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January 14, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE ADMINISTRATIVE LAW JUDGE IVAN SMITH

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

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

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

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

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

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

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

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

A. Standards for Disqualification

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

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

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

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

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

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

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

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

B. Discussion

1. Judge Smith's Letter to Judge Rambo

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

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

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

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

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

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

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

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

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

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

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

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

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

to the treatement of individuals of which he was critical) too sharp an issue, and these people become the focus of bitterness and dispute, we will hurt them even more." Tr. 33096.

Judge Smith's preoccupation with alleged unfairness in the treatment of Mr. Husted resulting from the settlement between the Commonwealth and GPUN is particularly troubling since the Appeal Board specifically rejected Judge Smith's findings regarding Mr. Husted and proceeded to order remedies stronger than those contained in the settlement. It should be noted that while the settlement barred Mr. Husted from operation or training of licensed operators, it allowed GPUN to promote him to Supervisor of Non-Licensed Operator Training, a position of management responsibility. ALAB-772, slip op. at 42-3.

The Appeal Board ruled as follows:

> We must, however, part company with the Licensing Board on how it views the relationship of Husted's attitude toward his teaching responsibilities. The Board states:
>
> > We have no evidence that the attitude we criticize is manifested in [Husted's] performance as a teacher but, as noted above, we fear that such is the case. But there is also a widely held view in the field of education that the attitude of a teacher is irrelevant to his or her competence. Mr. Husted does not have to love and respect the NRC to do his duties.
>
> Id. at 319-20 (Para. 2168). This does not square with the Board's earlier finding that Husted's "attitude may be a partial explanation of why there was disrespect for the training program and the examinations." Id. at 319 (Para. 2167). Nor does the Board provide any support for what it terms "the widely held view in the field of education that the attitude of a teacher is irrelevant to his or her competence." Id. at 320 (Para. 2168). Such a view would be valid only if the Board defines "competence" so narrowly as to mean the mere possession

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

Id. at 42 (emphasis added).

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

Id. at 46 (second emphasis added).

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

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

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

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

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

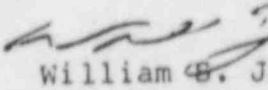
If company policies and procedures must be changed, as UCS will argue, the Board must make that finding regardless of how it might affect individuals who did not appear before the Board. The Board may not, as Judge Smith has indicated he would do, Tr. 33,089-90, come to a different conclusion on the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

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

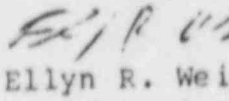
C. Conclusion

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

Respectfully submitted,



William S. Jordan, III



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Dated: January 14, 1985

January 14, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE ADMINISTRATIVE LAW JUDGE IVAN SMITH

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

DECLARATION OF WILLIAM S. JORDAN, III

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

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

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

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

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

William S. Jordan, III

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

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

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

Dear Judge Rambo:

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

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

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

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

January 14, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the UNION OF CONCERNED SCIENTISTS' MOTION TO DISQUALIFY ADMINISTRATIVE LAW JUDGE IVAN SMITH AND ANSWER TO THE COMMONWEALTH'S MOTION TO DISQUALIFY and DECLARATION OF WILLIAM S. JORDAN, III, were served on those indicated on the accompanying Service List. Service was made by deposit in The United States mail, first class, postage prepaid, on January 14, 1985, except those indicated by an asterisk were served by hand.

William S. Jordan, III

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Nuclear Regulatory Commission

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

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