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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Lawrence Brenner, Chairman
Dr. James H. Carpenter
Dr. Peter A. Morris

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In the Matter of LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1)	Docket No. 50-322-OL (Emergency Planning) December 22, 1982

MEMORANDUM AND ORDER CONFIRMING RULING ON SANCTIONS FOR INTERVENORS' REFUSAL TO COMPLY WITH ORDER TO PARTICIPATE IN PREHEARING EXAMINATIONS

The purpose of this order is to confirm this Board's rulings on the record on November 23, 1982 and November 30, 1982 (Tr. 14,746-48; 14,753), finding intervenors Suffolk County (the County), the Shoreham Opponents Coalition (SOC) and the North Shore Committee Against Nuclear and Thermal Pollution (NSC) to be in default of our "Memorandum and Order Ruling on Licensing Board Authority to Direct that Initial Examination of the Pre-filed Testimony be Conducted by Means of Prehearing Examinations", LBP-82-107, 16 NRC ___ (November 19, 1982), and to state our reasons for concluding that dismissal of "Intervenors'

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Consolidated Phase I Emergency Planning Contentions" is the appropriate sanction in these circumstances.

I. Background

On November 19, 1982, this Board issued an order directing that the parties to the Shoreham operating license proceeding conduct their initial cross-examination, redirect and recross-examination of the previously filed written testimony on "Phase I" (primarily onsite) emergency planning contentions by means of public prehearing depositions. The transcripts of these prehearing examinations were to be filed with the Board, with the portions which each party sought to move into evidence noted thereon. The Board was to then resolve any procedural or evidentiary objections noted therein (and pursued at the time of filing the depositions), rule on the admissibility of the remaining proffered portions into evidence after their adoption by the witnesses at hearing, and preside over any follow-up questioning by the parties and the Board. Portions of the prehearing examinations were thus to become a part of the evidentiary record of this proceeding upon which this Board would base its initial decision. LBP-82-107, supra, Slip Op. at 1-2.

As we stated in that order, directing the use of prehearing examinations for these contentions would not limit the scope of the Board's attention to these matters; prior to hearing, the Board would

have read the portions of these examinations moved into evidence. Instead, use of these prehearing examinations would have allowed the parties to conduct thorough cross-examination on the pre-filed testimony, and would have enabled both the Board and the parties to conduct much better focused follow-up questioning at the hearing before the Board on the specific matters in controversy. Therefore, use of this procedure would have given the parties the opportunity to compile a comparable record utilizing many fewer days of hearing time before the Board.

At the time we proposed that the parties use prehearing examinations for their initial cross-examination on Phase I Emergency Planning issues, this Board indicated its belief that it possessed the authority to direct that such examinations be held. Tr. 12,564. However, after the County questioned our authority in this regard, we believed it appropriate to allow the parties an opportunity to file legal briefs on this issue to see if their interpretations of applicable statutes, regulations and precedents might establish otherwise. Tr. 12,566; 15,585-86.

During the period prior to the issuance of our November 19, 1982 order, beginning on November 2, 1982, the Board's purposes and plans for implementing this proposal were the subject of numerous on the record discussions with the parties. See, e.g. Tr. 12,563-568; 12,576-80; 13,279-85; 13,368-372; 13,375-80; 13,420-21; 14,029-31; 14,679-88; 14,538-42; 14,593-96; 14,691-93. Furthermore, while lead intervenor

Suffolk County has generally assumed the responsibility for communicating news of the events at these hearings to SOC and NSC, the Board issued an order specifically inviting these parties to comment on the procedures proposed by the Board. See "Memorandum Advising SOC and NSC of Proposal to Require Depositions and of Opportunity to File Views," November 9, 1982 (unpublished).

Even prior to the issuance of our November 19 order, however, the County indicated on several occasions that it would not comply with any order directing that such prehearing examinations be held. See "Suffolk County Response to Licensing Board Proposal of November 2, 1982", dated November 8, 1982; Tr. 14,594. We therefore indicated our belief that such a direct violation of a Board order would constitute a default requiring the imposition of appropriate sanctions. Tr. 13,284-85; 14,594-95. Furthermore, recognizing the procedure which we were proposing to be a novel one in NRC practice, we indicated on several occasions our willingness to support rapid appellate review of this issue, if intervenors requested that review, such that a prompt appeal might be taken prior to our issuance of an overall initial decision in this proceeding. Tr. 14,030-31; 14,595. See also Tr. 14,726-29.

After due consideration of the filings provided by the parties to this proceeding,[1/] this Board issued its "Memorandum and Order Ruling on Licensing Board Authority to Direct that Initial Examination of the Pre-filed Testimony be Conducted by Means of Prehearing Examinations", LBP-82-107, 16 NRC ___ (November 19, 1982). That order affirmed the Board's conclusion that it has the authority to order such a procedure and directed that such examinations be conducted by the parties in accordance with the procedures described therein. The rationale and legal support for our authority to order the prehearing examinations is set forth in the November 19 order and therefore need not be repeated at length at this time. In sum, contrary to intervenors' unsupported assertions, we found that the use of prehearing examinations would enhance, rather than erode, intervenors' hearing rights.

In light of the County's preliminary indications that it would intentionally disobey any Board order directing the use of prehearing examinations for the initial examinations, and in light of our preliminary discussions with and warnings to the County about the

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1/ Of the filings submitted by the intervenors, only that submitted by NSC attempted to discuss the Board's proposal through a discussion of legal precedent. While SOC and the County each stated legal conclusions contrary to the views later adopted by the Board, their filings were so lacking in supporting legal argument that the Board was prompted to ask the County on the record whether some further filing of its legal views might be expected. Tr. 13,279. The County indicated it intended to make no additional filing. Id.; see also Tr. 14,031; 14,079-86.

probable consequence of any intentional default, our November 19 order included the following provision:

> I. Any party which chooses to default on the obligations imposed by this order and to not take part in the prehearing examinations will be deemed to have waived its right to conduct cross-examination. Similarly, as the Board intends that the prehearing examinations serve as the principal forum for cross-examination, redirect and recross on these contentions, any party which does not pursue its obligations in good faith may be held to have waived its right to ask follow-up questions before the Board. Any party which refuses to produce any of its witnesses for the prehearing examinations will be deemed to have abandoned its right to present the subject witness and testimony. Depending on the extent of any default, the total result could be an effective abandonment of the issue in controversy. 16 NRC ____. (Slip Op. at 27-28).

A conference of counsel was held on Long Island on November 23, 1982 to answer any requests for clarification and to discuss implementation of the Board's November 19 order. Counsel for both the County and SOC indicated that their clients would not participate in the prehearing examinations which the Board had ordered; this included refusals to make their witnesses available and to conduct cross-examination of LILCO and NRC Staff witnesses. Tr. 14,725-31; 14,738-39. We therefore found SOC and the County to be in default of our November 19 order and directed that those of "Intervenors' Consolidated Phase I Emergency Planning Contentions" admitted by our July 20, 1982 Prehearing Conference Order (unpublished) and September 7, 1982 Supplemental Prehearing Conference Order, LBP-82-75, 16 NRC ___,

and not otherwise settled between the parties (Tr. 14,717-19), be dismissed as to those two parties. Tr. 14,746-748.

Counsel for NSC was unable to attend this conference of counsel, but indicated in a letter to the Board dated November 24, 1982, that NSC also would not participate in the prehearing examinations ordered by the Board. We therefore ordered that "Intervenors' Consolidated Phase I Emergency Planning Contentions" be dismissed as to NSC as well. Tr. 14,753.

II. Appropriate Sanctions for a Default

A licensing board is not expected to sit idly by when parties refuse to comply with its orders. Pursuant to 10 C.F.R. § 2.718, a licensing board has the power and the duty to maintain order, to take appropriate action to avoid delay and to regulate the course of the hearing and the conduct of the participants. Furthermore, pursuant to 10 C.F.R. § 2.707, the refusal of a party to comply with a Board order relating to its appearance at a proceeding constitutes a default for which a licensing board "may make such orders in regard to the failure as are just".

The powers of a licensing board to maintain order and regulate the course of a proceeding were given further explication by the Commission

in its "Statement of Policy on Conduct of Licensing Proceedings", CLI-81-8, 13 NRC 452, 454 (1981):

> When a participant fails to meet its obligations, a board should consider the imposition of sanctions against the offending party. A spectrum of sanctions from minor to severe is available to the boards to assist in the management of proceedings. For example, the boards could warn the offending party that such conduct will not be tolerated in the future, refuse to consider a filing by the offending party, deny the right to cross-examine or present evidence, dismiss one or more of the party's contentions, impose appropriate sanctions on counsel for a party, or, in severe cases, dismiss the party from the proceeding. In selecting a sanction, boards should consider the relative importance of the unmet obligation, its potential for harm to other parties or the orderly conduct of the proceeding, whether its occurrence is an isolated incident or a part of a pattern of behavior, the importance of the safety or environmental concerns raised by the party, and all of the circumstances. Boards should attempt to tailor sanctions to mitigate the harm caused by the failure of a party to fulfill its obligations and bring about improved future compliance. (Emphasis added).

We believe the sanctions which we have imposed in response to intervenors' willful and total refusal to comply with our November 19 order to be appropriate in the present circumstances.

As read by the Appeal Board in Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2) ALAB-678, 15 NRC 1400, 1416-20 (1982), the Commission's Policy Statement requires that a board apply a four-factor test in determining the appropriate sanctions to be imposed for a default: (1) the relative importance of the unmet obligation and its potential for harm to other parties or the orderly conduct of the

proceeding; (2) whether the default is an isolated incident or a part of a pattern of behavior; (3) the relative importance of the safety or environmental concerns raised by the party; and (4) all of the circumstances.[2/]

A.

In the proceeding before us, we believe the obligation with which intervenors have intentionally refused to comply to be extremely important to both the pace of this proceeding and to the procedural due process rights of the other parties. Based upon the time estimates for cross-examination, redirect and recross on Phase I emergency planning

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2/ While we are of course bound by and follow this Appeal Board precedent, it is not clear to us that by its policy statement the Commission intended to establish a four-factor test for the selection of sanctions comparable to the five-factor test used under 10 C.F.R. § 2.714(a) to balance the equities of allowing the admission of late-filed contentions. Indeed, as the fourth prong of the Byron test, "all of the circumstances," appears to clearly subsume the first three factors enumerated above, we would view the Commission's policy statement as merely enumerating three of the many factors which may be relevant in determining what sanctions are appropriate in a particular situation. We believe that requiring a Board to consider "all of the circumstances" prior to its selection of a sanction is another way of restating the language of 10 C.F.R. § 2.707(b) empowering a licensing board to "make such orders in regard to the failure as are just."

matters submitted by the parties at the Board's request,[3/] our review of the prefiled written testimony and the pace of previous cross-examination and follow-up questions by the parties and the Board, we believe litigation of these contentions before the Board likely would have consumed about thirty hearing days. In contrast, after approximately twenty-five days of prehearing examinations on these contentions, we believe that follow-up questions before the Board would have been completed in approximately eight hearing days. Furthermore, the prehearing examinations would have taken place from the end of November, 1982 into January, 1983, while the Board was engaged in hearing evidence on other issues. Therefore, the use of these examinations would have saved almost two calendar months of hearing time at the end of the hearing which could be devoted to preparation of an initial decision on all issues (except for the subject of Phase II

3/ See November 8, 1982 letter to Board from counsel for LILCO transmitting chart showing LILCO and NRC Staff time estimates for cross-examination on Phase I emergency planning issues; November 15, 1982 letter to Board from Counsel for County transmitting intervenor's joint time estimates for "cross-examination and re-direct examination on Phase I emergency planning issues in any future public hearings before the Board."

offsite emergency planning, for which issues are not scheduled for admission or litigation at this time).[4/]

Intervenors' refusal to comply with the Board's November 19 order would also prejudice the procedural due process rights of both the Applicant and NRC Staff. Intervenors' refusal to make their witnesses available for prehearing examinations would limit the rights of the other parties to conduct cross-examination on intervenors' prefiled testimony, except upon such terms as unilaterally suit intervenors. This refusal, coupled with intervenors' refusal to cross-examine at prehearing examinations, essentially puts LILCO and the Staff in the position of having to address contentions which intervenors have refused to prosecute, and refused to allow the Staff and Applicant to defend against, in the manner directed by the Board.

Furthermore, we believe the refusal of intervenors to comply with our direction deprives all parties of the benefits of the procedure

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4/ The use of prehearing examinations for parties' initial cross-examination, redirect and recross-examination of witnesses' prefiled direct testimony is not the only procedural method which we have adopted to attempt to increase the efficiency of both the Board's and the parties' use of time. On November 30, 1982, we directed that the parties file their proposed findings on all contentions litigated prior to the September 14, 1982 commencement of the current litigation of QA/QC matters. Tr. 14,789-91. LILCO is to file its findings by January 10, 1983. Intervenors are to jointly submit their findings by January 20, 1983, and the Staff's findings will be due by January 31, 1983. LILCO's reply findings will be due by February 7, 1983. We believe our adoption of this procedure will permit the Board to commence its preparation of its initial decision promptly after litigation of all remaining issues, rather than having to wait two months before receiving proposed findings on any issue from the parties.

which we described in our November 19 order. As we stated at that time, the parties each would have been able to cross-examine broadly at the prehearing examinations, trying many different avenues of questioning. Therefore, in their follow-up questioning before this Board, all parties would have had the opportunity to conduct focused and incisive examination on those aspects of the contentions which they believe to be most material and most likely to prove fruitful in making their case, having had the benefit of time to fully review the answers given to their previous questions and having had the chance to better evaluate the relative positions of the parties on the issues.

The most critical result of intervenors' decision to default on their obligations under our November 19 order, however, is the impact which allowing such behavior to go unchecked would have upon the orderly conduct of these proceedings. Put in its most basic terms, a party may not simply refuse to comply with a direct Board order, even if it believes the Board decision to have been based upon an erroneous

interpretation of the law.[5/]

To allow intervenors to decline to follow our order, solely because they disagree with it, would be a particularly egregious abdication of our duty under 10 C.F.R. § 2.718 to regulate the course of this proceeding. Not only would permitting such actions be contrary to Commission precedent, but it would also likely be repeated were sanctions not imposed for this breach so as to induce future compliance with Board orders.

B.

On the whole, intervenors in this proceeding, primarily through lead intervenor Suffolk County, have met and responded to the obligations and orders imposed by this Board. Indeed, intervenors'

5/ A licensing board is to be accorded the same respect as a court of law. See 10 C.F.R. § 2.713(a). Should a litigant in a U.S. District Court disagree with the legal conclusions reached in an order of the court, his only remedy is to appeal that order; should he refuse to comply with that order, he is subject to sanctions for contempt of court. He may not later base an appeal of the contempt order on the alleged invalidity of the initial order, at least where the party has had the opportunity to challenge the decree on appeal, and when the order is not so vague that the party had no notice that its conduct would be considered contemptuous. NLRB v. Union Nacional De Trabajadores, 611 F.2d 926, 928 .1 (1st Cir. 1979) (civil contempt); Walker v. City of Birmingham, 388 U.S. 307 (1967); United States v. Dickinson, 465 F.2d 496, 509-511 (5th Cir. 1972) (criminal contempt).

default in this matter is not as repetitive as the multiple defaults of the intervenors in Byron, which the Appeal Board held did not constitute a "pattern" of recalcitrance. 15 NRC at 1418.

We note for the record, however, that Suffolk County's decision, made prior to our November 19 order, to take no part in any prehearing examinations which might be ordered by the Board resulted in its refusal, at least initially, to provide the Board with intervenors' estimates as to the amount of time which they would require to conduct their cross-examination on Phase I emergency planning matters. While these time estimates were originally due on November 8, 1982 (Tr. 12,577), Suffolk County filed on that date only its above-mentioned pleading stating its opinion that the Board-proposed prehearing examinations were illegal and that the Suffolk County Executive had directed that the County's counsel and witnesses not take part in any such proceedings. Thereafter, the Board warned the County that it deemed intervenors' refusal to provide the time estimates to be a default, independent of our ultimate resolution of whether we had authority to order the prehearing examinations. We further warned that the Board would have to consider the imposition of appropriate sanctions for this default if the County did not take advantage of a second chance permitted by us for the County to supply its time estimates by November 15, 1982. Tr. 13,368-72.

Subsequently, on November 15, 1982, the County provided the Board with its time estimates for cross-examination and redirect examination on the Phase I Emergency Planning Contentions. These time estimates, however, were stated to be for "any future public hearings before the Board". Thus, while intervenors' refusal to comply with our November 19, 1982 order cannot be said to be a part of an overall pattern of recalcitrant behavior by the County in this proceeding, there is no doubt that the County's decision not to participate in the prehearing examinations had deleterious effects upon its compliance with our other orders relative to this phase of this proceeding.

We further note that our oral rulings dismissing intervenors' Phase I emergency planning contentions may have had a remedial effect on the County's initial indications that it would also refuse to participate in prehearing examinations, similar to those previously proposed by the Board, for the litigation of matters relevant to the Torrey Pines report on the independent verification of the Shoreham Nuclear Power Station. Prehearing examinations on the prefiled direct testimony on this issue are to be held on December 27-30, 1982 and January 3, 1983. Transcripts of these examinations are then to be marked by the parties jointly to show those portions which each party desires to move into evidence. The Board will rule on the admissibility of the indicated portions on January 10, 1983. Follow-up questions of the witnesses by the parties and the Board will also commence on that

date. The Board may proceed similarly in the future for the litigation of Phase II (offsite) emergency planning matters.

C.

As interpreted by the Appeal Board in Byron, the third factor which the Commission's Policy Statement requires a licensing board to consider when assessing sanctions is "the importance of the safety or environmental concerns raised by the party." On the facts presented in Byron, however, the Appeal Board concluded that this factor was "not at all decisive" in determining whether the licensing board had erred in dismissing a party for failing to comply with a discovery order, since the Appeal Board at that time had "little but the bare contentions upon which to rely". 15 NRC at 1419. In the view of the Appeal Board, "[t]his factor is of more importance during the later stages of a proceeding when the contentions have been fleshed out (presumably through discovery) and parties have submitted testimony." Id.

While the Commission's Policy Statement speaks to the "importance of the safety and environmental concerns raised by the party", the Appeal Board's brief discussion of this factor does not weigh what it describes as "the abstract importance" of the individual issues raised by that intervenor; instead the Appeal Board addresses whether there is "some basis for believing" that the dismissed intervenor in that proceeding might contribute to the proceeding, based on affidavits submitted by that intervenor's experts. Id.

While the procedural posture of the proceeding before us is considerably more developed than it was in Byron, we too feel that we can conclude little more than that there does appear to be "some basis for believing" that intervenors' participation might contribute to the litigation of the Phase I Emergency Planning issues. We are aware that pursuant to our previous prehearing conference orders, the parties have conducted extensive formal and informal discovery on these issues, in the form of informational meetings and negotiations, as well as depositions and requests for documents. Furthermore, the County filed testimony of its expert witnesses on a number of the Phase I emergency planning contentions. As the intervenors indicated their intention to proceed on other contentions solely by way of cross-examination, however, we know of no way to assess the contribution which they would have made on those issues at this juncture.

We think it most pertinent to any assessment of the potential contribution of the intervenors in this proceeding, however, to note that the very default which is the subject of this order is intervenors' willful refusal to come forward and make their contribution to this proceeding through the prehearing examinations. We believe intervenors' effective abandonment of their Phase I contentions precludes our litigation of these matters in intervenors' absence; in an operating

license proceeding such as this, we are only permitted to litigate matters "in controversy" among the parties. 10 C.F.R. § 2.760a. Intervenors have refused to allow their contentions to be placed "in controversy" pursuant to our November 19 order.

Nor do we find the issues raised by intervenors' Phase I contentions to be appropriate for sua sponte consideration in the present circumstances. This is so even though we are aware that LILCO and the Staff appear to have not yet resolved all differences between them as to these issues. We observe, however, that each of the Phase I issues raised by intervenors, such as the question of LILCO's ability to augment its onsite staff within 30 minutes of the declaration of an emergency in order to meet the Staff's conditions of Table B-1 of NUREG-0654, is a matter which the NRC Staff must review and approve as a prerequisite to any loading of fuel at Shoreham. The Staff is aware of all matters raised in intervenors' prefiled testimony. We presume that the Staff's review of onsite matters will address these issues whether or not they are raised in litigation before this Board. Tr. 14,748.

D.

The fourth matter which we must address under the Commission's Policy Statement and the Byron decision is "all of the circumstances".

This includes the attempt to tailor the choice of sanctions to mitigate the harm caused by a party's failure to fulfill its obligations and to bring about improved future compliance.

As we have already recited at length the nature of intervenors' refusal to comply with our November 19, 1982 order and the serious challenge to this Board's ability to regulate the course of this proceeding which their default represented, we will not discuss those matters again here.

We wish to note, however, that our purpose in setting forth potential sanctions in our November 19 order was wholly remedial. In view of the intervenors' stated intention to default from participation in any Board ordered examinations, we had hoped and intended that the threat of sanctions such as these might have induced intervenors to comply with our order. In light of intervenors' previous default in not providing their cross-examination time estimates when first ordered by the Board, we believed it appropriate to warn intervenors, in accordance with the guidance on sanctions set forth in the Commission's Policy Statement, 13 NRC at 454, that such conduct would not be tolerated in the future.

Futhermore, in drafting the sanctions which we warned would be imposed for default of our November 19 order, we attempted to fashion sanctions which would not only tend to induce compliance with our order,

but which would also be flexible, so as to allow for the variation of the specific sanctions to be imposed depending upon the nature and extent of any default.[6/]

Based upon the facts of the present proceeding, we believe our decision to hold a party to have waived its right of follow-up cross-examination before the Board if it defaults on its responsibility to conduct cross-examinations at the prehearing examination to be properly tailored to mitigate the particular default and to be supported by Commission precedent.

The Appeal Board's opinion in Northern Indiana Public Service Company (Bailly Generating Station, Nuclear -1), ALAB-224, 8 AEC 244 (1974) is instructive on this point. In Bailly, the licensing board had required that the intervenors commence their cross-examination of the Applicant's and the Staff's witnesses on a given date. Although intervenors had already received much information through discovery from the Applicant, they objected to going forward at the time proposed by the Board since the Staff had still not produced certain information which intervenors had requested through discovery.

6/ The default provision of our November 19, 1982 order appears, supra, at 6.

Rather than postpone its evidentiary hearing until the Staff could produce the requested materials, the Board ruled that intervenors should initiate cross-examination on the specified date, but that they would be given an opportunity to recall and cross-examine the Applicant's and the Staff's witnesses, to present new evidence, and to add new contentions after they had received and reviewed the documents sought from the Commission. "In short, the Licensing Board was willing to afford intervenors 'two bites of the apple'...." 8 AEC at 250.

The Board directed, however, that should intervenors decline to conduct their cross-examination as ordered by the Board, they would be deemed to have waived their opportunity to cross-examine these witnesses on the matters then in issue. The intervenors chose literally to walk out of the hearing and the Board later refused to allow them to cross-examine the Staff's and Applicant's witnesses on these matters. The intervenors subsequently appealed this ruling, asserting that they had been denied procedural due process. Id.

In upholding the licensing board's sanction under 10 C.F.R. § 2.707, the Appeal Board stated:

> Intervenors' conduct merited the sanction imposed by the Board. American jurisprudence has long passed the point where a party -- particularly one represented by experienced counsel -- may refuse to participate in a case because the presiding official ruled in a manner

> it did not like. There are appropriate ways of preserving objections to such rulings; going home is not one of them. A party may not be heard to complain that its rights were unjustly abridged after "[h]aving thus purposefully refused to participate." Brotherhood of Railroad Trainmen v. Chicago, M., St. P. & P.R.R., 380 F.2d 605, 608-09 (D.C. Cir., per Burger, J.), certiorari denied, 389 U.S. 928 (1967). See also, United States v. Taylor, 333 F.2d 633, 639-40 (5th Cir. 1964); Federal Power Commission v. Arizona Edison Co., 194 F.2d 679, 683-86 (9th Cir. 1952). 8 AEC at 251.

We believe a similar analysis applies in this proceeding. Intervenors simply refused to participate in the prehearing examinations, rather than proceeding as ordered by the Board and accepting the Board's offer to refer its ruling on the propriety of its November 19 order to the Appeal Board for expedited review, or e.g., pursuing another alternative of seeking a stay of our order and directed certification before the Appeal Board. Indeed, intervenors had refused to participate in any Board-ordered prehearing examinations even before seeing the Board's legal analysis in support of our conclusion that such examinations can be required.

Intervenors continued to refuse to participate in any such examinations even when specifically offered an opportunity to turn back from their impending default after the issuance of our November 19, 1982 order. At the conference of counsel held November 23, 1982 to discuss the implementation of our order, we gave the intervenors an additional opportunity to agree to participate in the prehearing examinations while, if requested, we would refer our ruling to the Appeal Board.

Even though all intervenors were aware of the sanctions which we had proposed for any party defaulting on its obligations under our order, each refused to comply.[7/]

We also find our sanction deeming the refusal of any party to make its witnesses available to participate in the prehearing examinations to be an abandonment of its right to present the subject witness and testimony to be susceptible to a similar analysis to that employed in the Bailly decision, as applied by us above. In our view, intervenors' intentional waiver of both their right to cross-examine and their right to present witnesses amounts to their effective abandonment of their Phase I contentions, in that they have refused to prosecute whatever case they might otherwise have been able to make.

As the Phase I emergency planning contentions have been effectively abandoned by intervenors, they are no longer "in controversy" among the parties. Accordingly, in the absence of any issue which we would raise sua sponte, there are no Phase I Emergency Planning Issues remaining before us for litigation.

7/ We also note that no party has sought a stay of these proceedings from this Board or the Appeal Board, pursuant to 10 C.F.R. § 2.788, pending the outcome of an interlocutory appeal of our November 19 order. Either our referral of that order to the Appeal Board or the Appeal Board's directed certification of that ruling would not have stayed the effectiveness of that decision, unless otherwise ordered. 10 C.F.R. § 2.730(g). Had intervenors requested this Board to stay our November 19 order, we do not believe we would have granted it, as we do not believe intervenors could have met the standards enumerated in section 2.788(e) for the grant of a stay.

IT IS THEREFORE

ORDERED that intervenors' have waived their rights to cross-examine and to present witnesses on "Intervenors' Consolidated Phase I Emergency Planning Contentions" by their refusal to comply with our November 19, 1982 order; and

ORDERED that "Intervenors' Consolidated Phase I Emergency Planning Contentions" are hereby dismissed, with prejudice, due to intervenors' refusal to prosecute them.

THE ATOMIC SAFETY AND
LICENSING BOARD

Lawrence Brenner

Lawrence Brenner, Chairman
ADMINISTRATIVE JUDGE

James H. Carpenter

Dr. James H. Carpenter, Member
ADMINISTRATIVE JUDGE

Peter A. Morris

Dr. Peter A. Morris, Member
ADMINISTRATIVE JUDGE

Bethesda, Maryland
December 22, 1982