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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
COMMONWEALTH EDISON COMPANY	)	Docket Nos. 50-454
	)	50-455
(Byron Nuclear Power Station, Units 1 and 2)	)	
	)	

ROCKFORD LEAGUE OF WOMEN VOTERS' PETITION FOR RECONSIDERATION OF BOARD ORDERS OF OCTOBER 27, 1981*

Pursuant to 10 C.F.R. Section 2.771, the Rockford League of Women Voters ("the League") hereby petitions for reconsideration of (a) the October 27, 1981 Order of the Atomic Safety and Licensing Board ("the Board") striking all of the League's contentions and dismissing the League as a party; and (b) the October 27, 1981 Order of the Board denying the League's motion for sanctions against Commonwealth Edison Company ("Edison").

Introduction

The League believes that the Board's Orders -- which among other things used asserted noncompliance with discovery as a ground for striking "SER" contentions concerning which discovery has not yet commenced under the Board's own prior schedules -- are not legally justifiable. But the League has chosen to seek reconsideration of those Orders, rather than to file an immediate appeal which might delay these proceedings, because we believe that the Board arrived at its judgment on the basis of a serious misconstruction of the record and by making findings of fact in reliance on statements by counsel for Edison which were not only disputed but directly contradicted by sworn Affidavits of record.

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* The grounds for this Petition and supporting authority are contained herein.

We have also chosen to request Board consideration because — in part for the reasons just noted — the Board's Orders unwittingly take sides in what is essentially an inter-party dispute between counsel, and suggest that the Board was in some way offended by the League's opposition to Edison's position. Apparently the Board has misconstrued both the League's position and the seriousness of the League's concerns in this proceeding. To be sure, the League is opposed to the Byron facility. The League's counsel has previously expressed positions critical of the AEC/NRC licensing process.[1] But both the League and its counsel are willing to participate in the Byron operating license proceedings in accordance with NRC rules. The issues raised by the League's contentions are far too serious to go unaddressed — as is implicitly recognized by the Board's initial admission of those contentions and its denial of Edison's request to reconsider that admission.[2]

Finally, when the record in this proceeding is analyzed (as we do below) it becomes clear that the Board's October 27th Orders have the effect of destroying the vitality and meaning of agreements between counsel — which in the discovery context, and in light of the Board's explicit directions to counsel in this proceeding to confer with each other for the purpose of reaching just such agreements, ought to be no less enforceable than rulings of the Board

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1. The League's counsel is not alone in that regard. Both the Kemeny Commission and the NRC's Special Inquiry Group have expressed similar concerns. We would hope, therefore, that the positions taken in the Board's October 27th Orders do not in fact — as they seem to do — reflect an antipathy to the views expressed by the League's counsel.

2. The Board's denial of Edison's request did not occur until mid-August, 1981, some eight months after Edison's request was made. During that hiatus, the League was understandably uncertain as to the status of its contentions. See pages 3-5, 7 below.

itself. And the Board's Orders in that regard (urged only by Edison, not by the Staff) are as noted above based almost exclusively on self-serving statements by Edison's counsel which are contradicted by Affidavits of record. For this reason, the League also seeks reconsideration of the Board's denial of the League's motion for sanctions against Edison — which merely sought a direction to Edison to live up to the agreements Edison itself voluntarily made.

Factual Background

A. Proceedings Prior to August 18, 1981

Though the Board's October 27th Orders seem restricted to consideration of events since August 1981, in fact the pertinent events here began in March 1980. On March 12, 1980 — after the League had been admitted as a party and had filed revised contentions, but before the contentions had been ruled upon by the Board — the League served Interrogatories on both Edison and the Staff, together with a Motion requesting the Board to rule that interrogatories to the Staff are necessary in this proceeding. See Exhibits 1, 2 and 3 hereto. The Staff (on March 26, 1980) and Edison (on March 19, 1980) objected to the League's Interrogatories, principally on the ground that they were premature because there was no definitive ruling on the League's contentions. See Exhibits 4 and 5 hereto. On April 1, 1980 the League responded, requesting that answers to those interrogatories be compelled (See Exhibit 6 hereto), which pointed out, inter alia, that the discovery the League had requested was essential to its future preparation.

Those discovery requests by the League, and the League's Request to compel, were filed and fully briefed more than 19 months ago. The Board has never ruled on them.

On December 19, 1980, however, the Board did rule on the League's revised contentions, admitting a substantial number of them and rejecting, inter

alia, Edison's argument (contrary to a prior understanding between the parties) that the contentions were inadmissible because they had not been "negotiated" with Edison. The Board's December 19th Order provided that "[d]iscovery shall commence forthwith upon all the issues included in the admitted contentions...."

Still Edison did not respond to the League's March 1980 interrogatories. Instead, a month and a half after the Board's December 19th Order, Edison -- claiming it had only recently received the Order -- sought leave to file a petition for reconsideration. Despite the Commission's official marking that the December 19th Order had been "served January 8, 1981," the League did not oppose Edison's late-receipt claim,[3] and on February 14, 1981 (some 60 days after the December 19th Order) the Board expressly permitted (Ex. 7) Edison to file a sweeping motion for reconsideration which challenged anew well over half of the League's contentions and virtually all of the issues the League had raised.

The League responded to Edison's new attack on its contentions. The Board did not rule on that matter until August 18, 1981. Given the position Edison and the Staff had taken concerning the League's March 1980 interrogatories (See Exhibits 4 and 5) and the lack of any Board ruling on the League's Request (Ex. 6) to compel answers to those interrogatories, and given the continued uncertainty concerning the League's contentions as a result of Edison's pending petition to reconsider their admission, the League believed that discovery was essentially in limbo during this period. The League did not initiate further discovery. Indeed the League — as it had noted in its March-April 1980 filings (page 3 above) -- the first party to initiate discovery, was in the

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3. That claim may be contrasted with the fact that Edison widely broadcast the results of the Board's October 27th Orders on the same day they were entered — five days before the League's counsel (in the same city as Edison's counsel) received copies of the Board's Orders in the mail.

unenviable position of being denied access to critical information while being unfairly faulted for not responding.

Despite this state of the record, and despite its own announced position concerning the League's interrogatories, on July 8, 1981 Edison filed interrogatories directed at all of the League's still-pending contentions.[4] The League believed that Edison had done so for the record, pending the Board's ruling on the contentions. But without any discussion with the League's counsel, Edison then filed a Motion to compel answers to its interrogatories. The League filed Objections to the interrogatories (pointing out inter alia that they were premature — the same position Edison itself had taken regarding the League's interrogatories filed in 1980 and which were — and are — still unanswered) and also responded to Edison's Motion to Compel.[5]

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4. Each of Edison's interrogatories called for a separate answer as to each of the League's contentions. **This would require some 400 responses many of which could be mooted depending upon the Board's then pending ruling on Edison's Petition to Reconsider.**

5. One of the main thrusts of Edison's interrogatories was to secure the names of the League's witnesses. As noted in the League's responses, a hearing date on the contentions had not even been set at that point, and the League did not know who its witnesses would be. Another thrust of Edison's interrogatories was to secure facts supporting the League's contentions. But as the League had pointed out in its March-April 1980 filings, the League had just asked Edison (and the Staff) to provide information concerning the contentions uniquely within their control — for example, by answering the League's 19-month-old March 1980 interrogatories. In its March 19, 1980 objection to the League's first round of interrogatories, Edison had stated that:

> "...Applicant is willing to respond to informal discovery with respect to such contentions, if any, which, after an adequate opportunity to review, applicant believes constitute valid contentions...."

Edison never did anything of the sort. It thus not only deprived the League of information which would have been beneficial to the League, but also lulled the League into believing that Edison adhered to its position that interrogatories ought not to be answered until a final ruling on contentions (which did not come until August 18, 1981) or at the very least prior to informal negotiations among counsel. As noted below, Edison's July 1981 filings were preceded by no discussion whatever.

See also, pp. 14 to 19, infra. The League provided discovery to Edison during this period (and in response to Edison's interrogatories) on a continuing, albeit informal basis, notwithstanding Edison's defaults.

It will be noted that Edison's interrogatories directly contradicted the position taken by Edison and the Staff concerning the League's interrogatories. Further, Edison completely failed to comply with the Commission's policy — explicitly restated in the Board's subsequent Order of August 18, 1981 (at pp. 10-11) — that before motions to compel are filed the parties:

> "...are directed to confer directly with each other regarding alleged deficiencies in discovery before resorting to motions involving the Board. To this end, voluntary discovery and disclosure are highly encouraged. All motions involving discovery controversies should describe fully the direct efforts of the parties to resolve such disputes themselves."[6]

The record is devoid of any effort by Commonwealth Edison to obey that principle in connection with its July filings. Given the facts noted above, the record affirmatively shows that Edison had what is equivalent to unclean hands when it filed its original Motion to Compel in July — the starting point for the Board's discussion in connection with its dismissal Order of October 27, 1981.

Despite this background, on August 18, 1981 the Board summarily overruled the League's objections to Edison's interrogatories and ordered the League to respond to them. (The Board ignored, or perhaps overlooked, the League's own long-pending interrogatories, even though the August 18th Order ruled at p. 11 that past interrogatories were deemed continuing in nature.) The Board did not set a specific date for the League's response. Instead -- in

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6. The reason for this rule is vividly apparent here. As noted above, when Edison's July 1981 interrogatories were filed the procedural setting (including the League's own long-pending interrogatories) was such that the League believed not only that the Board's position was to defer discovery until a final ruling on the contentions, but also that Edison — in accordance with its prior statements — took the same position. It was for this reason, among others, that the League did not file interrogatory answers or objections by July 27th; and it was for this reason that Edison's Motion to Compel, filed without so much as a prior phone call (see Response to Motion to Compel, Aug. 7, 1981, ¶¶ 3-5), was somewhat shocking.

recognition, the League thought, of some of the concerns described above — the Board directed "a prompt conference between the parties" and granted Edison's Motion only "subject to" that conference.[7]

Hence as of August 18, 1981 the following was evident from the record:

1. Edison's Motion to Compel was granted in the same Order as the Board's final decision on the contentions. Thus the Board criticized the League for not having answered interrogatories with respect to contentions on which the Board had not yet finally ruled, because of Edison's Petition for Reconsideration which had been expressly permitted by the Board's January 31, 1981 Order;

2. The League believed that all parties had agreed that interrogatory answers would not be due until a reasonable time after the contentions had been finally admitted (this was in fact the position of Commonwealth Edison and the Staff in their respective filings on March 19 and March 26, 1980; the League's contrary position set forth in its filing of April 1, 1980 had apparently been rejected sub silentio by the Board);

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7. The Board's August 18, 1981 characterization of the League's position (at p. 14) as "a bit too casual," is somewhat confusing given the failure of other parties to respond to discovery which had been outstanding for more than a year and a half; the Board's failure to have ruled upon a pending Motion to Compel by the League which was likewise outstanding for a year and a half; and the position of Edison and the Staff taken in their Objections to League Interrogatories, filed respectively on March 19 and 26, 1980, that discovery ought to await a finalized ruling.

Nevertheless, as shown below, the League did in fact promptly move forward with a conference with Edison to discuss all outstanding discovery requests in this and in a related proceeding. As will be clear from the facts set forth below, an agreement was reached whereby discovery would move forward; but Edison breached that agreement. The League promptly reported the breach to the Board. But instead of the Board ordering a prehearing conference to determine the reasons for the dispute among counsel and the reasonableness of each party's position, the Board simply adopted Edison's representations (directly contradicted by Affidavit of the League's counsel) and dismissed the League's Petition.

3. The League had never taken a position that it would not answer interrogatories and had not flouted the discovery process. The League's position had merely been a series of attempts to have counsel for the various parties engage in discussions, with Board supervision if necessary, in order to accomplish the kind of cooperative discovery which the Board ordered and encouraged at pp. 10 and 11 of its August 18, 1981 Order.

Under these circumstances it is hardly fair for the Board (as it did in its October 27, 1981 Orders) to characterize the League as having ignored discovery requests, or to criticize the League's arguments that Edison's interrogatories were premature when Edison and the Staff had made — apparently successfully — the very same arguments in their March 1980 filings.

B. Events Since August 18, 1981: The Related Proceedings

At pages 6-7 of its October 27, 1981 Orders, the Board also accused the League of "deliberateness and willfulness" in the period subsequent to August 18, 1981 (notwithstanding the fact that no date for answering interrogatories had been set by the Board in its August 18, 1981 Order — indeed, the date had been made expressly subject to the outcome of a conference among counsel), dismissed as totally irrelevant the League's description of the agreements of counsel as to overall discovery concerning not only this but two other relevant and directly related proceedings, and ignored the good faith presentation of counsel concerning personal and compelling problems and schedule conflicts. The Board's Order, without factual investigation and contrary to the League's sworn Affidavits, gave short shrift to those issues and adopted as findings of fact Edison's seriously disputed versions of the facts and of meetings among counsel. Thus, without any investigation of the other relevant proceedings, and without any hearing to determine who was at fault, if anyone, as a result of the conference among

counsel ordered by the Board on August 18, 1981, the Board made findings of deliberateness and willfulness without any factual record whatsoever.

Before detailing the events surrounding the conferences of counsel which took place promptly after the August 18, 1981 Board Order, it is necessary to describe the two related proceedings which those conferences also involved.

The NRC Section 2.206 Proceeding. Somewhat contemporaneous with the filing of the Revised Contentions herein (but prior to this Board's original admission of those contentions, later subject to Edison's petition for reconsideration which remained pending until August 18, 1981), the League on November 21, 1980 filed a request with the NRC pursuant to 10 C.F.R., Sections 2.206 and 2.202 to have an immediate hearing as to why construction of the Byron facility should not be halted pending resolution of outstanding safety problems. Attached to that request was a detailed, 85-page Affidavit of the League's technical consultants, MHB Technical Associates, documenting and analyzing the outstanding safety and other problems on the basis of the Byron FSAR and other NRC materials and tracking the League's revised contentions herein. That Affidavit (of which Edison has long had a copy and which is on file with the NRC and thus available to the Licensing Board) is directly related to this proceeding. It was prepared by MHB Technical Associates in connection with and subsequent to the Petition to Intervene herein; and it provides a great deal of information as to the League's substantive overall position in this proceeding. If one compares the information provided in the Affidavit together with the issues raised by the League's contentions in this proceeding, the similarity will be at once obvious.

The League's Section 2.206 Petition was denied by Director Denton on May 7, 1981 on the precise ground that the issues raised by the League could,

should, and would be thoroughly aired in this proceeding.[8] That the Section 2.206 Petition, and the MHB Affidavit described above, are directly relevant to this proceeding has therefore been announced by the NRC's own Director of Nuclear Reactor Regulation; and it is no accident that Edison itself subpoenaed in this proceeding the authors of that Affidavit.

The Illinois Commerce Commission Proceeding. Also approximately contemporaneous with the League's Revised Contentions in this proceeding (and with the League's Section 2.206 Petition), in November 1980 the League filed an application before the Illinois Commerce Commission (ICC - Docket No. 80-0760) requesting that body to hold hearings as to why the Byron certificate of public convenience and necessity should not be revoked. Like the Section 2.206 Petition, the League's application was supported by a detailed MHB Affidavit (See Exhibit 8 hereto) closely similar to that filed with the NRC. It raises and analyzes the same safety issues, though because of the differing jurisdiction of the ICC it focuses on their economic impact rather than their purely safety aspects. The ICC proceeding is thus not only factually relevant but legally intertwined, for if the ICC re-examined or revoked Edison's authority, any NRC license would be affected and perhaps mooted.

Hence the Illinois application, as to which discovery has been opened, is a third parallel proceeding focused on the same issues the League has raised here. To be sure, the economic cost to ratepayers of the safety issues discussed in the MHB Affidavit — a central concern of the Illinois Commission — is not a matter within the purview of this Board (save insofar as it affects the NEPA cost-benefit balance). But the merit of those issues, the cost to Edison of resolving those issues, and Edison's self-proclaimed "credit crunch," all directly

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8. The League's appeal from Mr. Denton's decision is pending in the United States Court of Appeals for the Seventh Circuit. At the Commission's request, the appeal was in effect held in abeyance until on August 24, 1981 (after the Board's August 18th ruling herein) the Commission finally decided not to review Mr. Denton's decision. Accordingly, the League awaited a final NRC decision on its Verified Petition for nine months — November 1980 until August 24, 1981.

involved in the Illinois proceeding, most emphatically are issues before this Board in view of the required safety findings and the additional finding which this Board must make that Edison is financially able to operate the Byron facility in accordance with NRC regulations — including safety improvements which, here as in the parallel proceedings, the League and MHB maintain are essential.

The Discovery Overlap. As shown above, all three proceedings rely upon essentially the same information (though touching, in part, upon different concerns arising from the same facts). Edison has, of course, copies of both MHB Affidavits and of the other papers filed by the League. So does the NRC. Indeed, Edison considered the Illinois proceeding sufficiently related to the Section 2.206 Petition to provide Mr. Denton with information concerning it.[9]

Moreover, on November 5, 1981 Edison filed (see Exhibit 16 hereto) a Motion before the ICC admitting that the two proceedings were not only interrelated but involved the same identical issues; and Edison has now urged the ICC to terminate the ICC proceeding upon the grounds that the pending NRC proceeding will cover and protect the public interest concerning these identical issues. Clearly the Board's "unrelated" finding in its October 27 Order (Mem. at 7) that counsels' agreements involved an "unrelated" proceeding is against the weight of the facts; and Edison's arguments which obviously prompted the Board to make that finding and take the action it did are not only disingenuous -- they are nothing short of intentional misrepresentations. Finally, and more relevant here, Edison's position before the ICC lends substantial credibility to the position of the League's counsel here with respect to the overall discovery agreement reached and "pokes the final hole" in the balloon of hot air Edison has somehow managed to float past this Board.

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9. While Edison has now taken the position that these other two proceedings are dissimilar, that simply is not true. In fact in Edison's December 19, 1980 filing with the ICC in Docket 80-0760, Edison not only urged the ICC to reject the Petition on the merits, but argued that the pendency of proceedings before the NRC dealing with the very same issues should encourage the ICC not to initiate an independent proceeding. See Memorandum of Commonwealth Edison, December 19, 1980, filed with the ICC in Docket 80-0760.

Because of the close interrelationship of the three proceedings and the fact that the same counsel were common to all of them, the League determined that insofar as practicable it would be desirable to deal with overall discovery as a unit, rather than filing identical pieces of paper in each differing only in their captions. (Edison has seemed to agree: its response to the Board's August 18th direction of a conference between counsel was initially to suggest a meeting at which both "NRC" and "Illinois" discovery would be discussed together.) Mr. Denton having ruled that the Section 2.206 Petition issues should be covered in this proceeding, and Edison having argued to the Illinois Commission that the issues here and in that case were essentially similar (see p. 11 n. 9 above), it made eminent sense to try to organize simultaneous discovery so that the various proceedings would not result in wasteful, duplicative effort and paperwork.[10]

That was the genesis of the parties' conferences following the Board's August 18th ruling in this proceeding. The Board's refusal in its October 27th Orders even to consider those circumstances not only rewards Edison's deliberate violation of the agreements reached at the parties' conferences (as will become clear below), but also runs counter to the principles of judicial economy that discovery should proceed: (i) in accordance with the parties' agreements, and (ii) so as to minimize duplication. See, e.g., 10 C.F.R. 2.715a, 2.716; and see the Federal Rules on Multidistrict Litigation.[11]

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10. The Board in its August 18, 1981 Order indicated its displeasure with paperwork as opposed to progress when it indicated at page 10 of the Order that "...discovery is intended by our Rules of Practice to be conducted by the parties, usually without Board involvement. Those Rules, like their judicial counterparts 'attempt to minimize involvement by the trial board.'" Indeed, Edison itself reluctantly admits the relevance of discovery in the ICC to the NRC proceedings (or vice versa) when on September 4, 1981 Edison admitted that the two cases were parallel. See: Attachment A to the Board's October 27th Order; discussion, pp. 10-11, supra; and Ex. 16 hereto.

11. Thus the efforts of League counsel were aimed at efficiency (not delay), an efficiency which has been observed before in NRC proceedings, (Douglas Point Reactor [Md.] and Jamestown Reactor [N.Y.]) where the NRC and a State agency held joint hearings on common issues on pending related and parallel proceedings.

Hence, when Edison filed its original Motion to Compel in July, 1981 not only was the League then under the impression that the parties had agreed that discovery would not commence until final decision by the Board (see pages 3-5, 7 above), but also the League was then engaged in formulating and responding to interrogatories, deposition requests and other discovery in the Illinois proceeding, and attempting to work out an overall discovery plan for the three parallel proceedings,[12] and as noted elsewhere herein was actively supplying information to Edison. See e.g. Exhibits 20 and 21 hereto. Moreover, notwithstanding Edison's July 20, 1981 "for the record" motion to compel (see, supra, p. 5), Edison itself did not view with any seriousness its "outstanding" interrogatories prior to a decision by the Board on the pending motion for reconsideration of the contentions which was not rendered until August 18, 1981. See, e.g., Exhibit 22 hereto.

It is in this context — consistently misrepresented to the Board by Edison — that we must approach the events since the Board's August 18, 1981 Order. Those events are as follows:

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12. Edison now claims that its failure to provide discovery pursuant to overall agreements relates only to the Illinois proceeding, and is therefore a "non-event" in consideration of this Board's deliberations. That is not only unfair, it is also a misrepresentation. Edison and the League proceeded to exchange deposition notices and interrogatories in the Illinois proceeding knowing full well that, for example, with respect to depositions noticed the parties would attempt not to duplicate depositions for the NRC proceedings which had in fact been taken in the ICC proceedings covering the same ground. Indeed, the Minor and Hubbard depositions were scheduled and agreed to by the parties for early September 1981 with the understanding that those depositions were to serve for both proceedings, and it was not until Commonwealth Edison refused to provide expenses for Minor and Hubbard and thereafter breached its overall agreement (See Exhibit 17 hereto) with the League on these two cases that Commonwealth Edison in a rush filed its Application for Subpoenas of Minor and Hubbard which although falling technically under the auspices of the NRC proceeding still violated its obligation to pay MHB fees. See Exhibit 18 hereto.

Again contrary to Edison's "fact concealment" policy herein, the relevance of the ICC and NRC proceedings was acknowledged multiple times by not only the ICC but by counsel for Edison on the record on July 22, 1981 before the ICC, a discussion which prompted the efficient notion of joint overall discovery. See Exhibit 11 hereto and Edison's recently filed Exhibit 16.

1. The Board did not order that the League answer Edison's outstanding interrogatories by a date certain. In fact, the Board's Order was that the League answer the interrogatories subject to a prompt conference between the parties.

2. On August 25 the parties' counsel discussed the setting up of a meeting to discuss outstanding discovery.

3. On August 31 and September 2 Edison indicated that it needed extra time to comply with the overall discovery and the League did not object. (See Exhibits 9 and 10 hereto).

4. On September 10, 1981, while the League was dealing with Edison's interrogatories in the NRC proceeding and accommodating Edison's discovery delays (asked for under the caption of the Illinois proceeding, but directly relevant to this proceeding because of the common discovery approach noted above), Edison served by messenger a proposed modification and "consolidation" of the League's contentions in this proceeding. (See Exhibit 12 hereto.) These "consolidated" contentions were 45 pages long. Edison never informed the Board that it had asked the League during early September to take on the task of reviewing 45 pages of proposed amended contentions, which obviously impacted upon both Edison's outstanding interrogatories and the League's response.

5. On September 10 and September 16 the parties met and worked out an overall discovery schedule and agreements in some detail. These are reflected in part in letters of September 16 and 17 between counsel. (See Exhibits 13 and 14 hereto.)

6. By September 17 Edison had already secured from the League substantial document discovery which Edison had informally requested of the League, and which was relevant both to the NRC and Illinois proceedings. (See Exhibit 15 hereto.) (The Board obviously was unaware of this fact, given its findings of willfulness and deliberateness in connection with discovery. In fact, what occurred during September was the League voluntarily responding to informal discovery requests without getting an iota of response from Edison. Added to this was Edison's request in early September that the League answer interrogatories by October 1 with respect to contentions as to which Edison had proposed major substantive and procedural modifications, which had not yet produced agreement.)

7. The depositions of Minor and Hubbard (the experts to whom the League looked in connection with scientific support herein and any answers to the outstanding interrogatories) were scheduled to commence by agreement on September 24 and 25, 1981. Edison (which omitted to advise the Board of this fact) had agreed to hold off on requiring answers to its interrogatories until after the depositions of Minor and Hubbard, a procedure which not only made sense but which complied with discovery suggestion No. 9 at p. 12 of the Board's August 18, 1981 Order. Thus in mid-September, since depositions for Minor and Hubbard — who are the League's principal resource for answering interrogatories propounded by Edison — were going to take place, and since Edison already had the long detailed MHB Affidavit (Exhibit 8 hereto) which flushed out in some detail the underlying basis for the contentions, and surely could have sufficed in and of itself as first round answers to continuing interrogatories, it made eminent sense to all of the parties, including Edison at that time, to await the

taking of those depositions before insisting on any answers to interrogatories. Thus, Edison failed to inform the Board that in the third week of September the parties were negotiating as to whether Edison's interrogatories here would ever be answered in the form in which they were served, both because of the impending Minor-Hubbard depositions and because of Commonwealth Edison's multi-page suggestion of amendment and consolidation of contentions. The October 1st date Edison "selects" as the due date for interrogatories (the Board had set none -- ordering a conference presumably to seek agreement among all counsel) was in reality a date subsequent to the scheduled MHB depositions to determine the interrogatories' then status. And while all this was going on, an agreement was reached concerning overall discovery which for inexplicable reasons was breached and violated by Commonwealth Edison as is set forth herein and in the League's response to the Motion for Sanctions filed October 13, 1981.

8. On September 10, 1981 one of Edison's counsel raised the prospect of a negotiated settlement of the League's concerns in Byron proceedings, as a followup to his August 7, 1981 letter concerning the same topic. Counsel for the League analyzed those matters in depth, discussed them with Edison's counsel, and on September 17, 1981 wrote a response to Edison's counsel:

> "I confirm my discussion with you raising some generalized issues [concerning settlement] which you were to consider with Cordell Hull [Commonwealth Edison Vice President] and then get back to me. As I indicated to you, I have not as yet spoken withthe League and do not intend to do so until I hear back from you."

9. Edison then repudiated its agreements concerning discovery, dropped the settlement discussions it had initiated [13], and -- without telling the Board of its conduct, representations, agreements, and discussions described above -- engaged in the October 2, 1981 conference telephone call concerning which the League's sworn October 13, 1981 filing with the Board set forth the circumstances in detail.[14] Edison's Motion for

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13. Edison's counsel was, in the end, not interested in substantive disucussion but rather was prepared to pay League counsel attorneys fees, a suggestion promptly rebuffed and considered by League counsel as a bribe.

14. The Board's discussion of the circumstances surrounding the ex parte October 2, 1981 conference (October 27, 1981 Order at pp. 7-8) is troublesome. The tenor of the Board's discussion indicates clearly that the representations of Edison's counsel were accepted as factually accurate in that telephone conference. Whether or not the Board was "fortunate" in having the conference call transcribed, that conference call (as well as the Board's ensuing and implicit reliance upon the League counsel's "failure" to participate in the call as an indication of willfulness) was improper for at least two reasons. First. League counsel had a valid excuse for not participating in the conference call and the Board should not have moved forward unless it assured itself of notice to and availability of all counsel. The conference call was not initiated by the Board, with or without notice, but simply (if one believes Edison's version) a less than 24 hour notice of a telephone call to the Board at which Edison wanted all counsel present. What the Board has done is to set a precedent for telephone calls without the presence of all counsel simply on a representation by one counsel that he made an effort to get all parties together. That makes no sense, particularly where the Board could have adjourned the Friday call and had its offices call all counsel to arrange for a mutually convenient time. Second. The fact that the Board requested that Edison file a written motion for sanctions is quite beside the point. The League at the time of that call was a party to the proceeding and was entitled to be present, upon reasonable notice, at all proceedings discussing the case. Were it otherwise the Board could simply have a conference call with less than all of the parties by "finding" that the absent party's interests (without inquiry of the party) are not being specifically discussed. Yet that is not the law at the NRC or elsewhere.

Thus our concern over the ex parte conference was not a "red herring" but rather a sincere desire to point out to the Board and all counsel that conferences, like other proceedings, are to be set and scheduled in accordance with having "due regard for the convenience of the parties or their representatives." 10 C.F.R., sec. 2.703(e). And nowhere do the Commission Rules permit any hearing, whether by telephone conference or not, and whether ex parte or otherwise, except upon proper notice.

Sanctions -- which again completely misrepresented or suppressed the facts we have set forth above — followed.[15] Even thereafter the League attempted to resolve the matter by agreement (see Exhibit 23 hereto) and hoped the Board would schedule the conference the League sought.

As with the pre-August 18th events, therefore, these post-August 18th events show that the Board's October 27th Orders seriously misread the pertinent facts. The Board's August 18th Order explicitly conditioned the progres of discovery upon conferences between the parties. Necessarily the Board must have contemplated that the parties would act in good faith in connection with those conferences, and would adhere to agreements reached. The League did act in good faith. Far from "wilfully ignoring" discovery, the League did everything it could to simplify and expedite discovery.

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15. Given the events described above, it is unlikely that Edison's interrogatories, assuming that the depositions and amended contentions had proceeded to agreement, would have ever been answered in their present form. Edison knew this. Then suddenly without explanation Edison refused to pay for the expenses of Minor and Hubbard (see Exhibits 17-18 hereto), totally reneged on the then existing agreements (Exhibit 19 hereto), and filed its Motion to Compel totally avoiding any fair or honest representation to the Board. Edison then noticed the Minor and Hubbard depositions once again, offering to pay the expenses and fees of Minor and Hubbard (but actually failing to live up to that commitment as well - see Exhibit 18 hereto). What Edison thus sought to achieve was an improper strategic advantage in arguing to the Board that the interrogatories in the NRC proceeding were an isolated and detached event from the overall discovery. Had Edison agreed to pay the expenses of Minor and Hubbard in the first instance, those depositions would have gone forward during the third week of September. The parties would then have reached or not reached agreement on the amended contentions tendered by Edison which then would have shortly been followed by answers to the outstanding interrogatories to the extent that the information was not earlier given to Edison by the documents which were tendered on September 17, the MHB Affidavits (which directly analyzed the FSAR and the League's contentions) which had long been in Edison's hands and which were written by source people, as Edison was told, providing most if not all of the League's back-up at that juncture.

But Edison did not. There is absolutely no question that if the Board factually investigates the circumstances subsequent to its August 18th Order -- as opposed to relying (in the teeth of the League's sworn Affidavits [16]) on misrepresentations and factual suppressions by Edison -- that Board will find that the true sequence of events was as follows:

1. Edison and the League had agreed to do parallel discovery in the Illinois and NRC proceedings, and to avoid duplication. All parties were well aware of this.

2. Edison chose to avoid its agreed-to obligations under that commitment regarding consolidated discovery information it promised would be given to the League (which the League had requested through the vehicle of the Illinois proceeding, since all parties were in Chicago and since information in the possession of a party furnished by another party could not be asked for again in any event).

3. As a result, Edison and the League had reached an impasse, of which the League informed the Board, and the League requested an immediate conference to attempt to resolve matters (see the League's response to Motion for Sanctions filed October 13, 1981).

4. Notwithstanding Edison's failure, the League nonetheless delivered documents to Edison (Exhibit 15), provided Messrs. Minor and Hubbard for deposition (Exhibit 13) (both of which gave Edison, along with the MHB Affidavit, substantially all of the information Edison sought in its interrogatories), and was considering Edison's 45 page suggestion for amending the League's contention, an exercise obviously impacting upon the pending interrogatories.

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16. And the documents attached hereto which Edison withheld.

The Board's October 27th Orders responded by adopting — without even considering the League's sworn filings — a diametrically opposite version of the facts. But those facts show that it is not the League, but Edison, which has chosen to ignore the Board's August 18th admonitions concerning discovery. Edison is in violation of paragraph 1 (at pp. 10 .2) of the August 18th Order, by refusing to try in good faith to resolve the overall discovery controversy. Edison is in violation of paragraph 2 of that Order, by refusing to provide answers to the League's interrogatories pending since March 12, 1980.[17]

On a fair reading of the facts, it is Edison — not the League — against whom the Board's October 27th Orders should have been directed.[18]

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17. Edison's objections on March 19, 1980 were solely that the interrogatories did not become "effective" until contentions were admitted. Contentions were admitted on January 8, 1981, and Edison supplied no information. Contentions were finalized on August 18, 1981 and Edison supplied no information, refusing even to acknowledge its continuing obligation when it filed its Motion for Sanctions on October 2 which led to the Board's dismissal on October 27, 1981. Indeed, Edison made no effort to provide any of the information requested in 1980 by the League as it had promised in its objections dated March 19, 1980. See also the Board's discovery admonitions in its August 18, 1981 Order, ¶¶ 3, 5, 6 and 7, in light of the facts herein.

18. In prior papers filed with the Board the League informed the Board of scheduling and personal problems of counsel. Those events were real and are described in Exhibit 24, a Verified Petition to the Seventh Circuit Court of Appeals seeking an extension of time in connection with the League's appeal of Director Denton's May 7, 1981 decision, made final on August 24, 1981. That Petition has been granted. The extension of time was agreed to by the General Counsel for the NRC, and Edison, knowing full well the merit of those facts, did not oppose that motion before the Seventh Circuit. Yet here before this Board Edison ignored those facts and its own acquiescent conduct thereto (see also, e.g., Exhibit 25 hereto to which Edison made no response — let alone objection), by contending that the League had willfully withheld discovery.

The Law Does Not Support The Board's Action

The October 27 Order is without precedent in the annals of Commission practice. As discussed at length above, the issuance of sanctions would have been proper as to Edison — but certainly not as to the League. Despite a direct conflict between the sworn statements of the League's and Edison's, the Board's October 27 Memorandum relied solely upon Edison's contorted and incorrect version of the facts. However, even if the Board's October 27 Memorandum were factually correct -- and as we have demonstrated it was not -- the Memorandum and Order have no basis in law. The Board's dismissal of the League and its contentions flouts not only the Statement of Policy on Conduct of Licensing Procedures recently issued by the Commission (Fed. Reg., Vol., 46 No. 101, pp. 28533 et seq., May 27, 1981) (hereafter referred to as the "Statement of Policy") and the requirements of due process under law, but even the very case authorities relied upon by the Board in its October 27 Memorandum -- the identical authority submitted by Edison. The abrupt dismissal of the League and its contentions from the proceeding — the most drastic sanction available to the Board and issued without prior warning and hearing — was clear error.

1. The Board's Order Flouts Commission Guidelines.

Only months prior to the October 27 Order the Commission issued its Statement of Policy. There the Commission stated:

> "In selecting a sanction [for failure to comply with discovery requests] the Board should consider the relative importance of the unmet obligation, its potential for harm to the other parties, whether its occurrence is an isolated incident or a part of a pattern of behavior, the importance of the safety or environment concerns raised by the party, and all of the attendant circumstances. Boards should attempt to tailor sanctions to mitigate the harm caused by the failure of a party to fulfill its obligation and bring about improved future compliance." 46 Fed. Reg. at 28534.

These considerations -- which as we see below reflect prior Commission decisions on this issue (and a long line of Federal case law) -- are glaringly absent from the October 27 Memorandum underlying the Order.

First. Contrary to the Statement of Policy, the October 27 Memorandum totally fails to mention, much less consider, the importance of the League's contentions and the extent to which, if any, these matters will receive consideration following the League's dismissal.[19] The reasons for the Board's total disregard of this guideline are patently clear. The issues raised by the League's contentions are far too serious to go unaddressed — as is implicitly recognized by the Board's initial admission of those contentions and its denial of Edison's request to reconsider that admission. And there can be no doubt that those admitted contentions will go unaddressed in the absence of the League. The League's contentions could not possibly be construed as duplicative of those raised by the other public interest intervenors — the DeKalb Area Alliance for Responsible Energy ("DAARE") and the Sinnissippi Alliance for the Environment ("SAFE"). Even if that were not so, those entities have acknowledged their inability to retain counsel and actively participate in the proceeding. See Tr. Ex Parte Telephone Conference. It cannot be denied that to date the League has actively participated in the proceeding and if reinstated as a party will aggresively pursue its contentions. None of these incontrovertible facts received so much as a whisper of a mention in the Memorandum. Without doubt, the

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19. The consideration of important public interests — here the need for a full evidentiary record — in the course of determining which, if any, sanction to apply for the failure of a party to make discovery has not, of course, been limited to proceedings before the Commission. See e.g., Harlem River Consumers Co-op, Inc. v. Associated Grocers of Harlem, Inc., 64 F.R.D. 459 (S.D.N.Y. 1974) where it was held that in view of the important public policy of fostering private antitrust litigation, the sanction to be imposed upon the plaintiff, whose answers to defendants' interrogatories were not in conformity with the magistrate's orders that more detail be supplied, would not be dismissal but the district court would once again order the plaintiff to provide a specific and detailed response.

consideration of the public interest in a full evidentiary record has been simply and totally ignored by the Board. For this reason alone, the Order must be reversed. But there is more.

Second. The matters set forth in the League's response to Edison's Motion for Sanctions — the critical illness of the daughter of one of the League's attorneys[20], the full-time, Court-supervised settlement discussions of the other attorney representing the League, and the total noncompliance of Edison[21] with the League's discovery requests, Edison's failure to confer in good faith as directed by the Board on August 18th, and Edison's 45-page suggested revised contentions (Exhibit 12) which would have drastically impacted upon Edison's interrogatories — clearly evidenced the inability of the League to then meaningfully respond to Edison's interrogatories [22] and not deliberate disregard of Edison's discovery requests as found by the Board. The Board not only

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20. In National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 640 (1976) the Supreme Court reaffirmed its admonition that the use of sanctions for a party's failure to comply with a discovery order must be tempered by the requirements of due process:

> "This Court held in Societe Internationale v. Rogers, 357 U.S. 197, 212, 2 L.Ed.2s 1255, 78 S.Ct. 1087 (1958), that rule 37
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> > 'should not be construed to authorize dismissal of [a] complaint because of petitoner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner.'"

Thus, it has been held to have been reversible error to enter on order barring plaintiff from seeking to introduce at the trial any documents that had not been furnished to defendant in accordance with a production order when failure to produce by the date set by the district court was result of illness of the plaintiff and an airline strike. Dorsey v. Academy Moving & Storage, Inc., 423 F.2d 585. (5th Cir. 1970).

21. Nowhere in its Memorandum does the Board mention the failure both of the Staff and Edison to answer the League's interrogatories filed over a year and one-half ago or the Board's long-standing failure to rule upon the League's Motion to Compel.

22. As noted at 16 supra, Edison has secured from the League substantial discovery relevant to this proceeding on an informal basis. Indeed Edison's suggested revisions to the League's contentions (Exhibit 12) evidences that Edison had received discovery information (e.g., Exhibit 8) from the League sufficient to proffer detailed amendments.

totally failed to take these peculiar circumstances into consideration in tailoring a sanction to "bring about improved future compliance" as the Statement of Policy requires, but also compounded the error by turning these facts on their head and characterizing them as "pretexts and excuses" that evidenced "a pattern of behavior which seriously impedes our proceedings and impairs the integrity of our orders." Mem. at 9. Of far more than passing interest is the fact that on the basis of those very same "pretexts and excuses" the Office of the General Counsel of the Commission stipulated to the League's motion for a 30-day extension of time in which to file its brief in the League's appeal from Director Denton's May 7, 1981 decision now pending in the United States Court of Appeals for the Seventh Circuit (Exhibit 24 hereto); Edison similarly did not oppose that Motion; and in fact the Motion was granted by the Seventh Circuit. Even Edison, in its sanction papers before the Board, did not quarrel with the personal and professional problems faced by the League's counsel in the late September-early October period. Only the Board, sua sponte, has seen fit to twist and contort these matters into purported evidence of a pattern of deliberate and willful misbehavior.

Third. Dismissal of a party and all of its contentions is unquestionably the most severe sanction available to the Board. However, in framing its October 27th dismissal Order the Board admittedly (Mem. at 9) made absolutely no attempt to "tailor its sanctions to...promote future discovery in the proceeding" as mandated by the Statement of Policy. 46 Fed. Reg. at 28534.[23] Rather, in flat opposition to the letter and spirit of the Commission's

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23. The Board suggests that the Order is appropriate "...to deter similar conduct by other parties in the future." Mem. at 9. But indeed what conduct will the Order deter. At most, here was a disagreement among counsel — and the only circumstances which the Order will ensure is a lack of cooperation among counsel concerning discovery, so formalizing that process that counsel will fear reliance upon agreements reached in good faith, in the absence of Board approval of each and every element of such an agreement C.f. The Board's contrary statements concerning the necessity of informal discovery in its August 18th Order, pp. 10-12.

guidelines -- and as we see below all prior Hearing Board decisions[24] on the issue — the Order was solely and improperly[25] punitive in nature.

Only months ago the Commission ennunciated clear standards to be followed in cases such as the instant one. Hearing Boards are "to tailor sanctions to...bring about improved future compliance;" promotion of discovery, not punishment, is to be the order of the day. The public interest in a full evidentiary record cannot simply be flung out the window in a moment of pique. All the attendant circumstances are to be considered. The Board's dismissal Order and underlying Memorandum openly flouts these principles. It cannot stand.

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24. The Federal case law (relied upon by the Board at p. 9 of its October 27 Memorandum) similarly holds that the use of sanctions for failure to make discovery should be considered in terms of education rather than punishment and that the guiding principle ought to be to apply no sanction harsher than is reasonably necessary to achieve the purpose of compliance. Wright and Miller, Federal Practice and Procedure, sec. 2284, notes at pp. 767-771:

> "...Rules 37(b) and 37(d) call upon the court to 'make such orders in regard to the failure as are just' and that justice requires that the most drastic sanctions be reserved for flagrant cases. Accordingly, the courts have administered justice with mercy. They have allowed a party a second opportunity comply with the discovery rules and orders made under them and have made other conditional orders intended to encourage compliance rather than punish a failure...[T]he imposition of sanctions has been comparatively rare: Yet it seems especially fitting that courts should make the punishment fit the crime and should not impose a drastic sanction that will prevent adjudication of a case on its merits except on the clearest showing that this course is required. As the draftsman of the Federal Rules wrote:
>
> > 'In final analysis, a courts has the responsibility to do justice between man and man; and general principles cannot justify denial of a party's fair day in court except upon a serious showing of willful default.'
>
> The courts have recognized this and have exercised their discretion in a fashion intended to encourage discovery rather than simply to punish for failure to make discovery." [Footnotes omitted.]

22. The National Hockey League case relied upon by the Board (Mem. at 9, fn. 14) has not altered the standard to be applied by the Federal Courts (See Werner, Survey of Discovery Sanctions, 1979 Ariz.St.L.J. 299, 319). Even if it had, the Statement of Policy -- the mandated guidelines for the Board's determination issued by the Commission some four years after that the National Hockey League decision expressly reaffirms the previously ennunciated Commission goal of tailoring the sanction to promote improved future compliance, excluding any purely punitive measures as the Board has taken here.

2. The Very Case Authorities Relied Upon By The Board Mandate Reversal Of The October 27 Dismissal Order.

At page 9 of the October 27 Memorandum the Board cites precedents for the "dismissal of parties or contentions."[26] Contrary to the Board's suggestion, those authorities clearly demonstrate that in no prior case has a Hearing Board abruptly dismissed a public interest intervenor or its contentions — much less both — as the Board has done here. Rather, in even the most openly flagrant situations involving a party's openly-stated firm refusal to comply with discovery requests and orders, (totally unlike the facts presented here), Hearing Boards have denied sanctions motions and attempted again and again to resolve a means whereby discovery would be promoted without losing the participation of the party. In short, not one of those cases provide the slightest justification the Order; rather, they mandate reconsideration and reversal.

In Susquehanna — despite a public interest intervenor's "blanket refusal to answer even one [interrogatory] on the ground of undue burden" (12 NRC at 325) and an earlier statement of the Board which "questioned the intervenor's 'ability to contribute to the substantive resolution of the issues it [had] raised'" — neither of which has occurred in this proceeding — the Hearing Board thrice extended the intervenor's time to answer interrogatories (for a period of almost one year), and denied motions for sanctions. This treatment of the intervenor was approvingly found by the Appeal Board to have exempliified "a steady patient course designed to move the proceeding along, without allowing

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26. Pennsylvania Power and Light Company and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 322, 339 (19800. See Metropolitan Edison Company (Three Mile Island Station, Unit No. 1), LBP-80-17, 11 NRC 893 (1980); Northern States Power Company, et al. (Tyron Energy Park, Unit 1), LBP-77-337, 5 NRC 1298, 1301 (1977); Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), LBP-75-67, 2 NRC 813, 817 (1975); Public Service electric & Gas Company (Atlantic Nuclear Generating Station, Units 1 and 2), LBP-75-62, 2 NRC 702, 705-6 (1975). See also National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 640 (1976); Mertens v. Hummel, 587 F.2d 862 (7th Cir. 1978); Kelley v. United States, 338 F.2d 328 (1st Cir. 1964).

potentially important issues either to slip by the wayside or to lose active supporters in the hearing." 12 NRC at 338. By no stretch of the imagination did this Board face a factual situation remotely as difficult as that faced by the Susquehanna Board; nevertheless, the Board refused to call a discovery conference requested by the League to discuss the impasse in discovery brought about by Edison — not the League.[27] And the "steady patient course" of the Hearing Board in granting extensions of time and denying motions to dismiss in Susquehanna obviously cannot justify in this proceeding the unforwarned issuance of most drastic sanctions available to the Board.

In Three Mile Island — despite the public interest intervenor's statement during the course of a hearing on a sanctions motion that it had made a firm decision not to respond to interrogatories and raising serious questions about its ability and readiness to participate in the proceeding at all (11 NRC at 902) — neither of which has occurred here -- the Hearing Board conducted an exhaustive inquiry into whether the intervenor's allegations concerning denial of information to it was the cause of the problem. 11 NRC at 898-900. Only after concluding that the intervenor's allegations were unwarranted and that the staff and applicant had in fact extended unusual courtesies in supplying the information requested, did the Board act — accepting "the standard of adopting the least severe sanctions consistent with due process for licensee and a reliable evidentiary record." NRC at 903. The Board refused to dismiss the intervenor from the proceeding; rather it dismissed only those contentions "adequately covered by the contentions of the other parties" (11 NRC at 904) so as to protect the public interest in a full evidentiary record. Neither the facts of Three Mile Island nor the actions taken by the Hearing Board in that case provides even a glimmer of support for the October 27th Order.

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27. It continues to puzzle the League as to why the Board refused to have a meeting with all counsel (as the League had earnestly and urgently requested) to discuss the asserted failure of all counsel to agree (or keep committments) when the Board had earlier ordered counsel to meet, a meeting which thereafter was the genesis of the dispute.

In Northern States Power — despite a total failure on the part of three intervenors to respond to discovery requests and to subsequent orders of the Hearing Board — the Board refused to grant a motion to dismiss but rather directed the following questions to the intervenors:

> 1. "Do you want to remain as a party intervenor in this proceeding?
>
> 2. Do you want to pursue each of your contentions? If not, which contentions do you want to pursue?
>
> 3. What were your reasons for not complying with the Board's order to you compelling responses to discovery requests?"
>
> 4. If given the opportunity, would you comply with the Board's orders to yu compelling responses to discovery requests?" (5 NRC at 1299)

Only upon the total failure of two intevenors to respond and the late response by the third indicating an "inability to cooperate further" in the proceeding did the Board dismiss those parties. Once again, the facts are totally inapposite to those presented here; and the steady patient course of the Three Mile Island Hearing Board in the face of a truly difficult situation stands in stark contrast to that chosen by the Board in the instant proceeding.

In the fourth case relied upon by the Board, Offshore Power, outstanding discovery requests were ignored for almost ten months at which point the intervenor advised the applicant "that it had made a 'firm decision' that it would not proceed with discovery" (p. 815) and did not even respond to the applicant's motion for sanctions. Id. Despite those facts the intervenor was granted ten days to cure its noncompliance. (p. 817) The last case, Public Service, involved a similar set of facts. There also the intervenor flatly refused

to allow discovery (there depositions). (P. 705) The Board denied an unopposed and unanswered motion to dismiss and permitted the intervenor not only a second but also a third chance to respond (Id.) Only after the intervenor reaffirmed for the third time its total refusal to permit discovery did the Board determine to dismiss.

An unmistakably clear pattern emerges from these cases. Dismissal of a party or its contentions has only been considered — not granted — in the most eggregious cases wherein a party has repeatedly indicated (usually by an unequivocal statement to the Board) a total unwillingness to comply with discovery orders and has also indicated (by its own statements) an inability to aid in the public interest goal of a full evidentiary record. Not even the Board has suggested that any of those facts obtained in the instant case. Moreover, even in these truly flagrant cases, totally unlike this one, the initial motion for sanctions was consistently denied. Rather — unlike the October 27th Order — second, third or fourth chances to respond were routinely granted. In short, every case the Hearing Board's course of action was to discover if future compliance was attainable and to promote that goal; never was a purely punitive action considered -- much less, as is the case here — taken without prior warning. No more be said.

We end this legal discussion as we began. Factually the actions taken by the League were not accurately characterized by the Board. Assuming, arguendo, that Edison's assertions (relied upon by the Board as fact) are true, the law neither supports nor permits the October 27, 1981 Order.

CONCLUSION

The Board's October 27th Orders are contrary to both the facts and the law. Those Orders accomplish a result which is both bizarre and unfair, and which not only penalizes the League for attempting in good faith to work out a consolidated and efficient discovery schedule, but also rewards Edison for deliberately breaking discovery agreements (and misrepresenting the facts to the Board) in order to carry out a grossly improper tactical ploy. We respectfully request that the Board vacate its October 27th Orders and, as we requested earlier, promptly schedule a conference in order to place this important proceeding on track.

ROCKFORD LEAGUE OF WOMEN VOTERS

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PROOF OF SERVICE

I certify that the foregoing Petition for Reconsideration was filed (within the meaning of 10 C.F.R., sec. [illegible](c)), ten days after the date of the Order sought to be reconsidered (w[illegible]eaning of 10 C.F.R. 2.771) by mailing postage prepaid and properly ad[illegible]essed on November 6, 1981, copies to the Chairman of the Atomic Safety and Licensing Board herein, counsel for the parties, directly to the parties unrepresented by counsel, the Secretary of the Commission, and the Atomic Safety and Licensing Appeal Board Panel.

Dated: November 6, 1981