

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

AFFIDAVIT OF THOMAS Y. AU
IN SUPPORT OF
MOTION TO DISQUALIFY
ADMINISTRATIVE LAW JUDGE IVAN SMITH

I, Thomas Y. Au, swear and depose as follows:

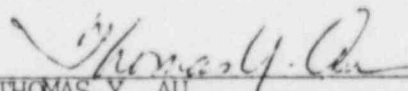
1. I am an attorney admitted to the Bar of the United States Supreme Court, the Pennsylvania Supreme Court, and other courts, and have represented the Commonwealth of Pennsylvania during hearings in the above captioned matter since those hearings began on November 14, 1984 in Harrisburg, Pennsylvania.

2. I have read the Motion to Disqualify Administrative Law Judge Ivan Smith and aver that the facts alleged therein are true and correct to the best of my knowledge and belief.

3. On Wednesday, January 2, 1985, Administrative Law Judge Ivan Smith, of the Atomic Safety and Licensing Board, released a copy of a letter dated December 27, 1984 that he had written to Judge Sylvia Rambo of the United States District Court requesting leniency in the sentencing of Mr. James Floyd. Mr. Floyd was the TMI-2 licensed operator who was convicted of cheating on his NRC examination. A copy of the letter he released is attached hereto as Exhibit 1.

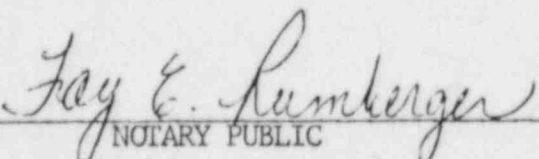
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4. Judge Smith has on several occasions criticized the 1983 Stipulation Agreement between the Commonwealth and General Public Utilities, which agreement terminated the Commonwealth's participation in the appeals process for GPU's commitment not to utilize Mr. Husted and others in licensed operator activities. These comments were made on the record, and reflected his view that the Commonwealth unfairly penalized licensed operators and had deprived them of a livelihood, and his view that the Commonwealth may seek to unfairly penalize others. These comments were not relevant to the proceeding, and are not within the scope of this remanded hearing. Judge Smith used a loud voice and harsh tones when criticizing the Commonwealth on this matter. The comments were clearly unwarranted at the time and reflect a bias against Commonwealth participation in these proceedings. (Transcript pp. 29,092 - 29,095; 32,211-32,315; 32,317-32,325; 33,084 - 33,097).



THOMAS Y. AU
Assistant Counsel

Subscribed and sworn to
before me this 11th day
of January, 1985.



NOTARY PUBLIC
JAY E. RUMBERGER
111 E. ...
BOSTON, MASSACHUSETTS
MY COMMISSION EXPIRES ...

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

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

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

Dear Judge Rambo:

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

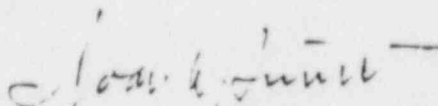
While serving as Chairman of the Three Mile Island Licensing Board I have had an excellent opportunity to gain some insight into the events and the affected persons following the 1979 accident at the station. I hasten to add, however, that I know nothing about Mr. Floyd except the information produced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

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

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

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

Sincerely,



Ivan W. Smith

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

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NUCLEAR REGULATORY COMMISSION

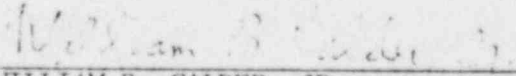
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion to Disqualify Administrative Law Judge Ivan Smith and Affidavit in support thereof was mailed, first class postage prepaid to the persons on the attached Service List this 11th day of January, 1985.



WILLIAM B. CALDER, JR.
Assistant Counsel

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