

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

DOCKETED  
USNRC

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In the Matter of:

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

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Docket No. 50-289  
(Restart)

SP  
OFFICE OF SECRETARY

COMMONWEALTH OF PENNSYLVANIA  
MOTION TO DISQUALIFY  
ADMINISTRATIVE LAW JUDGE IVAN SMITH

The Commonwealth of Pennsylvania hereby moves Ivan Smith, as presiding officer on this Atomic Safety and Licensing Board panel, to disqualify himself from further participation on the panel in this proceeding.

The Commonwealth of Pennsylvania makes this motion for two reasons:

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

2. Judge Smith has interjected in this proceeding matters which are outside the scope of this proceeding in a manner prejudicial to the Commonwealth.

The Commonwealth of Pennsylvania enters into this Motion reluctantly; however, the statements by Judge Smith on the record of this hearing and outside the hearing can only lead to the conclusion that his impartiality might reasonably be questioned. The conduct of proceedings concerning the restart of Three Mile Island Unit No. 1--subject to intense public scrutiny and interest--requires the highest standards of judicial impartiality and a clear lack of bias. The mere appearance of personal

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bias or prejudice as to factual issues in this matter undermines public confidence in the integrity of NRC decisions. Because Judge Smith's conduct both within and outside the hearings has created such a strong appearance of bias, the ability of the present Atomic Safety and Licensing Board panel to reach a fair and impartial decision in the present case is irreparably compromised as long as Judge Smith sits on the panel.

A. Standards for Disqualification

The Commission's Rules of Practice provide that if a party deems the presiding officer or a designated member of an Atomic Safety and Licensing Board to be disqualified, he may move that the presiding officer or board member disqualify himself. The Rules of Practice further provide that this motion shall be supported by affidavits setting forth the alleged grounds for disqualification. 10 C.F.R. §2.704(c).

It is well settled that a safety and licensing board member may be disqualified if he:

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

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

Unit 1), 19 NRC 13, 20 (1984); Nuclear Engineering Co., Inc. (Sheffield, Ill. Low-Level Radioactive Waste Disposal Site), 8 NRC 299, 201 (1978); Consumers Power Co. (Midland Plant Units 1 & 2), 6 AEC 60, 64-65 (1973).

The Commission has stated the applicability of federal judicial disqualification standards in the NRC's adjudicatory proceedings.

Houston Lighting and Power Co. (South Texas Project, Units 1 & 2), 15 NRC 1363, 1365-67 (1982). Under 28 U.S.C. §455(a), a federal judge must disqualify himself in any proceeding in which his impartiality might reasonably be questioned. Moreover, in applying 28 U.S.C. §455(a), federal courts have held that a judge should exercise his discretion in favor of disqualification if he has any question about the propriety of sitting in a particular case. Hill v. Small Business Administration, 695 F.2d 175 (5th Cir. 1983); Matter of Searches Conducted on March 5, 1980, 497 F.Supp. 1283 (D.C. Wisc. 1980).

The Commonwealth notes that this is not simply a case of apparent bias due to statements by a judge on the record, during the course of an adjudicatory proceeding, which reflects the decision-maker's judgment of facts properly before him in the proceeding. Judge Smith has made statements, on the record, that reflect judgment of issues not before the Board and show an apparent bias against the Commonwealth. Contrast Houston Lighting and Power Co. (South Texas Project, Units 1 & 2), 15 NRC 1363, 1365-66; Commonwealth Edison Co. (LaSalle County Nuclear Station, Units 1 & 2), 6 AEC 169, 170, citing U.S. v. Grinnell Corp., 384 U.S. 563, 580-83 (1966). In an unprecedented action, Judge Smith also has written to a federal judge who must sentence a former TMI operator convicted of cheating on an operator examination, and has vouched for the operator's good character and pleaded to the federal judge for leniency in sentencing.

## B. Discussion

Judge Smith has engaged in two activities meriting his disqualification from this proceeding in accordance with the statutory and case authority described above. First, Judge Smith sent a letter dated December 27, 1984, to Judge Sylvia Rambo of United States District Court requesting leniency in the sentencing of Mr. James Floyd. (This letter is attached to the Affidavit of Thomas Y. Au, in support of this Motion). Mr. Floyd was the TMI-2 licensed operator convicted of cheating on his NRC examination. Judge Smith revealed to the parties the contents of the letter on January 2, 1985, when NRC hearings resumed in Harrisburg. For example, Judge Smith states in the letter:

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

\* \* \*

I hasten to add, however, that I know nothing  
about Mr. Floyd except the information produced  
on the public hearings most of which is set out  
in our July 1982 decision.

\* \* \*

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

\* \* \*

One senses he neglected his examination  
responsibilities out of a misguided but  
altruistic effort to attend to matters of  
perceived greater urgency. In addition, he  
apparently felt that he was well qualified  
notwithstanding his licensing status.

This letter has attracted a great deal of public attention and gives the strong impression that Judge Smith has a significant personal bias on matters presently before the Board, which include training, competency, and the integrity of TMI-1 operators. It raised questions concerning Judge Smith's regard for the value of the NRC licensing exams. A reasonable person would be led to conclude that Judge Smith's impartiality in this proceeding may be questioned, given his obvious belief that Mr. Floyd has been treated too harshly.

It is well settled that a federal administrative law judge is subject to the canons of ethics of the bar, the federal government and his agency. Ruhlen, Manual for Administrative Law Judges, p. 59 (1974). Thus, it is highly likely that Judge Smith's conduct violates Canon 2 of the ABA Code of Judicial Conduct. Canon 2 states that a "judge ... should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 2 also states that a judge "should not testify voluntarily as a character witness", which is what Judge Smith has effectively done here. The rationale for this rule is clearly stated in the Commentary to Canon 2:

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

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

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

Many weeks of public NRC hearings have been devoted to the issue of TMI management integrity and operator competence and, in fact, hearings on that very issue are still in progress. I have confidence that the NRC administrative regulatory process, with extensive public participation, will provide an orderly and reliable mechanism for assuring that any problems caused by deception respecting Three

Mile Island will have been identified and resolved. Deception in the future is very unlikely. [emphasis added]

Whether deception is likely or unlikely in the training program for TMI-1 operators is clearly an issue in this proceeding. By stating that deception in the future is unlikely, Judge Smith leads a disinterested observer to conclude that Judge Smith may have adjudged facts and issues in advance.

Canon 3 A. (6) of the ABA Code of Judicial Conduct states that: "A judge should abstain from public comment about a pending proceeding in any court..." Judge Smith's letter to Judge Rambo is precisely the type of public comment that violates Canon 3's requirement that a judge perform his duties impartially.

Second, Judge Smith has on at least three occasions criticized the 1983 Stipulation Agreement between the Commonwealth and General Public Utilities. Over eighteen months after this settlement was voluntarily reached by the parties, Judge Smith has made it abundantly clear that he disagrees with the settlement. On November 21, 1984, Judge Smith sua sponte launched into an attack on the Stipulation Agreement:

For example, Judge Smith stated:

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

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

This attack came unexpectedly and without justification. It is irrelevant to the proceedings at hand. No witnesses and no counsel had mentioned the Stipulation Agreement. On January 2, 1985, Judge Smith

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

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

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

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

WITNESS LONG: Yes, sir.

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

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

WITNESS LONG: No, sir; it was not.

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

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

JUDGE SMITH: He lost his license.

WITNESS LONG: Yes, sir.

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

WITNESS LONG: Yes, sir.

\* \* \*

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

WITNESS LONG: Yes, sir.

JUDGE SMITH: He didn't disobey the law.

WITNESS LONG: There were three instances.

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

WITNESS LONG: Yes, sir.

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

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

Judge Smith then turned to counsel for the Commonwealth and asked him to assess the "fairness" of the facts that Judge Smith had just adduced. Not only was the subject matter outside the scope of hearing, the subject matter (i.e. Mr. Husted's punishment) had been already decided by the Appeals Board in this case. ALAB 772 at 45-46. It is clear that Judge Smith simply did not agree with the stipulation and the facts described by the Appeals Board and was trying to impose his view on these subjects upon the witness.

This exchange concluded with an emotional outburst against the lawyers who were involved in the settlement.

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

Well, I am concerned that the lawyers in this hearing have accepted that. You can continue your cross examination. I would have expected lawyers to have gagged, to have gagged on that treatment. (Transcript p. 32,323)

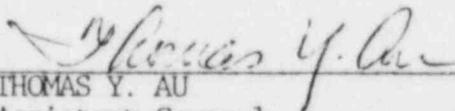
This intemperate conduct by a judge creates an additional implication of bias and prejudice and further compromises his ability to preside in this proceeding.

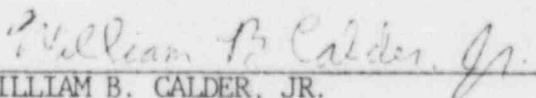
C. Conclusion

Accordingly, the Commonwealth of Pennsylvania moves that Judge Smith disqualify himself from participating in these proceedings. If he does not so act, the Nuclear Regulatory Commission or the Atomic Safety and Licensing Appeal Board, as appropriate, should disqualify Judge Smith. See 10 C.F.R. §2.704(c).

Respectfully submitted,

FOR THE COMMONWEALTH OF PENNSYLVANIA

  
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Dated: January 11, 1935