UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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 | Docket No. 50-322-OL (Emergency Planning) |
| LONG ISLAND LIGHTING COMPANY | |
| (Shoreham Nuclear Power Station, Unit 1) | November 19, 1982 |

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

## I. Background

On October 29, 1982, this Board, presiding over the Shoreham operating license proceeding, noted that it was considering ordering that the parties conduct cross-examination, redirect and recross examination with respect to the Phase I emergency planning contentions initially by means of public prehearing depositions. Tr. 12,541-43. We proposed that these sessions be conducted as if the parties were examining on the pre-filed direct testimony at the hearing, except that the Board would not be present.

The transcripts of the prehearing examinations subsequently would be filed with the Board, with tne portions which each party seeks to move into evidence noted thereon. The Board would then resolve any procedural or evidentiary objections noted therein (and pursued at the time of filing the depositions), would rule on the admissibility of the noted portions into evidence after their adoption by the witnesses at hearing, and would preside over any follow-up questioning by the parties and the Board. Id. Portions of the prehearing examinations would thus become a part of the evidentiary record of this proceeding upon which this Board will base its initial decision. Therefore, in the end, the parties would be able to compile the same record utilizing many fewer days of Board hearing time.

The Board's purpose in proposing this procedure is to enable it to meet several obligations to the parties in this proceeding simultaneously. The Board's primary considerations are to protect the rights and interests of all the parties and to allow the exploration of all issues thoroughly, including through the important device of examination of witnesses. At the same time, the Board has an obligation to see that the hearing proceeds efficiently and substantively.

As the transcript from the current Shoreham proceedings demonstrates, Suffolk County (the County), as the lead intervenor, is exercising its right to examine fully and broadly, with substantial diligence. Such examination necessarily stimulates full examination by

the other parties both through their redirect and through their cross-examination of opposing witnesses. In the quest for comprehensiveness, lines of questioning may be pursued with varying degrees of success in uncovering substantive facts. It is the Board's obligation to give close and careful attention to the substantive facts that are uncovered.

With these obligations in mind, we note that the County has not exercised its opportunity to file direct testimony in the upcoming hearings for certain of the Phase I Emergency Planning contentions. We also note that as demonstrated by the County with respect to the safety contentions (including the many on which it has filed testimony), full and broad examination on all contentions may be anticipated. Thus, the Board believes that the County may wish to develop its views through the cross-examination of witnesses both in lieu of and in addition to providing its own direct testimony.

The addition of the examinations before hearing to the proceedings is not put forth as a substitute for the Board's attention to those matters. It is a means to aid the parties and the Board to follow-up the examination of witnesses before the Board in a probative and efficient manner. It is the Board's intention that these prehearing examinations will be the mechanism to give the parties the ability to more fully probe the areas of their concern, while utilizing significantly less hearing time. Unless all parties and the Board agree

otherwise, each witness will appear before the Board to orally attest to the truth of both his written prefiled direct testimony and those portions of his examination during depositions that the Board has decided to admit into evidence.

It is anticipated that both the parties' and the Board's questioning at hearing will be much better focused on the matters in controversy as a result of these prehearing examinations. The issues should be more thoroughly, yet efficiently, probed than they might have otherwise been. The result, we believe, will be beneficial to all parties, to the Board and to the public interest.

In its November 1, 1982 "Response to Board Request for Parties Views on Scheduling Matters", at 5, Suffolk County said that it "vigorously objects" to the Board's proposal, stating that it did not believe that depositions, such as those proposed by the Board, were an appropriate alternative to actual examination of witnesses before this panel, and asserting without explanation that the Board's proposal "is improper and inconsistent" with Section 189 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2239(a).

At hearing the following day, Counsel for the County adopted essentially the same position, without further elaboration. Tr. 12,564. In response to the County's request for an opportunity to brief this subject, Tr. 12,566, the Board suggested that all parties submit their

views on the Board's proposal by November 8, 1982, with any replies to be served on November 15. Tr. 12,566. One of the Counsel for Suffolk County requested a lengthier time frame, owing to his other commitments. Accordingly, the Board adjusted its originally proposed deadlines to November 12 and 18, respectively. Tr. 12,585.

After having secured the Board's consent to extend the due date for filings from parties until November 12, the County filed with the Board on November 8, 1982 a "Response to Licensing Board Proposal of November 2, 1982" which did little more than restate the initial position taken by Suffolk County in its November 1 scheduling filing. The November 8 filing strongly asserts, with no supporting analysis and almost no explication, that the Board's proposal to require that initial cross-examination, redirect and recross be done by prehearing examination is "unlawful". The only explanation offered by the County for this stark characterization is its view that the proposed procedure violates Section 189 of the Atomic Energy Act, because that statute has consistently been implemented by the NRC "to require adjudication of evidentiary disputes in public hearings before the Commission or the Boards to which it has delegated its authority" (emphasis in original).

In the view of the County, the Board's proposal "is at odds with the norm and practice of NRC licensing proceedings" and the Board "has no authority in this proceeding to depart from the settled adjudicatory practice of the NRC", absent a change in the Commission's rules or a congressional amendment to the Commission's empowering legislation.

The Board had requested, Tr. 12,582, that the County discuss why the evidentiary use of such examination by deposition would be impermissible in NRC practice, in light of the provision in the Commission's rules, 10 C.F.R. § 2.743(b), requiring that parties submit the direct testimony of witnesses in written form. In its filing of November 8, the County notes only that the prefiled direct testimony is useful in preparation for a hearing and is explicitly authorized by the Commission's regulations. The County does not discuss or allege how the procedure proposed by the Board would violate the APA, Atomic Energy Act or NRC regulations, or that it would in any way prejudice the County's rights.

On November 11, 1982, the Board received the Long Island Lighting Company's (LILCO's) "Memorandum on the Use of Depositions to Increase Hearing Efficiency", which concludes that the procedure which the Board has proposed is proper under both the APA and the Commission's regulations. LILCO states that under the APA, submission of all evidence in an "on the record" hearing may be done in written form in the proper circumstances, 5 U.S.C. § 556(d); it notes that this is effectively the procedure used in an NRC proceeding pursuant to § 2.760(b), wherein the Commission, if required by the public interest, may direct that the Licensing Board certify the record to it without an initial decision and prepare its own initial decision.

Furthermore, LILCO asserts that the use of the procedure which the Board has proposed is an appropriate means of expediting what it describes as "very likely...one of the most complex cases in this country's administrative history." LILCO states its belief that the hearings to be held under the Board's proposed procedure will meet the "public" aspect of the NRC hearing requirement, and concludes that no party will be prejudiced by this procedure, since the scope of their examination will not be varied, only the form in which it will be presented initially to the Board.

The NRC Staff filed its "Position on the Board's Proposed Deposition Procedures" on November 12, 1982, which concludes that the Board does have the authority under the APA, the Atomic Energy Act and the Commission's rules to direct the parties to conduct their cross-examination through deposition-like prehearing examinations. The Staff further concludes that there would be no hearsay problem in the admission of portions of these prehearing examinations into evidence, both in that strict rules of evidence do not apply in administrative proceedings, and in that the declarants of this examination will be present at the hearings before the Board so as to permit the parties to establish the reliability of those portions of the prehearing examinations admitted into evidence.

The Staff also asserts that the use of the procedures proposed by the Board will not deprive any party of its rights to a full and fair

hearing, since each of the parties will have the opportunity to present evidence, to conduct thorough cross-examination, and to make arguments. Furthermore, it states that the admission of depositions into evidence "does not constitute a substitute for the hearing, but rather a means to facilitate and focus that hearing." In this regard, the Staff analogizes the procedure proposed by the Board to 10 C.F.R. § 2.743(b), which requires the pre-filing of written direct testimony for these very purposes.

In the filing received on November 18, 1982 from the Shoreham Opponents Coalition, SOC asserts that while the Board's proposed prehearing examinations are stated to have been contemplated for the purposes of efficiency, it believes that the efficiency to be served by this procedure is the Board's own convenience and is unrelated to serving the interests of justice and a fair hearing process. It argues that the Board's proposal will violate long-standing administrative law public hearing requirements and will "create more problems, confusion and public skepticism about the licensing process than the Board will save in time through the use of evidentiary depositions." Furthermore, SOC asserts that the procedure proposed by the Board will deny the Board an opportunity to properly assess the demeanor of witnesses.

In a filing received on November 19, 1982, the North Shore Coalition (NSC) alleges that the Board's proposal would deny NSC procedural and substantive due process, in that it would permit a

hearing to be held in the absence of a hearing officer. Additionally, NSC asserts that the Board's proposal violates the APA, in that it amounts to an amendment to the Commission's procedural rules without a rulemaking proceeding. NSC also contends that the costs attendant to implementing the procedure proposed by the Board will effectively deprive NSC of the opportunity to properly litigate its contentions.[1/]

## II. The Licensing Board's Authority

The intervenors' objections to conducting initial examination of the witnesses in the manner which we have proposed appears to be predicated upon its interpretation of Section 189(a) of the Atomic Energy Act as requiring formal trial-type adjudicatory procedures, including oral examination before the Board, in all NRC licensing proceedings. While we acknowledge that the procedure which we have proposed apparently is an innovation in NRC practice, we believe it to be fully consistent with the requirements of the Atomic Energy Act, the Administrative Procedure Act (APA) and the Commission's regulations.

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1/ The matter of costs is not addressed in this memorandum, but will be discussed on the record at the conference to be held in Suffolk County on November 23, 1982.

We note at the outset that the Atomic Energy Act does not itself specify the nature of the hearings required to be held pursuant to Section 189(a) of the Act:

> In any proceeding...for the granting...of any license or construction permit...and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees...the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding....

This is why the County's bare assertion that Section 189 precludes our use of initial questioning by prehearing examination fails to rise to the level of legal analysis or supporting argument; further examination of relevant statutes and precedent is necessary to determine what kind of hearing is required by Section 189.

By viture of Section 181 of the Atomic Energy Act, 42 U.S.C. § 2231, "the provisions of the Administrative Procedure Act...shall apply to all agency action taken under this Act." However, pursuant to Section 5(a) of the Administrative Procedure Act, 5 U.S.C. § 544(a), the statute which describes when a formal adjudicatory hearing is required to be held under the APA, no adjudication is necessary in a case unless otherwise required by some different statute. Put another way,

> It will be noted that the formal procedural requirements of the Act are invoked only where agency action "on the record after opportunity for an agency hearing" is required by some other statute. The legislative history

> makes clear that the word "statute" was used deliberately so as to make sections 5, 7 and 8 applicable only where the Congress has otherwise specifically required a hearing to be held (citations omitted, emphasis in original).

U.S. Department of Justice, Attorney General's Manual on the Administrative Procedure Act, at 41 (1947). In the view of the Attorney General's Manual, "Licensing proceedings constitute adjudication by definition, and where tney are required by statute to be determined on the record after opportunity for an agency hearing, sections 5, 7 and 8 (of the APA, requiring use of formal adjudicatory procedures) are applicable." Id. at 41.

While Section 189(a) does not, in its reference to "a hearing", distinguish between adjudication and rulemaking or explicitly state whether either must be conducted through formal "on the record" proceedings,

> [t]he Commission has...invariably distinguished between the two, and has provided formal hearings in licensing cases, as contrasted with informal hearings in rule-making proceedings confined to written submissions and non-record interviews.

Siegel v. Atomic Energy Commission, 400 F.2d 778, 785 (D.C. Cir. 1968); see also Citizens For a Safe Environment v. Atomic Energy Commission, 489 F.2d 1018, 1021 (3d Cir. 1974) (AEC considers a licensing proceeding to be an adjudication).

Our determination that the APA and NRC precedent have provided for formal hearings in licensing cases does not, however, lead to the conclusion that it is improper to require that initial examination on the prefiled testimony be done in advance of the hearing before the Board. In accordance with Section 7(c) of the APA, 5 U.S.C. § 556(d), a party to an administrative adjudicatory hearing does not have an unlimited right to cross-examine witnesses, but is instead entitled only "to conduct such cross-examination as may be required for a full and true disclosure of the facts." Furthermore, as was noted by WILCO, Section 7(c) also provides that:

> In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form (emphasis added).

As contemplated by the Board, the selected portions of the transcripts of the cross-examinations, redirect examinations, and follow-up questions of all parties would be offered into evidence at the hearing before the Board. If admitted, they would then become a formal part of the decisional record of this proceeding. The Board and the parties would then be able to ask follow-up questions of the witnesses at the hearing before the Board. We believe this procedure to be closely analogous to the use of prefiled direct testimony, which, as just noted, is permitted under the APA, the rules of the Commission, 10 C.F.R. § 2.743(b), as well as under the rules of numerous other Federal

Agencies. Furthermore, we are unaware of any assertion by the County or any other party that they would be prejudiced by the Board's use of the procedure which it has proposed other than the complaint that the Board would not be present at the prehearing examinations.

The use of prehearing examinations will prevent the Board from observing the demeanor of the witnesses at the time of the initial examination. However, each witness panel will be made available for additional questioning before the Board, should the Board or the parties so desire. Therefore, the Board anticipates it will have sufficient opportunity to observe the witnesses' demeanor.

Additionally, while we know of no agency which has specifically authorized or required the use of cross-examination in written form in its hearings by rule, we note that the Interstate Commerce Commission has long made use of a "modified procedure" which requires that all evidence be submitted in the form of verified or sworn statements; an oral hearing and cross-examination are not permitted unless material facts are in dispute and the sworn statements do not provide an adequate basis for their resolution.[2/]

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2/ This procedure has been upheld under challenge in Federal Courts. Crete Carrier Corp. v. United States, 577 F.2d 49, 50 (8th Cir. 1978); Boat Transit, Inc. v. United States, 1970 Federal Carrier Cases, § 82, 215 (E.D. Mich. 1970), aff'd, 401 U.S. 928 (1971).

Furthermore, we take official notice that the U.S. Postal Rate Commission has been regularly using compulsory written cross-examination in the form of interrogatories, with additional follow-up oral cross-examination at the hearing in their rate cases.3/

In Permian Basin Area Rate Cases, 29 FPC 588 (1963), the hearing examiner directed that a substantial part of the cross-examination of a witness be done by deposition. In refusing interlocutory review, the Federal Power Commission stated:

> We are confident that the presiding examiner's ruling reflects an attempt to govern a massive proceeding fairly and expeditiously. Without expressing any opinion as to the appropriateness of the procedure generally, an isolated instance where the cross-examination of a particular witness has been ordered to be completed by "deposition" generally would not, in itself, constitute the extraordinary

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3/ LILCO also cites an administrative case, American Fruit Purveyors, Inc., 30 Ad. L. 2d 584 (Pike and Fisher) (1971) which supports the Board's proposal to require pre-hearing examination by oral deposition questions. That case involved the use of depositions on written questions as evidence-in-chief pursuant to Department of Agriculture rules where the witnesses were in excess of 100 miles from the place of hearing; the respondent in that case had been offered the chance to file cross-questions of these witnesses, but declined to do so because of the expense. The witnesses did not appear at the hearing, respondent asserted it had been denied the opportunity to conduct cross-examination. The Commission rejected this argument, on the basis that respondent had received an opportunity to cross-examine these witnesses but had waived this right by not filing cross-questions. See 7 C.F.R. § 47.16(f) regarding use of depositions in Department of Agriculture proceedings.

circumstances referred to in our Rules.[4/]

In American Public Gas Association v. FPC, 498 F.2d 718, 723 (D.C. Cir. 1974), petitioners alleged they had been denied their right to cross-examine in a Federal Power Commission decision which had limited the parties' cross-examination to written interrogatories, without any follow-up before the presiding finder of fact. In rejecting this position, the D.C. Circuit stated:

> Even in a formal adjudicatory hearing under the APA, however, cross-examination is not always a right.... Although the petitioners claim that cross-examination of live witnesses was necessary they do not point to any specific weakness in the proof which might have been explored or developed more fully by that technique than by the procedures adopted by the Commission.... We are told in general that the issues of costs, gas supply and rate of return might have been explored, but the petitioners do not suggest what questions were necessary for this purpose, nor do they explain why their written submittals were ineffectual. In the circumstances we cannot say that the rights of the petitioners have been prejudiced. See Long Island RR Co. v. United States, 318 F. Supp. 490, 499 (E.D.N.Y. 1970). 498 F.2d at 723.

We believe that the Board's proposal for the conduct of cross-examination is even less intrusive into the cross-examination flexibility of parties than the interrogatory procedure approved by the D.C. Circuit in American Public Gas, because parties will be permitted to orally question these witnesses in the prehearing depositions, and readily

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4/ The full case on the merits was decided by the Commission at 34 FPC 159 (1965), aff'd. 390 U.S. 747 (1968) without express discussion of this point.

follow-up on any incomplete or evasive answer. In addition, the Board and the parties will have the opportunity to follow-up with further questions at the hearing. Neither the County, nor other intervenors, has cited any reason why this procedure would prejudice its rights. We conclude that our proposed prehearing examination procedure clearly satisfies the provisions of the APA.

We further believe that this Board has the authority, under NRC rules, to dire t that the parties conduct initial examination by means of prehearing examinations. Pursuant to 10 C.F.R. § 2.718, this Board has the ,ower to regulate the course of the hearing and the conduct of the participants, as well as to "[t]ake any other action consistent with the Act, this chapter, and sections 551-558 of title 5 of the United States Code [the APA]." See also 5 U.S.C. § 556(c).

As is stated in Appendix A to 10 C.F.R. Part 2, at V:

> The board should use its power under §§ 2.718 and 2.757 to assure that the hearing is focused upon the matters in controversy among the parties and that the hearing process for the resolution of controverted matters is conducted as expeditiously as possible, consistent with the development of an adequate decisional record.

This guidance was echoed last year in the Commission's "Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 453 (1981):

> Individual adjudicatory boards are encouraged to expedite the hearing process by using those management methods already contained in Part 2 of the Commission's Rules and Regulations. The Commission wishes to emphasize though that, in expediting the hearings, the board should ensure that the hearings are fair, and produce a record which leads to high quality decisions that adequately protect the public health and safety and the environment.

Accordingly, as LILCO noted, for the purposes of focusing and expediting the hearing process, this Board may, under § 2.718(d), "[o]rder depositions to be taken;" under § 2.718(e), "[r]egulate the course of the hearing and the conduct of the participants;" under § 2.756, employ "informal procedures;" under § 2.757(c), "[t]ake necessary and proper measures to prevent...repetitious, or cumulative cross-examination;" and under § 2.767(d), "[i]mpose such time limitations on arguments as [it] determines appropriate, having regard for the volume of the evidence and the importance and complexity of the issues involved."

The Board's procedures are fully consistent with the requirement of 10 C.F.R. § 2.743(a), which grants parties the "right to ...conduct such cross-examination as may be required for full and true disclosure of the facts." The fact that the procedure which we are ordering has not previously been implemented in NRC licensing hearings does not mean that the procedure is invalid. As the Supreme Court stated in American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 538-539 (1970), upholding an Interstate Commerce Commission decision granting a motor

carrier temporary operating authority in circumstances not technically in compliance with ICC regulations:

> The Commission is entitled to a measure of discretion in administering its own procedural rules in such a manner as it deems necessary to resolve quickly and correctly urgent transportation problems....[T]here is no reason to exempt this case from the general principle that "[i]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party." NLRB v. Monsanto Chemical Co., 205 F.2d 763, 764. And see NLRB v. Grace Co., 184 F.2d 126, 129; Sun Oil Co. v. FPC 256 F.2d 233; McKenna v. Seaton, 104 U.S. App. D.C. 50, 259 F.2d 780.

We believe this operating license proceeding to clearly be a case in which the approach suggested by the Board to better focus cross-examination is warranted. The extraordinary breadth of this proceeding was discussed in LILCO's November 11 filing at 2-3:

> The Board made the remarks just quoted on November 2nd--the 61st day of hearings in this proceeding. The Transcript had then passed 12,500 pages. Over 100 exhibits had then been marked and/or received into evidence. Almost 7,000 pages of written direct testimony had then been

served.1/ Eighty-seven witnesses had already testified or were then on the stand.2/

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1/ The page totals include the testimony itself, attachments to it, and witnesses' qualifications. Some of this written testimony has become the predicate for settlement negotiations rather than hearings.

2/ The witnesses totals include each witness who testified on each contention. Thus, if a person testified on more than one contention, he has been counted more than once. In addition to witnesses at the hearings, 33 people have been deposed to date in this case.

Furthermore, as LILCO also notes, there still remain at this time a number of health and safety contentions to be litigated prior to the time when the Board will begin to hear Phase I Emergency Planning Contentions, while the time and energies to be devoted to Phase II Emergency Planning contentions still cannot be estimated. As LILCO also observes, the Manual for Administrative Law Judges (revised ed. 1982) defines a complex case as follows:

> Complex cases require hearings lasting from a few days to a month or more, have many parties and many issues, and involve few credibility questions. Typically, much of the testimony is highly technical and lengthy, and is submitted in written form prior to the hearings.

By this definition, Shoreham is indeed a most complex case.

Based on the experience which we have gained in these past six months through working with the parties to the present litigation all of whom are represented by very competent counsel, we are aware that they have developed an impressive track record for an NRC proceeding in the

number of contentions which they have been able to settle without litigation. Their record in focusing their cross-examination, or even reaching stipulations as to factual matters encompassed in the contentions which we would have thought incontrovertible, has not been quite so impressive.

In our view, requiring prehearing examinations on Phase I emergency planning contentions will greatly aid the parties questioning before the Board in that they will be able to test many lines of questioning during the prehearing examinations, and then follow-up before the Board on those matters they deem most significant with greater incisveness than might otherwise have been possible.

In reaching our conclusion that it is permissible under the Atomic Energy Act, the APA and the Commission's regulations for this Board to direct that the parties conduct their initial cross-examination, redirect and recross examination by prehearing examination in the nature of a deposition, we wish to emphasize that we cannot and do not reach the question of whether the adoption of such a procedure would be proper or advisable in other NRC proceedings. The proceeding before us is an exceptional case in many ways, and what might be an appropriate procedure to expedite a lengthy, highly litigated case involving sophisticated intervenors represented by a number of competent counsel might be fundamentally unfair in a case involving a pro se intervenor

unfamiliar with both depositions and adjudicatory procedures.[5/]

Furthermore, in light of the long-standing interpretation which has been given to the nature of the hearing required by the Atomic Energy Act, first by the Atomic Energy Commission, Siegel v. AEC, supra, and then subsequently in NRC proceedings, we need not and do not express a view on whether an amendment to the Commission's regulation requiring such a procedure in all NRC adjudications would be proper, absent prior Congressional action authorizing such a change.[6/]

In our view, the decision whether to require that initial examination be conducted by an appropriate form of prehearing examination is one best committed to the sound discretion of a licensing board as part of its general duty to regulate the course of the hearing

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5/ As the Supreme Court has stated in a non-APA context, "The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." Goldberg v. Kelly, 397 U.S. 254, 269 (1970). We believe similar concerns must be addressed in an agency's implementation of the APA. See Swift and Company v. United States, 308 F.2d 849, 851 (7th Cir. 1962). "Due process in an administrative hearing, of course includes a fair trial, conducted in accordance with fundamental principles of fair play and applicable procedural standards established by law."

6/ See State Farm Mutual Automobile Insurance Co. v. Department of Transportation, 680 F.2d 206, 229 (D.C. Cir. 1982), holding that the National Highway and Transportation Safety Administration had acted arbitrarily in rescinding its "Modified Airbags and Motor Vehicle Safety Standard 208" without stating "clear and convincing reasons" for altering what had been a "consistant administrative interpretation of a statute shown clearly to have been brought to the attention of Congress and not changed by it...."

and the conduct of the participants. See 5 U.S.C. § 556(c)(7); 10 C.F.R. § 2.718(e). This is consistent with the general case management powers committed to a board under 10 C.F.R. § 2.718, which requires it "to conduct a fair and impartial hearing according to law, to take appropriate action to avoid delay and to maintain order", and would ensure that this decision is made by those persons most familiar with the parties, the issues, the scheduling demands and the equities of any particular proceeding. See [Commission] Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 453 (1981).

## III. Procedure for Prehearing Examination

As we have concluded, based upon our examination of relevant statutes, regulations and judicial and administrative precedent, that this Board does possess the requisite authority to direct that initial examination of the prefiled testimony be had through prehearing examination in the nature of a deposition, we are directing that such examinations be held pursuant to the procedure set forth below. Implementation of this order will be discussed at a conference of parties to be held in Suffolk County on November 23, 1982. Therefore, it is hereby

ORDERED that prehearing examination be conducted as follows:

A. Commencing on or about November 29, 1982 and continuing on a schedule to be set by the Board in consultation with the parties during the November 23, 1982 conference, the parties are directed to conduct cross-examination, redirect, recross and any further follow-up questions as time may permit, on all prefiled direct testimony, not stricken or otherwise disposed of by Board rulings, which relate to those of "Intervenors' Consolidated Phase I Emergency Planning Contentions" as have not been otherwise resolved among the parties.

B. The prehearing examinations shall be open to the public and shall be held in a mutually agreeable location in Suffolk County, New York. The parties shall be jointly responsible for arranging for such facilities, including such security arrangements as are deemed advisable. In the event of any disturbance which disrupts examination to the extent that it is unreasonable to continue, the disrupted examination shall be adjourned and shall be reconvened when order has been restored. Should it prove impossible or unreasonable to publicly reconvene the examination, the remainder of those examinations scheduled for that day shall be resumed as promptly as possible in a prearranged location not subject to disruption. The Board shall be informed of this

circumstance as soon as practicable.[7/]

C. Prehearing examinations shall generally be conducted in the nature of a deposition, e.g., evidentiary and procedural objections shall be noted on the record, without argumentation, and the witness(es) shall thereafter be instructed to answer the disputed question. Witnesses shall testify under oath or affirmation. Exhibits used during the course of prehearing examinations shall be marked for identification and bound into the transcript of such examination if practical; copies of any exhibits too large to bind into the transcript itself shall be served upon the Board and parties participating in the examination, or identified as having been served previously.

D. Should any party believe a question or line of questioning to be so inappropriate as to entitle it to move for a protective order, within the scope of those situations enumerated in Cincinnati Gas & Electric Co. (Wm. H. Zimmer Nuclear Station,

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7/ Compare 10 C.F.R. § 2.751, under which all NRC hearings unrelated to restricted data, defense information or safeguards information are required to be public, "unless otherwise ordered by the Commission." As the body delegated the authority by the Commission to conduct this proceeding, this Board would have the authority to order that the prehearing examinations not be open to the public, should the integrity of the proceeding and the safety of the participants be threatened. See 10 C.F.R. § 2.4(e).

Unit 1), LBP-82-47, 15 NRC 1538, 1545-1546 (June 21, 1982), it shall be the duty of such party to so note on the record prior to instructing its witness not to answer. The party must then seek a protective order and shall be required to notify the Board and parties prior to the close of business on that day and arrange for a telephone conference call to be held at 8:15 am on the next business day, so that the Board may rule promptly on such objections. It is not anticipated that any party will instruct a witness not to answer a question except in those extraordinary circumstances where a protective order would be justifiable. Once a party announces its intention to seek a protective order, however, the examination shall continue to the extent possible on other matters relevant to the contention.

E. The time estimates prepared by each party for its cross-examination on Phase I Emergency Planning issues, as they may be modified at the November 23, 1982 conference, shall be used as general guidance for the parties for joint determinations as to how long should be allocated to cross-examination, redirect and recross. While these estimates are not to be treated as absolute requirements, the parties should take care to allow time for adequate coverage of each contention within this estimate.

F. The parties will subsequently jointly file the prehearing examination transcripts with the Board, with the portions which each party seeks to move into evidence noted thereon. The Board will thereafter rule on any procedural or evidentiary objections noted therein and pursued at the time of the filing of the transcripts. The scheduling for submission of these filings will be established at the November 23, 1982 conference.

G. At the time of the evidentiary hearings before the Board on Phase I Emergency Planning contentions, unless otherwise waived by all parties which participated in the deposition and the Board, each witness will appear before the Board. The parties would then ask their witnesses whether they adopt their prefiled written direct testimony and those portions of their prehearing examination remaining after the Board has resolved objections.

H. The Board will orally question the witnesses based upon both their written direct testimony and the transcript of their examinations. The parties will thereafter be permitted to question the witnesses orally before the Board regarding either matters raised by the Board's questions or any other matters material and relevant to the contentions. As the Board will have already read the prehearing examination transcripts, it is

anticipated that any questions asked which the parties previously had asked during their examination of these witnesses will be intended primarily for the purpose of providing necessary context and foundation for well-focused follow-up questions. Within its powers to limit the introduction of cumulative evidence, the Board will consider the imposition of time limits on any party whose oral questions before the Board warrant such a limitation.

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.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Lawrence Brenner
Lawrence Brenner, Chairman
ADMINISTRATIVE JUDGE

for/ Lawrence Brenner
Dr. Peter A. Morris
ADMINISTRATIVE JUDGE

for/ Lawrence Brenner
Dr. James H. Carpenter
ADMINISTRATIVE JUDGE

Bethesda, Maryland
November 19, 1982