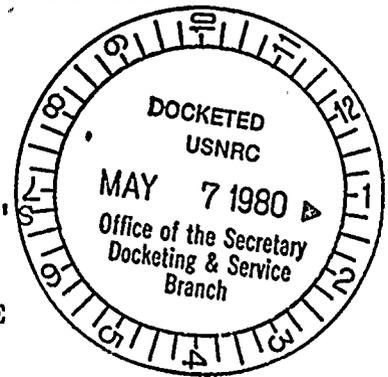


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
PACIFIC GAS AND ELECTRIC COMPANY)
)
(Diablo Canyon Nuclear Power)
Plant, Unit Nos. 1 and 2))
_____)

Docket Nos. 50-275 O.L.
50-323 O.L.



APPLICANT PACIFIC GAS AND ELECTRIC COMPANY'
ANSWER IN RESPONSE TO INTERVENOR'S
MOTION TO STAY PROCEEDINGS AND PETITION
FOR REVIEW OF AFFIDAVIT OF NON-DISCLOSURE

Intervenor San Luis Obispo Mothers for Peace ("Intervenor") has filed a motion to stay proceedings and petition for review of the affidavit of non-disclosure approved by the Atomic Safety and Licensing Appeal Board ("Appeal Board"). On April 11, 1980, the Appeal Board issued a "Second Prehearing Conference Order" which directed a sanitized version of the Diablo Canyon physical security plan be given to counsel for Intervenor following the close of business on Monday, April 21, 1980, provided that Intervenor's counsel had executed an affidavit of non-disclosure in the form appended to the Appeal Board's order. On April 21, 1980, the Commission issued an order directing that the security plan not be furnished to Intervenor's counsel unless and until the Commission so directs.

For the reasons set forth below, Intervenor has failed to satisfy its burden of showing that the proceedings should be stayed on the grounds it advances or that its petition for review should be granted. Therefore, Applicant Pacific Gas and Electric Company



("Applicant") submits that Intervenor's motion and petition should be denied as a matter of law.

I

Motion for Stay

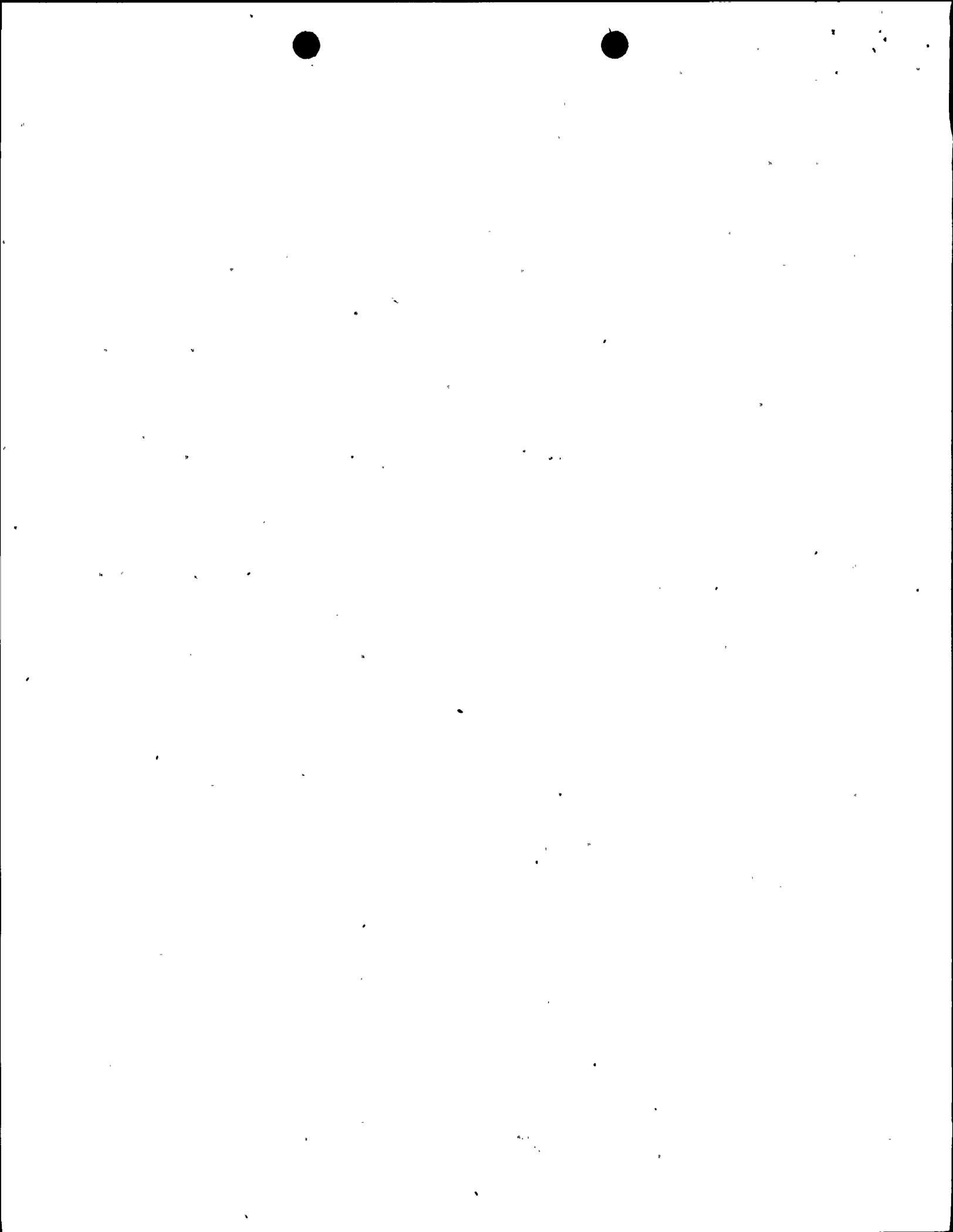
Under the Commission's regulations, the applicant for a stay bears the burden of persuasion to show that the four factors set forth in 10 CFR §2.788 are met. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, 8 NRC 253, 270 (1970). Intervenor has failed even to address three of the factors,¹ much less demonstrate that its application for a stay should be granted based on a consideration of these factors.

The only factor which Intervenor arguably has addressed is "whether the moving party has made a strong showing that it is likely to prevail on the merits". 10 CFR §2.788(e)(1). Intervenor argues that paragraph 8 of the affidavit of non-disclosure is a violation of the First Amendment. Paragraph 8 provides in part: "I will not publicly discuss or disclose any protected information that I receive by any means whatever."² Intervenor argues that the provision is an overbroad prior restraint on free speech:

"(1) [The affidavit of non-disclosure] purports to prevent disclosure of information obtained outside the course of this proceeding, and

¹Intervenor's motion is also deficient for the reason that it has failed to include a statement respecting where a stay was requested from the Appeal Board and denied. See 10 CFR §2.788(b)(3). In fact, Intervenor has not requested a stay from the Appeal Board.

²"'Protected information' is (1) any form of the physical security plan for the licensee's Diablo Canyon Nuclear Power Plant, Units 1 and 2; or (2) any information dealing with or describing details of that plan." Affidavit of non-disclosure Para. 1.



"(2) It purports to prevent disclosure of information which has been the subject of this proceeding but nevertheless by some other means reaches the public domain."
(Motion for Stay at 2-3.)

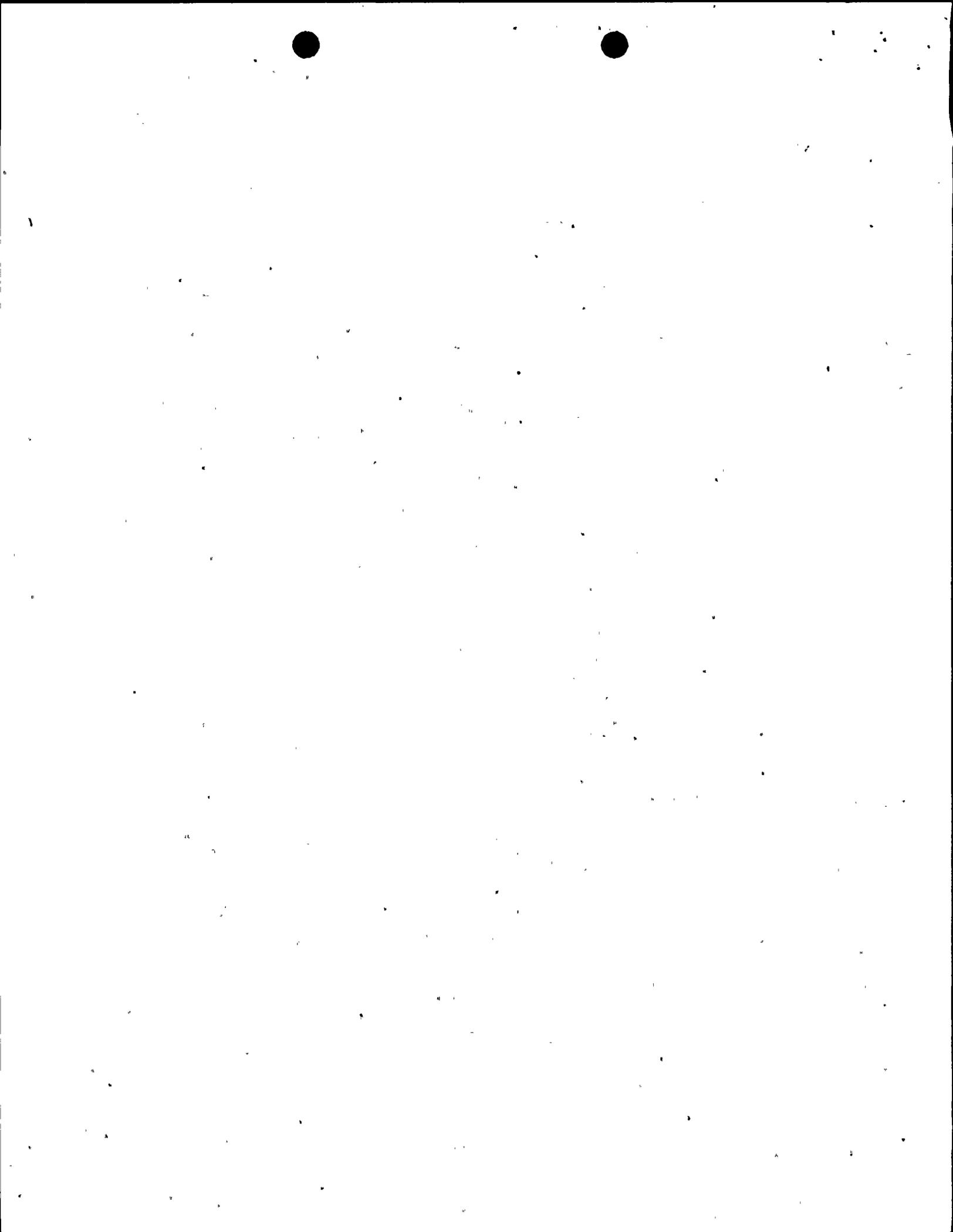
Intervenor's argument is without merit. First, Intervenor may well have waived any First Amendment rights in protected information when it entered into the discovery process in this proceeding. Rogers v. United States Steel Corporation, 536 F.2d 1001, 1006 (3d Cir. 1976) (dictum); International Products Corporation v. Koons, 325 F.2d 403, 407 (2d Cir. 1963).

Even if Intervenor did not waive its First Amendment rights, the restriction set forth in paragraph 8 of the affidavit of non-disclosure is still valid for it meets the three criteria by which such restrictions are evaluated. The three criteria are:

"[T]he harm posed by dissemination must be substantial and serious; the restraining order must be narrowly drawn and precise; and there must be no alternative means of protecting the public interest which intrudes less directly on expression." In re Halkin, 598 F.2d 176, 191 (D.C. Cir. 1979).

With respect to the first criterion, the harm resulting from disclosure of protected information would be substantial and serious. See Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units No. 1 and 2), CLI-77-23, 6 NRC 455, 456 (1977). As Chairman Salzman stated during the prehearing conference on April 2, 1980:

"Let us not talk in the abstract. We are discussing information which if it gets out, it simply would destroy or injure the plan.

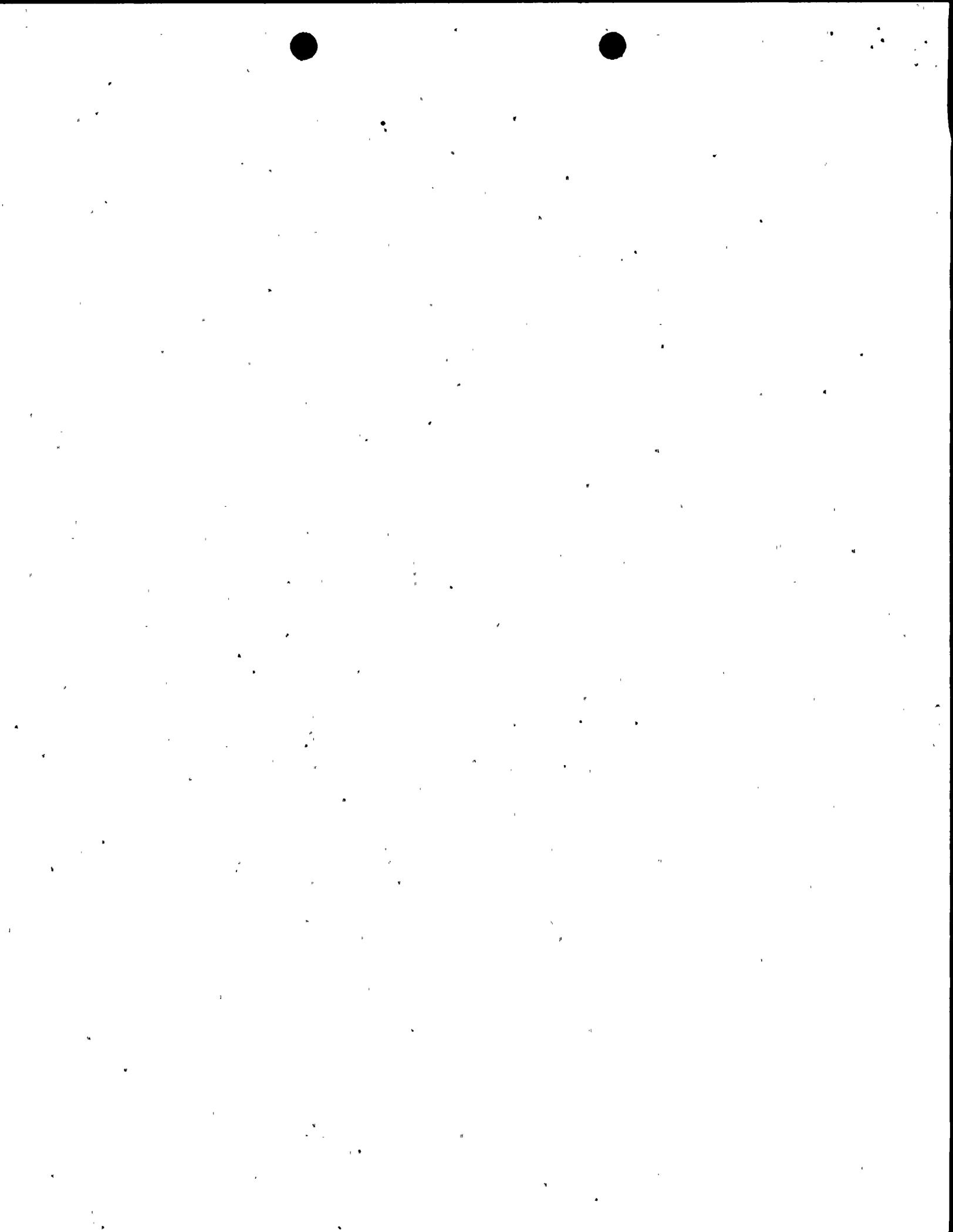


We are not talking about things [which if they get out], somebody can be sued later." (Transcript at 22.)

The security plan is very sensitive information. Knowledge of the details of a plant's security system would obviously make it easier for a person to defeat that system. In the interest of public health and safety, necessary precautions must be taken to safeguard the plan.

Second, the affidavit of non-disclosure is no broader than necessary to protect the countervailing interest of public health and safety. Intervenor's apparent problem is that paragraph 8 extends to the discussion and disclosure of protected information received by any means whatever. In the mind of Intervenor, this provision is overly broad in that it precludes Intervenor's counsel and expert witness from "disseminating or commenting on information . . . obtained independent of the litigation process." (Motion at 3.)

A careful consideration of the danger present if such provision is not included demonstrates its necessity. In the absence of paragraph 8, Intervenor's counsel would be free to comment on information received from another source. Yet that information may be nothing more than rumor or speculation, and the source may be looking to Intervenor's counsel to confirm the rumor or speculation as fact. For example, if a third source is generally familiar with security systems (perhaps by researching information available to the public, or through work experience), he may confront Intervenor's counsel with an intelligent guess as to what



security devices or systems may be in use at Diablo Canyon as a fact. Although the information might only be a guess, if it were presented to Intervenor's counsel as fact, without paragraph 8, Intervenor's counsel would be free to confirm that the Diablo Canyon security system does in fact contain certain of the security devices described by the source. The result would be that Intervenor's counsel would have disclosed protected information which in fact had not been in the public domain. Thus, paragraph 8 serves to guard against the inadvertent disclosure of protected information. While the example described above is speculative, such speculation does not invalidate its use as a basis in support of paragraph 8. "A determination of the likelihood of future harm from as yet unuttered speech will necessarily be speculative." In re Malkin, 598 F.2d 176, 193 n. 42 (D.C. Cir. 1979), citing Nebraska Press Association v. Stuart, 427 U.S. 539, 563, 49 L. Ed. 2d 683, 700 (1976).

Finally, the affidavit of non-disclosure represents the least intrusive alternative. As pointed out by the Appeal Board, it runs only to Intervenor's counsel and expert witness, not to the Intervenor's organization. (Order of April 11, 1980, at 7.) The only plausible alternative to the affidavit of non-disclosure would be a denial of discovery respecting the security plan. Applicant would, of course, prefer that course. This would presumably not be an acceptable alternative to Intervenor. In sum, the three criteria by which paragraph 8 should be evaluated are met in this case.

Intervenor's concern about criminal proceedings brought for violation of the affidavit are totally without merit.



Intervenor argues that if criminal proceedings were brought respecting specific information that was already in the public domain, "the affiant would have to prove that . . . he did not discuss it." (Motion at 5.) This assertion is specious; in a criminal proceeding the burden of proof is on the prosecution, not the defendant.

II

Petition for Review

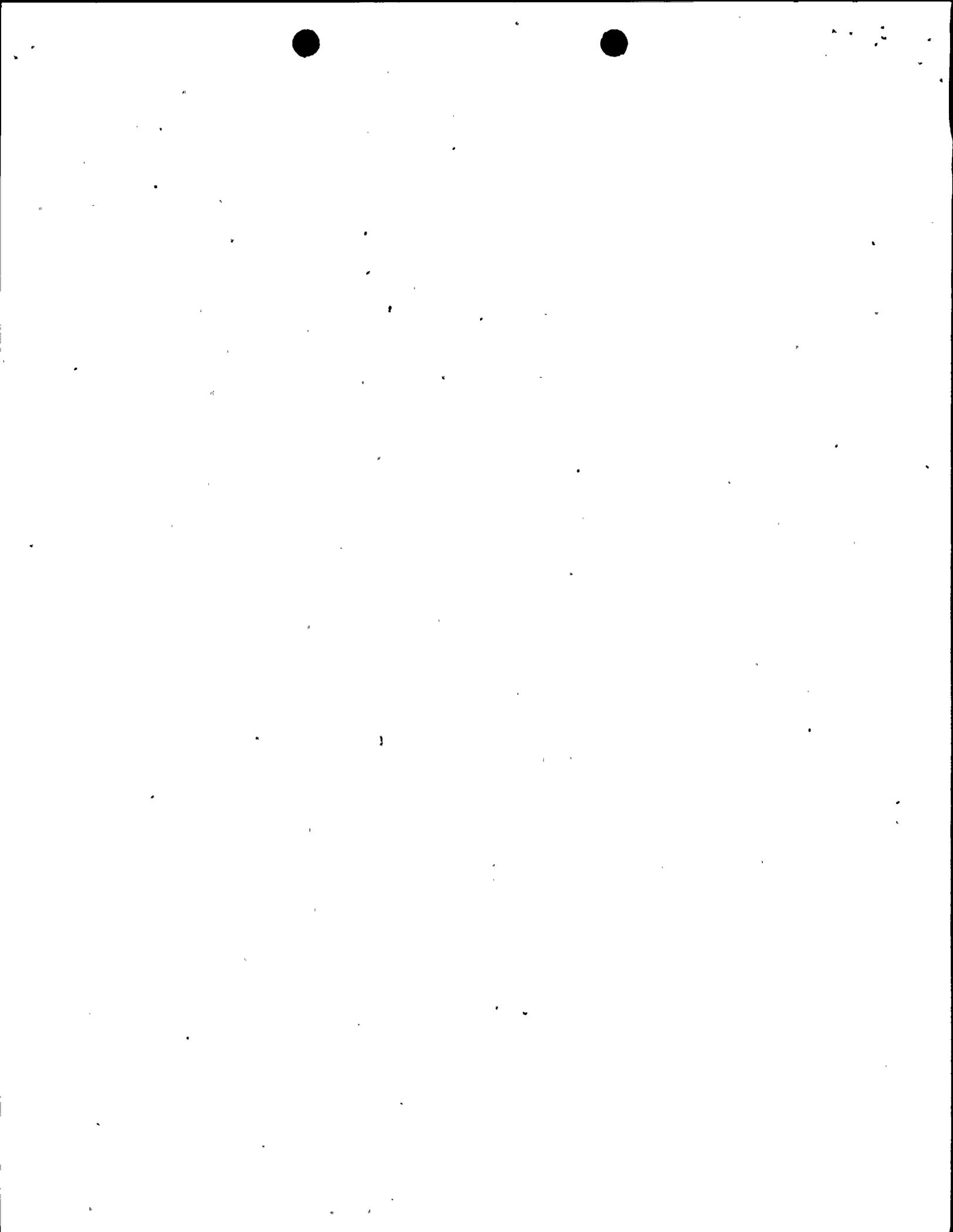
In petitioning for review of an Appeal Board decision, the petitioner must demonstrate that the decision complained of is erroneous. 10 CFR §2.786(b)(2)(iii). Intervenor's argument that the affidavit of non-disclosure constitutes an unconstitutional prior restraint has already been addressed in Applicant's answer. As shown by Applicant, Intervenor's argument is without merit.

Conclusion

Based on the foregoing, Applicant submits that Intervenor has failed to satisfy its burden as required by the Commission's regulations. Therefore, Intervenor's motion to stay proceedings and petition for review should be denied.

Respectfully submitted,

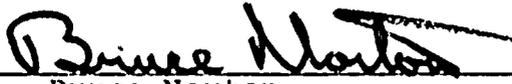
MALCOLM H. FURBUSH
PHILIP A. CRANE, JR.
Pacific Gas and Electric Company
77 Beale Street
San Francisco, California 94106
(415)781-4211



ARTHUR C. GEHR
Snell & Wilmer
3100 Valley Center
Phoenix, Arizona 85073

BRUCE NORTON
Norton, Burke, Berry & Junck
3216 N. Third Street
Suite 300
Phoenix, Arizona 85012
(602)264-0033

Attorneys for
Pacific Gas and Electric Company

By 
Bruce Norton

DATED: May 5, 1980.



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of)
PACIFIC GAS AND ELECTRIC COMPANY) Docket Nos. 50-275 O.L.
(Diablo Canyon Nuclear Power) 50-323 O.L.
Plant, Units No. 1 and 2))
_____)

CERTIFICATE OF SERVICE

I hereby certify that copies of "APPLICANT PACIFIC GAS AND ELECTRIC COMPANY'S ANSWER IN RESPONSE TO INTERVENOR'S MOTION TO STAY PROCEEDINGS AND PETITION FOR REVIEW OF AFFIDAVIT OF NON-DISCLOSURE", have been served on the following by deposit with Federal Express corporation for delivery on May 6, 1980, and/or the United States mail this 5th day of May, 1980:

Mr. John F. Ahearne, Chairman
Mr. Joseph M. Hendrie, Commissioner
Mr. Victor Gilinsky, Commissioner
Mr. Richard T. Kennedy, Commissioner
Mr. Peter A. Bradford, Commissioner
U.S. Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

James R. Tourtellotte, Esq.
Office of Executive Legal
Director
BETH 042
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Mr. Richard S. Salzman, Chairman
Mr. Thomas S. Moore
Dr. W. Reed Johnson
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission
4350 E. West Highway
Bethesda, MD 20014

Yale I. Jones, Esq.
100 Van Ness Avenue
19th Avenue
San Francisco, CA 94102

Bruce Norton

