form it was clear judges were forbidden to volunteer character references of the sort sent by Judge Smith.

Further, Judge Smith denies that the letter was an attempt to bring the prestige of his office to bear on Floyd's character. Yet this is the only apparent purpose for sending the letter. Certainly, he was not offering Judge Rambo any information about Floyd's criminal actions since these actions had already been proven in trial. Moreover, he provided absolutely no useful information in the letter other than a summary recital of "extenuating circumstances" which he believed compelled leniency for Floyd.

Despite this, Judge Smith suggests that he had a duty to express to Judge Rambo his opinion of Floyd, and that he did so "for public purposes." Memorandum and Order at 24-25. However,

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12. One early American Bar Association ethics opinion issued before enactment of Canon 2B, permitted a judge's character testimony if he were not sitting in the trial of the case, and he believed the defendant was unjustly accused; the individuals were likely to receive a more severe sentence than he deserved; or the individual appeared likely to be a victim of circumstances or prejudice. Formal Opinion 14 (Jan. 10, 1929), American Bar Association Opinions on Professional Ethics (1967), at 253-254. Judge Smith's letter to Judge Rambo requesting leniency for Floyd falls squarely within the definition of character testimony contemplated by the current prohibition of Canon 2B.

Judge Smith sent this letter only upon a specific request from Floyd's attorney. Tr. 32,600.[13]/

Therefore, under Canon 2B his letter violated the prohibition against judges providing character testimony. He thus has demonstrated his bias in favor of Licensee, or at a minimum, he has created an appearance of bias.

D. Judge Smith's Letter Stems From Extrajudicial Sources.

Judge Smith next argues that his letter to Judge Rambo was based only on the official record of these proceedings and, therefore, cannot be characterized as extrajudicial conduct. However, a close review of the the substance of his letter reveals that it is in part compiled from information he obtained outside these proceedings.

First, the portions of the PID which Judge Smith cites as the source for his statements do not contain information which would lead him to conclude "Mr. Floyd's deception was an impulsive act" and "motivated [not] by personal ambition" but for "altruistic" reasons. Compare PID , pars. 2274, 2278, 2285, and 2286 with Smith Letter, par. 3.

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13. Judge Smith revealed this only under direct questioning from a TMIA representative, after the letter was sent. Tr. 32,600.

It is also worth noting that courtesy copies of the letter were sent not only to Floyd's attorney, but also to NRC General Counsel Herzel Plaine. One could reasonably infer that Judge Smith held prior discussions with the General Counsel's Office. Yet he has not made these communications known to the parties in the restart proceeding. The implication that he fully disclosed all communications outside the hearing which led to the letter, "obviating any potential prejudice from learning about the conviction from the media," appears untrue. See Memorandum and Order at 22 n.17.

IV. IN THE COURSE OF THE MAIN AND REMANDED HEARINGS ON MANAGEMENT CAPABILITY JUDGE SMITH HAS DEMONSTRATED PERVASIVE BIAS AND PREJUDICE REQUIRING HIS REMOVAL.

Even if the Commission determines that Judge Smith's letter is not extrajudicial conduct indicating prejudgment and bias, TMIA urges the removal of Judge Smith for the pervasive bias in favor of Licensee he has demonstrated during these proceedings. This pervasive bias has been demonstrated in two ways:

1) Judge Smith's concern for the due process rights of individual operators and Licensee employees and managers has blinded him to the public health and safety dangers posed by operations staff, management, and a training program which lack integrity.

2) Judge Smith's conduct during the remanded hearings has demonstrated a pervasive, bias against TMIA and other intervening parties. Often this pervasive bias is manifested by an extreme concern for Licensee's due process rights which blinds him to the issue of corporate integrity pending before him. This became especially apparent during the remanded hearings on the Dieckamp Mailgram and training issues.

A. Judge Smith Exhibited a Pervasive Bias in Favor of Licensee by his Extreme Protection of Licensee Employees and Failure to Articulate Properly the Training Issues Remanded to Him by the Appeal Board.

The issue of whether or not Licensee management had dealt too harshly with individuals involved in the cheating incidents was not an issue the Appeal Board remanded to Judge Smith. Rather it is one which Judge Smith resurrected from the earlier "cheating hearings" and which he insisted on pursuing despite the

valid objections of the parties.

Judge Smith's distortion of the issues remanded to him shows that his bias is so serious that it prohibits him from understanding and rationally analyzing the issues before him for decision. For example, Judge Smith stated that management's treatment of Mr. Husted, G and H was an issue the Appeal Board remanded to him. Memorandum and Order at 34. He stated further that the issue was put squarely into issue by Licensee's prefiled testimony. Id. at 35. Finally, he argued that the parties which have moved for his disqualification have either questioned Licensee witnesses on this matter, or admitted that the issue was a valid one to address during the training remand. Id. at 35-36. A review of the record on the training issue illustrates the numerous misstatements in Judge Smith's opinion.

It is appropriate to review first the concern expressed by the Appeal Board in ALAB-772. In that decision, the Appeal Board contrasted the Special Master and the Licensing Board's findings on Husted. It found that given the stipulation entered into between Licensee and the Commonwealth of Pennsylvania, it did not need to address the question of whether Husted should be removed from licensed duties. ALAB-772 at 1222.

The Appeal Board did indicate, however, that it was disturbed by Licensee's placement of Husted in the position of Supervisor of Non-Licensed Operator Training. Id. at 1223-24. The Appeal Board stated, "[w]e 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." Id. at 1224. The

Board ordered Husted removed as Supervisor of Non-Licensed Operator Training. Ibid. The Appeal Board did not direct the Licensing Board to review whether removal of Husted created a poor attitude among operators or whether it was a violation of Husted's due process rights.

Later the Appeal Board ordered that the reappraisal by the OARP Committee address certain management reponses to the training deficiencies revealed by the "cheating hearings," including management's decision to promote Dr. Robert Long, Samuel Newton, and Edward Frederick, and to appoint Dr. Richard Coe Director of Training and Education. Id. at 1236 n.56.

In evaluating management's reponse to cheating, the parties, including TMIA, proposed that they be permitted to litigate whether Licensee management had taken appropriate disciplinary actions against operations personnel who had been involved in the cheating incidents. Judge Smith did not permit examination along this line even though it was within the Appeal Board remand. See, e.g., Tr. 31,826; 32,653.

However, Judge Smith himself went beyond the remand to ask witnesses whether the TMI-1 operations staff believed treatment of those operators found to be involved in the cheating incidents had been unfairly treated. Tr. 32,318-323. He pursued this line of questioning despite the fact that Licensee witnesses testified that in their opinion the hearings did not affect or impair the functions of the training department. Tr. 32,677-683.

Many of the citations in Judge Smith's opinion which he claims demonstrate the parties' inquiry into operators view of the

treatment of Husted, G and H, simply do not support this view. For example, TMIA counsel stated merely that TMIA's position was that the focus of the hearing should be on management's responsibility for training failures and not on individuals' responsibility and due process rights. Tr. 33,091-093. Commonwealth counsel questioned Licensee witnesses about whether management communicated to the operators the reasons disciplinary actions were taken in order to determine whether or not management communications with operators had improved. Tr. 33,494-96; 33,504. Most of the testimony elicited by the parties had to do with operators other than G, H or Husted. Tr. 33,494-96 (Frederick); 32,212-213 (Frederick).

Further, some portions of the transcript provided by Judge Smith illustrate the parties' attempts to follow up on Judge Smith's persistent and pointed questioning about the alleged unfair discipline meted out to Husted, and the fault attributed to the Commonwealth and TMIA. Tr. 32,318-323; 32,396-401. Judge Smith certainly cannot claim that the Commonwealth and the intervenors raised this issue when they merely attempted to correct a record he had created to prove they had unfairly trampled the rights of Licensee employees.

Judge Smith's bias can perhaps best be seen by his total unwillingness to see the responsibility of Licensee management for Husted, G and H's removal from licensed operator responsibilities. Dr. Long testified without hesitation that it was management's decision to take this action. Tr. 32,319-320.

Moreover, it was upon Licensee's initiative that the Commonwealth of Pennsylvania and Licensee entered into a

stipulation under which the Commonwealth agreed to withdraw its exceptions to the Licensing Board decision on cheating in return for Licensee's agreement not to utilize H to operate TMI-1, and not to utilize Husted to operate TMI-1 or train licensed operators. Tr. 32,322; ALAB-772 at 1212-13; 1222.

At no time does Judge Smith assign responsibility to Licensee for the reassignments of H and Husted. Instead he blames the other parties, including, alternatively, the Commonwealth, TMIA and UCS. While on the one hand he fails to recognize the public health and safety dangers involved in utilizing operators or training instructors with integrity and attitude problems, he affirms that he cannot blame Licensee for utilizing its right to withdraw sponsorship of a candidate for a operating license. Memorandum and Order at 38 n.24. Indeed, Licensee has an absolute obligation to withdraw such sponsorship if the public health and safety require it. It seems obvious that Licensee, in pursuing a stipulation with the Commonwealth, has done exactly that -- withdrawn its backing of certain candidates for licenses.[14]/

Judge Smith's insistence on exploring the "treatment of licensed personel" in the training remand, and his explanation of his deep-seated concern about the treatment of Husted, G and H, reveal how far beyond his jurisdiction he has gone in these hearings. First, he states, without a basis in the

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14.Judge Smith appears to criticize the stipulation between the Commonwealth and Licensee on the ground that he did not approve it. Memorandum and Order at 40 n.25. However, the Appeal Board did expressly approve the stipulation in permitting the withdrawal of the appeal of the Commonwealth of Pennsylvania. Unpublished Order of Appeal Board (Dec. 22, 1983), cited in ALAB-772 at 1201 n.1.

record, his opinion that anxiety and bitterness of licensed operators is generated by their perception of the unfair treatment of Husted, G and H. Memorandum and Opinion at 38. Nowhere in the Appeal Board decision can that view of this case be found.

Secondly, he implies that a harsh treatment by management of licensed personnel could impact on safety because those individuals removed for their par ticipation in the cheating incidents may be replaced by others who are less competent. Id. at 39.[15/] Again Judge Smith cites no support for this proposition. However, the argument is similar to one used throughout the PID in defense of those with technical competence but a demonstrated lack of integrity. See, e.g., PID at 347, par. 2286 (Floyd); 355, par. 2319 (Miller); 312, par. 2135 (GG); 319, pars. 2167, 2168 (Husted). The Appeal Board expressly rejected such a distinction, finding that "ethics and technical proficiency are both legitimate areas of inquiry insofar as con sideration of licensee's overall management competence is at issue." ALAB-772 at 1227 (citations omitted).

With regard to Mr. Husted in particular, the Appeal Board already determined that the "interests of safety" required Husted's removal. In doing so, it rejected Judge Smith's narrow definition of instructor "competence," that is, the "mere possession of and ability to impart to others a certain quantum of information," in favor of "one that recognizes teacher competence to include the ability to communicate effectively a sense of responsibility as

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15. Judge Smith's extreme view is contrary to that held even by Licensee management. Dieckamp believes that in fact the response to cheating should have been harsher. See footnote 8, supra.

well as information." ALAB-772 at 1223. The Appeal Board determined that attitude is an integral part of an instructor's ability to teach, and that Husted did not have this. Judge Smith's current concern evidences the same lack of understanding of the necessary elements of instructor competence revealed in the PID.

Third, he states that his "inquiry into the treatment of the licensed personnel" was justified for fear that the NRC adjudicatory process was being somehow abused. Yet he cites no evidence that this was the case and names no offender. Id. at 40.

Finally, he relates his inquiry to his need to be informed in a timely manner about TMI-1 personnel changes. Ibid. As demonstrated by the flood of letters from Licensee counsel to the Board, the Licensing Board has always been informed of any personnel changes which might impact a Commission decision concerning restart of TMI-1. See, e.g., Letters dated December 2, 1982 and January 27, 1984, from Licensee counsel to the Appeal Board, served on all Board members and parties.

Given that Judge Smith has cited no support for his concerns, and no authority or direction from the Appeal Board to explore these concerns, one must conclude that he has done so out of a bias which blinds him to the real issues remanded to him for decision.

As further evidence of bias, Judge Smith also attacks, without justification, the competence of the parties and counsel who have practiced before him during the main and remanded hearings. Memorandum and Order at 7-8. He makes these unjustified charges without a single citation to the record.

For example, Judge Smith states in his opinion:

> This compartmentalization has not been conducive to

> an orderly proceeding. Nowhere is the effect more troubling than in the separation between the plant-design-and-procedure phase and the operator-training phase. . .
>
> Yet there was almost a complete separation of the participants in the plant-design-and -procedures phase from the participants in the training phase and still another separation of the participants in the main hearings from those in the remanded hearings...
>
> I was particularly sensitive to the fact that an extensive litigation over the adequacy of the licensed-operator training program was in progress despite the fact that none of the movants' lawyers would know what it was that the operators should be trained to do.

Ibid.

First, the "compartmentalization" of which Judge Smith complains was largely of his own making, and permeated his August 27, 1981 PID on "management" issues. TMIA objected to Judge Smith's compartmentalization of the hearing issues. See Memorandum in Support of Request for Stay Pending Administrative Review (September 11, 1981), at 7-9. The Board gave the issues in that decision a "narrow, compartmentalized look [and failed] to connect evidence presented during one phase of the hearing to other aspects where it is directly relevant."

TMIA has consistently tried to connect evidence developed in different aspects of this proceeding, but Judge Smith has consistently resisted these attempts. See also TMIA's Brief in Support of Exceptions to Partial Initial Decisions of August 27, 1981 and July 27, 1982 - Management Issues and Reopened Proceedings (Sept. 30, 1982), at 21, 63-64. For example, in the remanded proceeding, TMIA explored whether or not the training program adequately trained operators to deal with operational problems which could

result from the newly repaired steam generators at TMI-1. Tr. 32,855-860; 33,524-527.

Second, the parties have always been competent to understand and illuminate the training issues which they have addressed. Contrary to Judge Smith's statement in his Memorandum and Order at 8 n.8, Joanne Doroshow, TMIA counsel, participated in aspects of the main management hearings, and first became familiar with the large record developed during these hearings at the time TMIA's Finding of Fact and Conclusions of Law on management issues were prepared in the Spring of 1981. Moreover, as Judge Smith is perfectly aware, TMIA representative Louise Bradford has represented TMIA since the main hearings, beginning in January, 1981, and participated in most of the hearings on training issues.

Further, by emphasizing solely the technical "demands" placed on operations personnel at TMI-1, Judge Smith misinterprets the significance of the training issue. Memorandum and Order at 8. Although he claims that he alone fully appreciates the complexity of the issue, he fails to understand or admit that training and other problems at Three Mile Island have resulted from a lack of competence and integrity of Licensee management, and are not the fault of the operators. TMIA has always held this position in these hearings. See. e.g., Tr. 32,653; 33091. Judge Smith is the one who has not understood this point. Judge Smith thus reveals his deep bias.

Certainly, Judge Smith's distorted view of his judicial responsibilities exhibits extreme prejudice toward parties other than Licensee and the lengths he will travel to avoid findings against its management.

B. Judge Smith Exhibited a Pervasive Bias in Favor of Licensee by his Protection of Licensee Employees and Failure to Articulate Properly the "Dieckamp Mailgram" Issue Remanded to Him by the Appeal Board.

During the remanded hearing on the Dieckamp Mailgram issue Judge Smith exhibited the same bias in favor of Licensee, even though on this issue the person he protected was GPU President Dieckamp. Judge Smith consistently defined the "Dieckamp Mailgram" issue not as one involving corporate integrity, but as one involving Dieckamp's personal integrity. TMIA attempted, without success, to correct this misinterpretation and bring to his attention the Appeal Board's stated purpose for remanding this particular "reporting failure" issue to the Board -- that Dieckamp continues to have an important influence on Licensee management.

For example, TMIA objected to certain portions of Dieckamp's prefiled testimony on the ground Licensee should not have been permitted to present Dieckamp's testimony on the mailgram's meaning while prohibiting the testimony of former Commissioner Gilinsky for the same purpose. Tr. 28,304-305. Judge Smith barred Dr. Gilinsky's testimony but permitted Dieckamp to testify on this issue, in order to allow him to defend himself against claims that he lied. Tr. 29,306. Thus, only Dieckamp's interpretation was made part of the record.

TMIA next moved to strike the portion of Dieckamp's testimony which discussed earlier TMI-2 operator interviews, since TMIA had been foreclosed from introducing similar evidence. Tr. 28,307. Judge Smith granted Licensee "latitude" and admitted Dieckamp's discussion of these interviews, again because of a

apparent sympathy for Dieckamp's position:

> ...we have, in my experience with the Nuclear Regulatory Commission, and I think for the first time in this agency, a high official controlled by the licensing process who has been accused of lying; he is accused of lying as he sits here today. Not only that, but he has been publicly accused of lying and the accusation has had widespread publicity. The effect upon him and his employer is very important.
>
> I believe that although some of the arguments he makes in his testimony could have easily been made by counsel, I think that latitude should be given to Mr. Dieckamp to state in his own words why he believes what he does....We see it as a sense of fairness...I think he has a right to tell his story cohesively in a forum such as this.

Tr. 28,312-313.

When TMIA counsel explained that this degree of sympathy was misplaced because the only issue properly before the Board was Licensee's corporate integrity, not Dieckamp's personal integrity, Judge Smith disagreed, stating that corporate integrity was outside the scope of the remanded hearing. Tr. 28,313-315.

Similarly, sometime later in the hearing, TMIA requested a sequestration order for all witnesses, including Dieckamp. Tr. 29,082-083. Judge Smith denied the motion with regard to Dieckamp on the following basis:

> I wouldn't believe that I would expect to hear in a tribunal of justice a motion to exclude the accused from the very hearing to determine whether he told the truth or not, and I will just preemptorily deny that. It would be patently unfair, in violation of due process and requires no analysis beyond that.

Tr. 29,083.

Moreover, he refused to order the sequestration of the other witnesses on the same basis, by applying an impermissibly high legal standard for such an order:

> The question of sequestration at NRC hearings is not a simple matter....There was a sequestration order in the cheating phase of the hearing which apparently the parties agreed to...
>
> Apparently everyone believed it had benefits...but it also had a downside to it, and that is persons were accused of misconduct based upon an evidentiary record that they were not even aware of and those accusations have in some instances continued to attach to them and it is to me simply an affront to any concept of justice that persons can be accused of misdeeds and have findings made to that extent and never even know who is accusing them.

Tr. 29,091-092.[16]/

Judge Smith then stated that he would grant a sequestration order only upon a "very, very strong demonstration of need." Ibid. He thus applied an illegal standard for a rule on witnesses because of his misplaced sympathy for operations personnel at TMI.

Judge Smith also attacked TMIA witness, former NRC investigator David H. Gamble, who testified to deficiencies regarding the Office of Inspection and Enforcement investigation into information flow during the TMI-2 accident. Judge Smith questioned Gamble on what he perceived to be an unethical or illegal failure to inform persons he interviewed during the NUREG-0760 investigation of their Miranda rights.[17]/ Tr. 30,684-688.

Later when NRC Staff counsel directed a similar line of questioning to Gamble, Judge Smith acknoledged that these questions were improper. Tr. 30,767. Judge Smith's explanation

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16. Incredibly, in evaluating evidence of G and H's cheating in the PID, Judge Smith recognized the value of sequestration, specifically because it prevented G and H from coordinating explanations in instances where they cooperated on exam answers. See PID at 304, par. 2103.

17. Miranda v. Arizona, 384 U.S. 436 (1968).

that he had earlier wished merely "to determine how [Gamble's] opinion on the adequacy of NUREG-0760 methodology was shaped by his view of his responsibilities," Memorandum and Order at 45-46, simply does not coincide with the substance of his questioning. Judge Smith's abusive questioning of Gamble must be seen as simply another excursion outside the scope of the remanded hearing for the sole purpose of unilaterally asserting due process rights of Licensee employees who had not raised them, to the prejudice of the intervening parties.

Finally, Judge Smith ruled that TMIA could not present the testimony of former Commissioner Gilinsky, largely on the ground that TMIA, because it could not prefile written testimony, had not given Licensee adequate notice of his testimony and was "withholding information" from the Licensee and the Board. TMIA counsel explained that she was not authorized to testify on Dr. Gilinsky's behalf, and that she could do no more than outline the general areas of Dr. Gilinsky's testimony, clearly relevant to the issue before the Board. TMIA's Motion for Leave to Present Testimony of Former NRC Commissioner Victor Gilinsky Without Prefiling Written Testimony (Nov. 1, 1984); Tr. 27,857-858; 27,864;27,867.

Nonetheless, Judge Smith continuously misrepresented TMIA's position during the prehearing conference held on November 9, 1984, and in his recently-filed Memorandum and Order. Tr. 27,864, 27,867; Memorandum and Order at 47. Again, Judge Smith was unable fairly to decide the issues before him because of his extreme concern for the alleged due process rights of Licensee.

As can be seen from the above examples, the alleged due

process rights about which Judge Smith is concerned are those of Licensee and its management, not those of the operators. Under no stretch of the imagination can it be claimed that failure to provide company President Dieckamp the full confrontation rights of a criminal defendant would have demoralized the TMI-1 operations staff and thus compromised safety.

Further, it cannot be argued that Judge Smith's extreme discomfort about providing adequate notice to Licensee is anything other than bias in favor of the company. In a similar situation, Judge Smith admitted that NRC Staff witness Norman Moseley's testimony was "conclusionary" but the lack of notice to TMIA was not of concern because intervenor's counsel was "saturated in the facts". Tr. 28,809-810.

C. Judge Smith Exhibited a Pervasive Bias in Favor of Licensee and Against TMIA by his Comments During the Remanded Hearings.

Judge Smith continually launched unwarranted criticisms of TMIA, TMIA witnesses, and TMIA representatives and counsel. TMIA refers the Commission to the discussion of these incidents in TMIA's Motion to Disqualify Judge Ivan W. Smith, at 14-23.

In his defense, Judge Smith has stated that his questioning of TMIA witness Gamble was proper. Memorandum and Order at 44-46. However, as discussed in, Section III, B., supra, Judge Smith acknowledged that his questioning was not properly motivated.[18]/

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18. The Commission should also note that the Department of Justice is investigating whether improper ex parte contacts occurred between the Commission and, inter alia, the Licensing Board on the subject of Gamble's testimony. See S. Connelly to L. Bernabei Letter (Jan. 7, 1985), attached and incorporated herein as Exhibit 1.

Judge Smith argued that he did not attack TMIA's motives in calling former Commissioners Bradford and Gilinsky. Yet he clearly applied an extraordinarily high threshold requirement for showing relevance of their testimony which was not applied to any Licensee witness. Moreover, he stated that since he believed the former Commissioners did not understand the purpose for which their testimony was being presented, they were precluded from testifying. Such a standard has absolutely no legal foundation. Tr. 27,832-833; 27,850.

During the remanded training hearing, Judge Smith attacked TMIA for the position it had taken on the training issue, and attributed to TMIA responsibility for poor operator attitude and morale.[19/] See TMIA's Motion to Disqualify at 18-20; Tr. 31,396-401.

Judge Smith's explanation of his remarks is not credible. Specifically, in response to TMIA's argument that he unfairly charged Ms. Bradford with responsibility for poor operator attitudes during a discussion of TMIA Exhibit 6, Memorandum and Order at 47-49, Judge Smith stated, inter alia, that his on-the-record comments were merely a reaction to an exhibit he was reading for the first time. Judge Smith asserted that much of the language of his cited statement came from the exhibit itself.

In fact, Judge Smith was provided a copy of TMIA Exhibit 6 the previous day, and he and the parties had a lengthy discussion of the

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19. TMIA found Judge Smith's criticisms of TMIA particularly shocking, since TMIA has expressed a genuine concern for minimizing the anxiety of operators who testifed in the cheating hearings. TMIA agreed to a protective order to protect the confidentiality of the operators, where they were identified publicly with letter designations, even though it had no legal obligation to do so under the Licensing Board's own ruling.

exhibit at that time. Tr. 32,298-306; 32,312-329. His discussion of the document on the following day and his unprovoked attacks on Ms. Bradford derived from his consideration of whether he would admit the document into evidence. Tr. 32,383-402. And, no fair reading of the transcript provides support for Judge Smith's claim that his criticisms of Ms. Bradford for causing poor operator morale came directly from the proposed TMIA exhibit.

Judge Smith also states that he admonished TMIA counsel during the hearing, not, as TMIA charged, to prevent them from conferring, but rather "to provide to counsel the benefit of both consultation and an understanding of the Board's rulings." Memorandum and Opinion at 49. However, a review of the numerous instances in which Judge Smith made such admonishments indicates that this was not his purpose. If Judge Smith's attempts to prohibit TMIA counsel from conferring during the hearing had been successful, he would have impaired their ability to represent their client TMIA.

The following examples illustrate that TMIA counsel fully understood Judge Smith's remarks and were consulting in the majority of cases to respond to the Board's concerns:

1) Judge Smith commented on TMIA counsel conferring even though the record reflects that they clearly understood Judge Smith's ruling and were not impeding the progress of the hearing, Tr. 29,039;

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

3) Judge Smith admonished TMIA counsel for "chatting" during the hearing when they were attempting to determine whether the Board had imposed any requirement on the parties to prefile rebuttal testimony as Judge Smith had a short time before suggested, Tr. 30,506-508; and

4) Judge Smith attempted to prohibit TMIA counsel from placing on the record objections to NRC Staff witness Moseley's testimony when the clear purpose of their consultation was to provide the Board with citations to the record to support TMIA's position then under discussion. Tr. 29,796-799;

Judge Smith also denied TMIA's "accusation" that he had signaled the correct answers to witnesses. Memorandum and Order at 49-50. He seemed to base his explanation on the fact that the witness, even after the verbal signal, was still uncertain about the expected response. It is clear from the record that the witness changed his testimony upon prompting from Judge Smith.

Moreover, the example cited by TMIA was not the sole example of Judge Smith's leading witnesses to answers favorable to the Licensee's case. For example, in the course of TMIA counsel's cross-examination of key witnesses, Judge Smith has frequently permitted interruptions by Licensee counsel so that witnesses would have time to amend or change their answers. In some case, he permitted Licensee counsel to read portions of exhibits into the record in the middle of cross-examination. Judge Smith permitted company counsel to interrupt TMIA's cross-examination of Dieckamp to read portions of Joseph Chwastyk's prior interview into the record, in an obvious attempt to bolster Dieckamp's testimony. Tr. 28,835-837.

In another instance, Judge Smith refused to permit TMIA to question Dieckamp about the reasons why he had transferred Miller and John Herbein out of nuclear operations, even though Judge Smith acknowledged that it was relevant to the issue before him. First he stated that TMIA counsel could not ask Dieckamp any questions to which she did not already know the answer. Tr. 28,893-894. He then changed his ruling but demanded that TMIA submit its proposed series of questions, and the basis for the questions, to the Board for pre-approval. Tr. 28,896.

After the lunch break Judge Smith told TMIA counsel that she could ask only two of the three questions, after he failed to pressure TMIA counsel to disclose the questions to Dieckamp. Tr. 28,913-917. In the middle of the attempted cross-examination TMIA counsel was interrupted and told she could ask only the second question since Dieckamp objected to answering the first question. Tr. 28,917-918. TMIA counsel then stopped all cross-examination on this point since Judge Smith had effectively destroyed the attempted cross-examination. Tr. 28,919-921.

On many other occasions, Judge Smith interrupted counsel's examination of witnesses for no valid reason, other than for the alleged purpose of requiring TMIA counsel to develop a full and complete record on each point. See, e.g., Tr. 28,797-806; 30,319; 30,354-363.

It is obvious that Judge Smith has exhibited throughout the remanded hearings an obvious prejudice against TMIA and bias in favor of Licensee. His justification for his actions described in his Memoradum and Order failed to address TMIA's arguments.

V. JUDGE SMITH'S COMMENTS DURING THE HEARINGS AND HIS LETTER TO JUDGE RAMBO WOULD LEAD A REASONABLE PERSON WITH KNOWLEDGE OF ALL RELEVANT FACTS TO QUESTION HIS IMPARTIALITY.

Judge Smith argues that the newspaper articles cited by movants do not demonstrate that a reasonable person, knowing all relevant facts, would question his impartiality. Memorandum and Order at 50-52. He states that since it is only the movants who are quoted, there is no evidence that a disinterested member of the public would similarly view him.[20]

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20. The question of whether reasonableness is to be viewed from the perspective of a disinterested observer or from that of the litigants has not been authoritatively resolved by the United States Supreme Court. In Roberts v. Ace Hardware, Inc. 515 F. Supp. 29 (D. Ohio 1981) a district court judge recused himself under section 455(a) after plaintiff's counsel filed "a long list of rulings and actions" which he argued were "so completely erroneous that they could only be the result of personal personal bias against counsel." Id. at 30. The Court reasoned that

> [I]n these days when public relations are all-important, it sometimes appears that the image is of greater consequence than the reality. Whatever logic may dictate, a person who feels very strongly that he is the victim of judicial prejudice carries with him a very poor image of the justice system with which he is perforce involved.
>
> Even though a disinterested person might not be reasonable in questioning the judge's impartiality, the test of what is reasonable for a very much interested person must necessarily be very much different. The question of reasonableness ought to be approached from the viewpoint of the party to the action, not of that famous fictitious character, the reasonable man.
>
> The justice system would be impaired in its functioning if plaintiff's counsel were forced to trial before a judge that he is convinced, however wrongly, is biased against him.

Id. at 30-31.

Judge Smith fails to consider that one movant is the Commonwealth of Pennsylvania. Certainly, the Governor, as the elected representative of his state, deserves the greatest deference in any consideration of how the Pennsylvania public views Judge Smith. Moreover, many other elected representatives have called for Judge Smith's removal, in addition to the Governor. They include United States Congressmen George W. Gekas, William F. Goodling, and Robert W. Edgar; Pennsylvania House of Representatives member Bruce Smith; and the Lower Swatara Township Board of Commissioners. See Letter of G. Gekas and W. Goodling, attached and incorporated herein as Exhibit 2; Letter of R. Edgar, attached and incorporated herein as Exhibit 3; Letter of B. Smith, attached and incorporated herein as Exhibit 4; and Letter of Lower Swatara Township Board of Commissioners attached and incorporated herein as Exhibit 5.

At no time in Commission history has the conduct of an NRC Licensing Board judge elicited such an outcry of public criticism. The cross-section of Pennsylvania public officials calling for Judge Smith's removal represent widespread public opinion. Unless the Commission is prepared to rule that a substantial portion of Pennsylvania's population, including its Governor, is "unreasonable" in their conclusion that Judge Smith is biased, it must disqualify him from further participation in the restart proceedings.

As expressed on October 8, 1981 by former Atomic Safety and Licensing Appeal Panel Chairman Stephen Eilperin in voluntarily recusing himself from serving on any TMI-1 Appeal Board, the TMI

experience "has . . . been unique, especially for those who live in that area." The parties to the TMI-1 restart hearings have "an especially strong claim that there should be not the slightest appearance of unfairness to the decision about which they are concerned." S. Eilperin Memorandum (Oct. 8, 1981), attached and incorporated herein as Exhibit 6. See also Smith v. Pepsico, Inc., 434 F.Supp. 524 (D. Fla. 1977) (supporting a "community standard" for disqualification under section 455(a) since the "appearance of partiality" may vary in different districts).

Clearly there is ample evidence on the record to show Judge Smith is actually biased in favor of Licensee and has prejudged factual issues. See Sections III and IV, supra.

However, such a showing is not a necessary prerequisite to disqualification under section 455(a). The statute's overriding concern with appearances, which also pervades the Code of Judicial Conduct, provides a sufficient basis for disqualification in this case. H. Rep. No. 1453, 93rd Cong. 2d Sess., 2-6 (1974). Potashnick v. Port City Construction Co., 609 F.2d 1101, 1111 (5th Cir. 1980), cert. denied, 449 U.S. 820 (1980) ("Potashnick").21/

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21. As the Court stated in Potashnick:

> The use of "might reasonably be questioned" in section 455(a) clearly mandates that it would be preferable for a judge to err on the side of caution and disqualify himself in a questionable case.

Id. at 1112.

Apparently, Judge Smith fails to appreciate this important policy consideration. Instead of erring "on the side of caution," he writes "these motions have come after I have served more than five years, in

(Footnote Continued On Next Page)

Moreover, Judge Smith's continued participation in the restart proceedings not only threatens the legitimacy of the adjudicatory process but also calls into question the institutional commitment of the NRC to ensure TMI-1 management capability. Therefore, the Commission has no choice but to remove Judge Smith to assure the public the agency will protect the public health and safety.

VI. THE COMMISSION MUST DISQUALIFY JUDGE SMITH IN THE EXERCISE OF ITS INHERENT AUTHORITY TO HALT ERODING PUBLIC CONFIDENCE IN THE NRC HEARING PROCESS.

The Commission has the authority to remove Judge Smith in exercising its discretionary, supervisory authority over pending adjudications. South Texas, supra, 15 NRC at 1367. The NRC Staff maintains that such a step is required to restore public confidence in the agency. This was the precise message of the Philadelphia Inquirer editorial referenced by all the movants. Regardless of whether or not the erosion of public confidence is well-founded, as movants believe it is, the fact the public has lost faith in the NRC mandates Judge Smith's removal. Indeed, Congress' purpose in amending the judicial disqualification

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(Footnote Continued From Previous Page)
over 160 days of hearings, heard hundreds of witnesses, and written thousands of pages of decisions, orders and memoranda. But none of the parties before found it necessary to seek my removal." Memorandum and Order at 53.

Although TMIA recognizes Judge Smith's historical role in this matter, the parties have not before been confronted with such open and blatant extrajudicial conduct evidencing bias. TMIA complained over three years ago of Judge Smith's bias and prejudice within the context of the restart proceedings. See TMIA's Brief in Support of Exceptions to Partial Initial Decisions of August 27, 1981 and July 27, 1982 - Management Issues and Reopened Proceedings at 2-5, 27-28.

statutes in 1974, was to ensure a judicial system of unimpeachable in which the public could have unwavering confidence. H.Rep. No. 1453, 93rd Cong., 2d Sess. 2-6 (1974); S.Rep. No. 93-419, 93rd Cong., 1st Sess. 5-6 (1973).

Thus, even if the Commission finds the statutory requirements have not been met, it must disqualify Judge Smith in order to restore public confidence in the NRC adjudicatory process.

VII. THE COMMISSION MUST VACATE ALL PRIOR DECISIONS OF JUDGE SMITH AND ORDER REHEARING ON THE REMANDED ISSUES SINCE HIS DECISIONS AND THE HEARING RECORD DO NOT FORM A FAIR AND RELIABLE BASIS FOR A RESTART DECISION.

When the Commission disqualifies Judge Smith from further participation in the TMI-1 restart hearings, the Commission must vacate all past decisions he has rendered and order rehearing on those remand issues for which he has developed the record.[22/]

Judge Smith has served since 1979 as Chairman of the Licensing Board for all TMI-1 restart proceedings. He was largely responsible for the opinions rendered in the main and reopened hearings on management issues, including training. More recently, Judge Smith had a dominant role in the permitted development of the record on the "Dieckamp mailgram" and remanded training issues. Judge Smith accurately described his dominating role among the Board Panel Members in stating in his decision, Memordandum and Opinion at 8: "I was the only person at the remanded hearing who had heard all of the testimony and

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22. The NRC Staff opposes rehearing or relitigation on any prior issue on the basis that NRC regulations provide authority only for designation of another board member to serve on the board in the event a judge is removed from a sitting panel. NRC Staff Response at 23-24.

considered all of the exhibits."

TMIA complained of Judge Smith's demonstrated bias in favor of Licensee in its Brief in Support of Exceptions to the Partial Initial Decisions of August 27, 1981 and July 27, 1982 - Management Issues and Reopened Proceedings (Sept. 30, 1982). Among the indicators of bias TMIA pointed out in that brief were the following:

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

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

3) The Board violated intervenors' due process rights by forcing TMIA to present its case first on TMIA Contention 5 concerning deferred maintenance on safety-related items;

4) The Board arbitrarily rejected TMIA's exhibits or accepted them only for limited purposes. In identical circumstances the Board simply accepted Licensee and NRC Staff exhibits. See TMIA Brief in Support of Exceptions (Sept. 30, 1982), at 2-5, 27-28.

If the Commission disqualifies Judge Smith it must also invalidate all TMI-1 restart proceedings in which he has participated. Withrow v. Larkin, 421 U.S. 35,46-47 (1975); In re Murchison, 349 U.S. 133,136 (1955); Berger v. U.S., 255 U.S. 22,36 (1921); Price Brothers Co. v. Philadelphia Gear Corporation, 629 F.2d 444,459 (6th Cir), cert. denied, 454 U.S. 1099 (1980); Potashnick, supra, 609 F.2d at 1115; United States

v. Amerine, 411 F.2d 1130,1133 (6th Cir. 1969); U.S. v. International Business Machines, Inc., 475 F.Supp. 1372,1390 (S.D. N.Y. 1979), aff'd, 618 F.2d 923 (2d Cir. 1980).

This would include vacating his past decisions as well as ordering new hearings on the remanded training and Dieckamp Mailgram issues.

An adjudicatory hearing before an administrative tribunal must afford a fair trial in a far tribunal as a basic requirement of due process. Withrow v. Larkin, supra, 421 U.S. at 46-47; Commonwealth Corp. v. Casualty Co., 393 U.S. 145 (1966); Doraiswamy v. Secretary of Labor, 555 F.2d 832,843 (D.C. Cir. 1976); Amos Treat Co. v. S.E.C., 306 F.2d 260,263-267 (D.C. Cir. 1962); Haldeman, supra, 559 F.2d at 130 n.276.

An impartial fact finder is a central element in the required Morgan v. United States, 304 U.S. 1, 14-15 (1963); Lloyd Carr & Co. v. Commodity Futures Trading Commission, 567 F.2d 1193, 1196 (2nd Cir. 1977); Helena Laboratories Corp. v. National Labor Relations Board, 557 F.2d 1183, 1188 (5th Cir. 1977). due process. As the court states in N.L.R.B. v. Phelps, 136 F.2d 562,563-64 (5th Cir. 1943):

> [A] fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge. Indeed, if there is any difference, the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency, been relaxed. . . . As to this feature of the statute, prejudice is presumed whether actually

> present or not. We believe that the language employed by Congress compels the conclusion that Congress was concerned with avoiding the appearance of partiality as well as avoiding the fact.

In re Murchison, supra, 349 U.S. at 136 (constitutional fair trial requirement is "stringent rule" and requires retrial when appearance of justice is lacking).23/

The Staff argues that the Commission can appoint a new board member to assist Judges Wolfe and Linenberger in rendering a decision on the Dieckamp Mailgram and training issues, since there is no alleged reason to disqualify them. NRC Staff Response, at 25. This argument too ignores due process requirements.

In an analogous situation, the Supreme Court vacated an arbitration board's award where one of those arbitrators had a prior business relationship with one of the parties. Commonwealth Corp. v. Casualty Co., supra, 393 U.S. at 146-147. The Court found the award could no stand even though there was no evidence that the arbitrator held actual bias against the moving party. In reversing the award the Court stated:

> This rule of arbitration and this canon of judicial ethics rest on the premise that any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias. We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another.

Id. at 150.

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23. The NRC Staff's argument that NRC regulations do not provide for rehearing of issues in the case a judge's disqualification is therefore irrelevant. Neither the NRC rules nor the NRC's authorizing legislation can contravene constitutional fifth amendment due process guarentees.

Here too, if the Commission disqualifies Judge Smith under one of the mandatory federal disqualification statutes, due process requires that the issues which he has heard or on which he has rendered a decision be reheard.

As Chairman of the Licensing Board, Judge Smith has primarily been responsible for making evidentiary rulings and shaping the evidentiary record on which the Board's partial initial decisions rest. As an attorney and administrative law judge presiding over the legal questions on management integrity, he is bound to have heavily influenced the technical board members. He has frequently questioned witnesses; established the procedural rules for organizing the various phases of the proceedings; and openly influenced the judgments of the board members.

In short, Judge Smith has held the dominant judicial role throughout these proceedings. His bias in licensee's favor has obstructed TMIA and other parties from developing a complete record to support their litigative positions. And, he has prevented TMIA and other parties opposing restart from prevailing on any issue litigated before him.

Without rehearing on these issues and opportunity for additional discovery, the parties will be denied their right to develop fully their cases in violation of fundamental due process. For this reason courts have generally required a rehearing or retrial on issues heard before a biased factfinder. See Leverett v. Town of Limon, 567 F.Supp. 471,474-475 (D. Colo. 1983) (citation against plaintiffs stricken when zoning board improperly biased); Hall v. Small Business Administration, 695 F.2d 175,180 (5th Cir.

1983)(judgment in sex discrimination action vacated and case remanded for retrial when magistrate's disqualification required); Roberts v. Bailar, 625 F.2d 125,129-130 (6th Cir. 1980) (judgment vacated and action remanded when judge should have been disqualified because reasonable person might question his impartiality); Loeb v. Nassau Electric Railroad Co., 240 App.Div. 912 (N.Y. 1933).

Furthermore, it is virtually impossible for the Commission to excise those portions of the record which may have been affected by Judge Smith's bias. In Berger v. United States, supra, 255 U.S. at 36, the Court explained the dilemma of purging a biased record on appeal:

> The remedy by appeal is inadequate. It comes after the trial and if prejudice exists it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient.[24]

Another practical problem in having a new judge join the Board at this late date to render a decision on issues already heard is that the new judge will not have an opportunity to observe the demeanor of witnesses. Section 554(d) of the Administrative Procedure Act, 5 U.S.C. 544(d) (1976), has been widely interpreted to permit an agency to appoint a new examiner to render a decision without rehearing testimony only when demeanor evidence is unnecessary or of little value. Millar v. Federal

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24. In IBM, supra, 618 F.2d at 934, the court concurred:
> The issue is not simply how long this would take but rather whether we could reasonably expect a judge to

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Communications Commission, 707 F.2d 1530,1538-39 (D.C. Dir. 1983); Pigrenet v. Boland Marine & Manufacturing Co., 631 F.2d 1190,1191-92 (5th Cir. 1980); Gamble-Skogmo, Inc. v. Federal Trade Commission, 211 F.2d 106,115 (8th Cir. 1954).

The exceptions to this rule are few. They include cases which turn on a question of public record or stipulated facts; in which the crucial evidence is presented through documents like affidavits, depositions, or extrajudicial writings; in which conflicting testimony is of experts; in which witnesses' testimony is so non-credible, or contrary evidence so overwhelming, that demeanor could not convince a reasonable factfinder that the witness was telling the truth. Millar v. F.C.C., supra, 707 F.2d at 1538-39.

None of these exceptions adhere in this case. Indeed, it is hard to imagine a case in which the demeanor of witnesses plays a more important role. The factual disagreements about licensee's awareness of the pressure spike and its implications, or about the cheating incidents illustrate how demeanor evidence can be determinative.

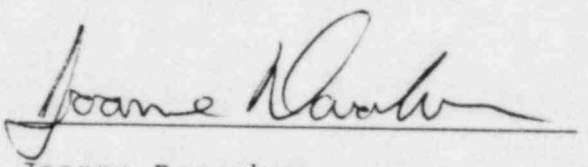
Therefore, after disqualifying Judge Smith from participation in the restart proceedings, the Commission must vacate his prior decisions and order rehearing on all issues heard in the main and remand hearings on management capability.

(Footnote continued from previous page)
accomplish the task at all. The labors of Sisyphus pale by comparison to those that would be imposed upon a new judge, and in the end, the attribution of extrajudicial bias would require extrasensory perception.

VIII. CONCLUSION

For the above-stated reasons, the Commission must reverse Judge Smith's decision of February 20, 1985; disqualify Judge Smith from any further participation in the TMI-1 restart proceedings; and vacate all decisions he has rendered and order rehearing of all issues over which he has presided.

Respectfully submitted,



Joanne Doroshow
The Christic Institute
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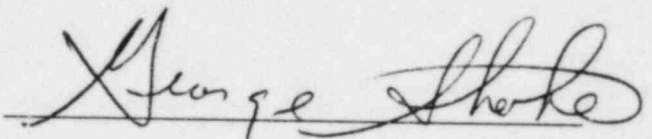
Washington D.C. 20002
(202) 797-8106



Lynne Bernabei
George Shohet
Government Accountability Project
1555 Connecticut Avenue N.W.
Suite 202
Washington, D.C. 20036
(202) 232-8550

Attorneys for Three Mile Island Alert, Inc.

Dated: March 6, 1985

EXHIBIT 1

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

January 7, 1985

Ms. Lynne Bernabei
Attorney for Three Mile
Island Alert
Government Accountability Project
1555 Connecticut Avenue, NW, Suite 202
Washington, D. C. 20036

Dear Ms. Bernabei:

Thank you for your letter of December 10, 1984, requesting that my office conduct an investigation to determine whether any NRC official attempted to harass a witness for Three Mile Island Alert or whether there have been any improper ex parte contacts between any NRC officials and employees advising the Commissioners in the exercise of their quasi-judicial functions.

I have been requested by the Department of Justice to defer any inquiry into these matters at this time.

Sincerely,

Sharon R. Connelly

Sharon R. Connelly, Director
Office of Inspector and Auditor

EXHIBIT 2

GEORGE W GEKAS
17th DISTRICT PENNSYLVANIA

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEES
CRIMINAL JUSTICE—RANKING MINORITY MEMBER
CONSTITUTIONAL AND CIVIL RIGHTS
SELECT COMMITTEE ON AGING

Congress of the United States

House of Representatives

Washington, D.C. 20515

WASHINGTON D.C. 20515
(202) 225-4315

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25 NORTH FOURTH STREET
SUNBURY, PENNSYLVANIA 17801
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85 FEB 14 P3:16

February 12, 1985

Mr. Nunzio Palladino
Chairman
Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

Dear Chairman Palladino:

The Nuclear Regulatory Commission has scheduled a public meeting on Wednesday, February 13, 1985 -- tomorrow -- to consider and affirm an order on the importance and impact on the possible restart of the Unit One reactor at Three Mile Island of those TMI hearings presently in progress or under review by the NRC.

While this matter before the Commission on Wednesday certainly represents one of the most important of the TMI saga to date, one issue of greater preeminence has appeared which must receive your immediate attention: the disqualification of administrative law judge Ivan W. Smith.

Judge Smith's recent letter to Judge Sylvia H. Rambo requesting leniency for James R. Floyd was an admission of bias which certainly cannot go unnoticed. By expressing his "personal" desire about the outcome of the Floyd case, Smith discarded the robes of judicial impartiality. But, even though his actions now show the tint of his personal, not judicial, opinion, Smith still maintains judicial stature in the Three Mile Island review.

The fact of Smith's letter to Judge Rambo is enough to cast a cloud over the entire TMI proceeding in which Smith participated. The absence of any action -- by the NRC or Smith himself -- to remove him from the hearing board after such an appearance of bias jeopardizes the validity of any future -- and past -- hearings on Three Mile Island. Any future actions by Smith as the administrative law judge considering the restart of TMI Unit 1 would be called into question. Both sides of the issue, and especially the general public, are being dealt a great disservice by this lack of proper action.

We, as representatives from the towns and counties surrounding Three Mile Island, beseech you to resolve the Ivan Smith question before continuing with any other aspect of consideration. And, following the resolution of that matter, we feel that the Nuclear Regulatory Commission should consider the question of restart only and not until the full and satisfactory completion of all hearings and matters related to Three Mile Island now pending before the Nuclear Regulatory Commisssion.

Thank you for your time and consideration of our views.

Very truly yours,

George W. Gekas

GEORGE W. GEKAS
Member of Congress

Bill Goodling

WILLIAM F. GOODLING
Member of Congress

GWG/wac

EXHIBIT 3

ROBERT W. EDGAR
7TH DISTRICT PENNSYLVANIA

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WASHINGTON, D.C. 20515
(202) 225-2011

55 NORTH LANSDOWNE AVENUE
LANSDOWNE, PENNSYLVANIA 19050
DEL. CO. EXCHANGE (215) 626-7000
PHILA. EXCHANGE (215) 726-4100

Congress of the United States

House of Representatives

Washington, D.C. 20515

'85 JAN 16 A9:16

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

January 15, 1985

SERVED JAN 16 1985

50-289 SP

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

Dear Chairman Palladino:

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

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

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

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

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

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

Sincerely,

BOB EDGAR
Member of Congress

BE/da

cc: Commissioner Bernthal
Commissioner Roberts
Commissioner Asselstine
Commissioner Zech

EXHIBIT 4

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

P.O. BOX 14
MAIN CAPITOL BUILDING
HARRISBURG, PENNSYLVANIA 17120
PHONES:
LEWISBERRY: (717) 938-4988
YORK: (717) 848-1653
HARRISBURG: (717) 783-8783

COMMITTEES
FINANCE
GAME AND FISHERIES

HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

January 8, 1985

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

Dear Commissioner Asselstine:

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

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

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

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

Sincerely,

Bruce Smith

Bruce Smith

BS:kat

Lower Swatara Township Board of Commissioners

1499 Sp_

EXHIBIT 5

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

January 31, 1985

'85 FEB -7 A9:03

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

Gentlemen:

SERVED FEB 7 1985

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

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

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

Sincerely,

Franklin D. Linn Sr.

Franklin D. Linn, Sr.
President
Board of Commissioners

FDL:jh

CC: Governor Richard Thornburgh

UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING APPEAL PANEL
WASHINGTON, D.C. 20555

EXHIBIT 6

October 8, 1981

MEMORANDUM FOR: ALL PARTIES

FROM: Stephen F. Eilperin, Chairman
Three Mile Island-1 Restart Proceeding

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

On September 28 I wrote a memorandum to the parties disclosing my prior involvement with matters touching the TMI-1 restart proceeding, and asking whether there was objection to my chairing the Appeal Board that would review at least the Licensing Board's August 27, 1981 Partial Initial Decision in this proceeding. The NRC staff had no objection, while the Union of Concerned Scientists, which did not participate on the management issues to which the Licensing Board's August 27 decision was addressed, reserved its right to object at a later date if I were appointed to the Appeal Board to review the follow-up Licensing Board decision on design and technical issues.

Three Mile Island Alert, Inc. ("TMIA"), however, voiced strong objections to my participation on the Appeal Board at this time. Its objections were twofold. First TMIA claimed that as a matter of law I was disqualified by reason of having supervised, as the Commission's Solicitor, the litigation defense of two TMI-1 restart related cases, People Against Nuclear Energy v. NRC, No. 81-1131 (D.C. Cir.) and TMIA v. NRC, No. 81-1157 (D.C. Cir.). This was said to demonstrate my substantial interest in the outcome of the TMI-1 restart proceeding and unquestionable prejudice to TMIA. Second, TMIA claimed that apart from legal considerations I was perceived as biased by area residents, and my appointment to the Appeal Board exacerbated the distrust with which TMIA's constituency had come to view the Commission's decisional process.

On the basis of TMIA's letter I have decided to recuse myself from the Appeal Board for the TMI-1 restart proceeding. I do so not on the basis of the claimed legal infirmity to my sitting for I believe that the Commission's former Solicitor, as the Commission itself, is free to hear and decide the TMI-1 restart proceeding, including any issues a court might remand for further consideration. TMIA does not claim that the Commission is somehow disqualified from having issued the rulings that gave rise to the TMI-1 restart related litigation. Defending those rulings in court would perforce not be ground for disqualification.

I am persuaded, however, to recuse myself in light of TMIA's argument that my sitting substantially adds to their distrust of the Commission's decisional process in this matter, and that it deserves total confidence in the tribunal which will hear its appeal. Plainly, a litigant should have confidence that the tribunal which will hear its case will do so fairly, but at what point a party's fear of unfairness (where the prospective judge thinks there is none) should lead to voluntary recusal is a difficult judgment to make. In this regard I think the TMI experience has undoubtedly been unique, especially for those who live in that area. They, of anyone, have an especially strong claim that there should be not the slightest appearance of unfairness to the decision about which they are concerned. Moreover, TMIA's unhappiness with the decisional process to date stems not only from the restart rulings that have been taken to court but includes earlier Commission decisions dealing with the cleanup of TMI-2 such as the decision to purge the TMI-2 containment of krypton. There too, as Solicitor, I actively defended the Commission's position in court. Additionally, I participated in advising the Commission on its course of action, had a hand in supervising the drafting of the Commission orders, and had rather frequent contact with lawyers for Metropolitan Edison during the extensive litigation which followed. On still other aspects of the TMI-2 cleanup, such as the operation of EPICOR-II I have had occasional contact with utility officials who later were witnesses in the TMI-1 restart proceeding.

Despite the fact that I have not formed any position on the merits of the Licensing Board's decision and consider myself free of bias about any of the issues which might come before me in this case, given the totality of circumstances recited above I think the integrity of the Commission's decisional process is better served if I voluntarily recuse myself from this proceeding so there is not the slightest doubt that TMIA and the other parties to the restart proceeding will be given a fair hearing. I therefore will not serve on either of the Appeal Boards which will review the TMI-1 restart proceeding.

On the basis of TMIA's letter I have decided to recuse myself from the Appeal Board for the TMI-1 restart proceeding. I do so not on the basis of the claimed legal infirmity to my sitting for I believe that the Commission's former Solicitor, as the Commission itself, is free to hear and decide the TMI-1 restart proceeding, including any issues a court might remand for further consideration. TMIA does not claim that the Commission is somehow disqualified from having issued the rulings that gave rise to the TMI-1 restart related litigation. Defending those rulings in court would perforce not be ground for disqualification.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

I hereby certify that a copy of the foregoing Three Mile Island Alert's Appeal of Judge Ivan W. Smith's Order Denying Motions to Disqualify Him, has been served on the following, by mailing a copy, first class, postage prepaid on March 6, 1985:

Service List

* Nunzio J. Palladino, Chairman
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

* Thomas M. Roberts, Commissioner
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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* Frederick Bernthal, Commissioner
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* Lando W. Zech, Jr., Commissioner
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Administrative Judge
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Administrative Judge
Ivan W. Smith, Chairman
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Administrative Judge
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Administrative Judge
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Atomic Safety & Licensing Appeal
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