

04/07/81



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

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

MOTION FOR RECONSIDERATION
OF LICENSING BOARD'S ORDER

INTRODUCTION

On February 13, 1981 the Licensing Board in the above proceeding issued a Prehearing Conference Order in which it rejected certain of Joint Intervenors contentions and Governor Brown's subjects,^{1/} but admitted 5 of Joint Intervenor's contentions and 3 Governor Brown's subjects.^{2/} On April 1, 1981 the Commission issued an Order (CLI-81-5) in which it clarified its "Statement of Policy for Further Commission Guidance for Power Reactor Operating Licenses" CLI-80-42 (December 18, 1980) (hereinafter Revised Policy Statement). The Commission addressed the Licensing Board's February 13 Order, clarified the standards to be applied for reopening closed records to consider TMI-related issues, and suggested that its guidance could lead the Licensing Board to reconsider some of its rulings.

1/ 22 of Joint Intervenors contentions were denied, deferred or withdrawn. 14 of Governor Brown's subjects were denied, deferred or withdrawn.

2/ The admitted contentions are: Contentions 4 and 5 (emergency planning); Contention 11 (Pressurizer Heaters); Contention 13 (Water level indicator); and Contention 24 (Safety and relief valves).

The admitted subjects are: Subject 3 (emergency planning); Subject 13 (water level indicator); Subject 14 (safety and relief valves).

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In view of this clarification the Staff now moves this Licensing Board to reconsider its admission of five of Joint Intervenors contentions and three of Governor Brown's subjects.

DISCUSSION

The clarification issued by the Commission provides adequate grounds for the Licensing Board to reconsider its February 13, 1981 Order admitting some contentions and subjects for consideration in a low power proceeding. The Commission recognized in that clarification that the "guidance could lead to reconsideration of some of the various rulings contained in the February 17, 1981 Order". Slip opinion at 1. As demonstrated below, a consideration of the applicable requirements for late filing and reopening, as clarified by the Commission, indicates that the admitted contentions and subjects should be rejected for the purposes of ruling on PG&E's motion for authorization for low power and fuel loading. As demonstrated below, the admitted contentions and subjects do not provide a basis for concluding the present record is inadequate for the purpose of authorizing fuel load and low power testing at Diablo Canyon.^{3/} The Commission noted that 10 CFR 50.57(c) does not generally contemplate a new evidentiary record based on new contentions for fuel loading and low power testing. Slip opinion at 2. The Staff, therefore, urges the Licensing Board to authorize fuel

^{3/} Since the Commission clarification applies a stricter interpretation of the requirements for late filing and reopening the record then the Licensing Board applied in its February 13, 1981 Order, there should be no need for the Licensing Board to reconsider the rejected contentions since they failed to meet even the lesser standard originally applied.



load and low power without requiring a separate evidentiary proceeding on the motion.

The Commission, in its April 1, 1981 Order supported the Staff's view that for a contention to be admitted in the Diablo Canyon low power proceeding it must satisfy, in addition to the normal requirements for contentions, the requirements for late filing and for reopening a closed record.

With respect to late filing of contentions the requirements appear in 10 CFR 2.714. In order to admit a late filed contention the Licensing Board should balance the following factors:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioners interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding. 10 CFR 2.714.

The Licensing Board indicated in their February 13 Order that, based on NUREG-0737, the Joint Intervenors had met the requirements of 10 CFR 2.714 for late filing of contentions. However, the Commission clarification indicates these factors must still be balanced even when the contention is related to NUREG-0737 "requirements". Slip opinion at 5-6. If the newly submitted contentions are unrelated to an area in which intervenors previously had an admitted contention, NUREG-0737 may provide



good cause if Joint Intervenors have focused on the proper safety concern.. (See Slip opinion, n.2, p. 4). If the new contention is not addressing the same safety concern as NUREG-0737 the Joint Intervenors must demonstrate good cause for not having raised any questions in a more timely fashion. Clearly the admission of the contentions will substantially delay the Licensing Board's action on the motion for fuel load and low power testing. The Licensing Board should specifically decide whether a balancing of the above factors justifies admitting late filed contentions.

Even if the Licensing Board finds that Joint Intervenors and Governor Brown satisfy the requirements for late filing, the Board must still find that there are grounds for reopening the record for the fuel loading and low power testing proceeding.

In the clarification the Commission agreed with the Staff's interpretation that the appropriate test for reopening under Kansas Gas & Electric Co., et al. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978), is whether there is:

1) significant new information and 2) would that information, if originally considered, have led to a different result. Slip opinion at 3.

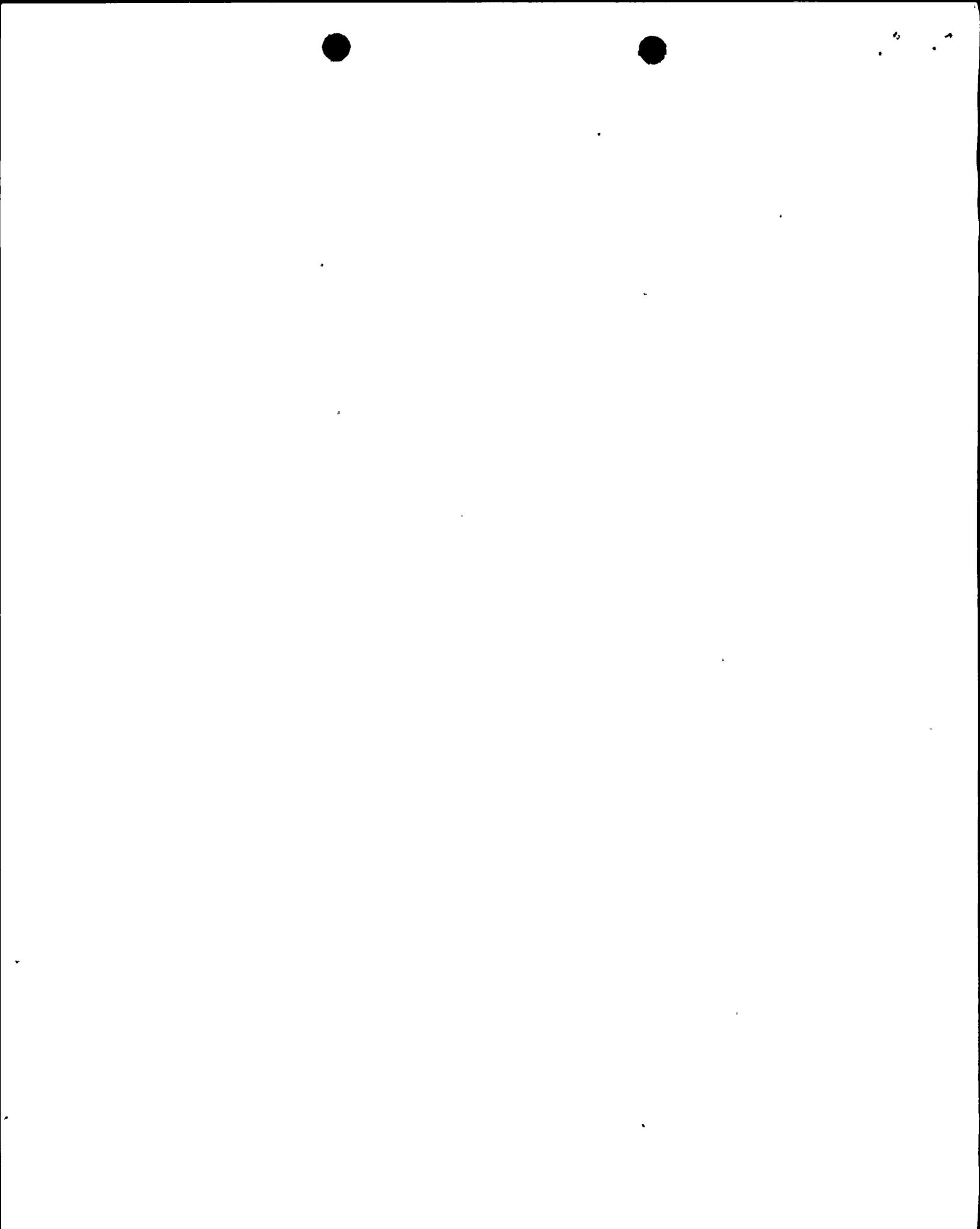
Further, the Commission agreed with the Staff's position that NUREG-0737 may meet the significant new information requirement, but Joint Intervenors and Governor Brown must still show that NUREG-0737 information would have led to a different initial result in order to reopen the record. Slip opinion at 6. The Commission noted that new evidence must be directly related to the fuel loading and low power



testing request to justify reopening the record for low power issues. Slip opinion at 2. The Licensing Board only admitted contentions in the context of NUREG-0737 requirements. February 13, 1981 order at 16.

The initial result which intervenors must show would have been changed, in the case of Diablo Canyon, is the decision which would have been reached on fuel load and low power if the new information did not exist. In other words, if the Licensing Board would have issued the fuel load and low power testing license based on the present evidentiary record if NUREG-0737 did not exist, the Joint Intervenors and Governor Brown must show that the new information would change that result. The Commission emphasized "that base allegations or simple submission of new contentions is not sufficient." Slip opinion at 3. At the time of the Licensing Board's decision on the fuel load and low power contentions, the Joint Intervenors had presented no evidence other than "bare allegations and simple submission of new contentions." The Licensing Board's ruling was based on the assumption that the Revised Policy Statement and NUREG-0737 satisfied all requirements for late filing and reopening the record. February 13, 1981 Order at 12. The Licensing Board, therefore, should reconsider its decision to admit contentions and subjects and apply the full set of requirements for late filing and reopening since the Commission has rejected the interpretation that NUREG-0737 provides the bases for both late filing and reopening the record on NUREG-0737 issues.

Since the Joint Intervenor's and Governor Brown have made no showing that the information from NUREG-0737 raised in the admitted contentions and subjects would change the initial decision, their contentions and



subjects should be dismissed and the Licensing Board should issue a decision on the fuel loading and low power testing application.^{4/}

An examination of each admitted contention shows the above requirements for late filing and reopening the record have not been met by Joint Intervenors.^{5/}

Contentions 4 and 5 relate to emergency planning requirements for the Diablo Canyon facility. These contentions state:

Contention 4. Numerous studies arising out the accident of TMI recognized the necessity of upgrading emergency response planning. Based upon these studies, the Commission has promulgated revised emergency planning regulations effective November 3, 1980. The Applicant has failed to demonstrate that the combined Applicant, state, and local emergency response plans for Diablo Canyon comply with those revised regulations ("Final Regulations on Emergency Planning," 45 Fed. Reg. 55402 (August 19, 1980)).

Contention 5. The Applicant has failed to demonstrate that the combined Applicant, state and local emergency response plans for Diablo Canyon comply with the requirements of Sections III.A.1.1 and III.A.1.2 of NUREG-0694.

These contentions do not relate to a previously admitted contention in this proceeding. The contentions are, therefore late and must meet

4/ The Staff notes that the Joint Intervenors and Governor Brown have recently filed various pleadings (filed after the prehearing conference) which have attempted to meet the requirements for late filing and reopening a closed record. The parties were on notice prior to the prehearing conference of the clearly established standards for both late filings and a reopening of closed records. Under these circumstances, the Board should not consider these late attempts to resurrect the rejected contentions and subjects for the low power proceeding.

5/ The Staff notes that, since all of Governor Brown's subjects were only admitted to the extent they were the same as Joint Intervenors contentions, rejection of the 5 admitted contentions would also require rejection of the corresponding subjects of Governor Brown.



the requirements of 10 CFR 2.714 for late filing. Joint Intervenors failed to address, let alone meet prior to the Prehearing Conference, the requirements of 10 CFR 2.714 for late filing. Having failed to satisfy the requirement that they show the factors listed in 10 CFR 2.714, on balance, justify late filing, their contentions should be dismissed.

Even if the contentions on emergency planning did satisfy the requirements for late filing, the contentions do not satisfy the requirements for reopening the record.

Contention 4 relates to the new emergency planning requirements. Under the requirement for reopening as reaffirmed by the Commission, the Intervenors must show that the new requirements amount to significant new information and that the information would be likely to change the initial decision. Slip opinion at 6.

Contention 5 relates to NUREG-0737 requirements. However, it does not relate to the concern of emergency planning for full power which is the focus of the NUREG-0737 requirement, but rather focuses on emergency planning for low power operation. As the Commission noted in its April 1, 1981 Order, a party may base their challenge on NUREG-0737 only to the extent they are focusing on the same safety concern as the NUREG-0737 requirement. Therefore, the Intervenors should have demonstrated that the new information is significant for low power operation and that it is likely to change the initial decision on low power operation. Having failed to make this showing, this contention should be dismissed.

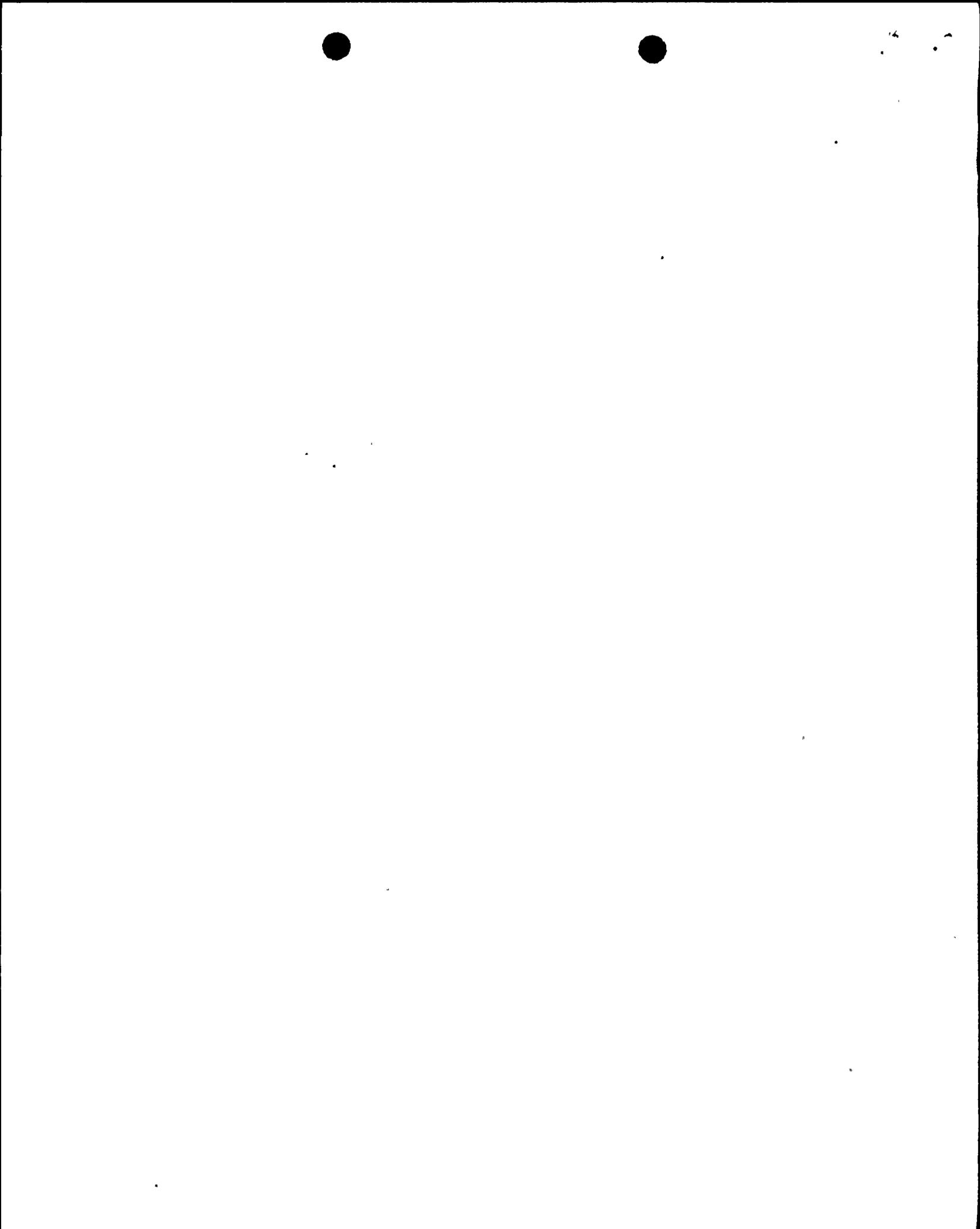


Contention 11, which was admitted by the Board reads as follows:

Contention 11. The Applicant has proposed simply to add the pressurizer heaters to the on-site emergency power supplies. It has not been demonstrated that this will not degrade the capacity, capability and reliability of these power supplies in violation of GDC 17. Such a demonstration is required to assure protection of public health and safety.

This contention is not in an area in which intervenors have a previously admitted contention and is, therefore, a late filed contention. The Joint Intervenors must have complied with the requirements of 10 CFR 2.714 for late filing to have this contention accepted. The Intervenors failed prior to the prehearing conference, to plead, let alone show, a balancing of the factors in 10 CFR 2.714 weigh in favor of allowing the late filing of this contention. This contention should, therefore, be dismissed for lateness.

Even if the contention was not late, it fails to meet the requirements for reopening the record. The Intervenors can not rely on NUREG-0737 to establish significant new information for their contention because they have not focused on the same safety concern as the NUREG-0737 "requirement". CLI-81-5, Slip opinion at 4. While the NUREG-0737 requirement focuses on the need for pressurizer heaters, the contention focuses on the integrity of the emergency power system. The intervenors, therefore must show both that this information is significant new information with regard to the power supplies and that the new information is such as would change the initial result. Such a showing was not made prior to the prehearing conference and this contention should be dismissed.



Contention 13, which was admitted by the Board states:

Contention 13. NRC regulations require instrumentation to monitor variables as appropriate to ensure adequate safety (GDC 13) and that the instrumentation shall directly measure the desired variable. IEEE 279, §4.8, as incorporated in 10 CFR 50.55a(h)), states that:

"To the extent feasible and practical protection system inputs shall be derived from signals which are direct measures of the desired variables."

Diablo Canyon has no capability to directly measure the water level in the fuel assemblies. The absence of such instrumentation delayed recognition of a low-water level condition in the reactor for a long period of time. Nothing proposed by the Staff would require a direct measure of water level or provide an equivalent level of protection. The absence of such instrumentation poses a threat to public health and safety.

This contention is not in an area in which intervenors have a previously admitted contention and is, therefore, a late filed contention. The Joint Intervenors must have complied with the requirements of 10 CFR 2.714 for late filing to have this contention accepted. The intervenors failed, prior to the prehearing conference, to plead, let alone show, that a balancing of the factors in 10 CFR 2.714 justifies allowing the late filing of this contention. This contention should, therefore, be dismissed for lateness.

Even if this contention were not filed late, it fails to meet the requirements which the Commission emphasized must be met for reopening the record. CLI-81-5, Slip opinion at 6. The contention raises the issue of the necessity of a direct water level indicator for low power operation prior to fuel load. NUREG-0737 focuses on indications of inadequate core cooling. The Commission in its April 1, 1981 Order, indicated that the intervenors can not rely on NUREG-0737 in their challenge unless the contention addresses the same safety concern as the



NUREG-0737 requirement. Slip opinion at 4. Therefore, the Intervenor must show that the information in NUREG-0737 is significant new information with regard to having a direct water level indicators during low power operation and that this information is such as would change the initial decision on low power operation. This showing was not made by the Joint Intervenor and this contention should be dismissed.

Contention 24, which was admitted by the Board states:

Contention 24. Reactor coolant system relief and safety valves form part of the reactor coolant system pressure boundary. Appropriate qualification testing has not been done to verify the capabilities of these valves to function during normal, transient and accident conditions. In the absence of such testing and verification, compliance with GDC 1, 14, 15 and 30 cannot be found and public health and safety are endangered.

This contention does not relate to a previously admitted contention and is, therefore, a late filed contention. The Joint Intervenor must have complied with the requirements of 10 CFR 2.714 for late filing to have this contention accepted. The intervenors failed, prior to the prehearing conference to plead, let alone show, that a balancing of the factors in 10 CFR 2.714 justifies allowing the late filing of this contention. This contention should, therefore, be dismissed for lateness.

Even if this contention were not filed late, it fails to meet the requirements which the Commission emphasized must be met to reopen a closed record. CLI-81-5, Slip opinion at 6.

This contention raises the issue of the testing of relief and safety valves to assure operation during low power operation. The NUREG-0737 requirement focuses on the testing of relief and safety valves to assure operation during full power operation. The Commission, in its clarification, indicated that the intervenors can not rely on NUREG-0737 in



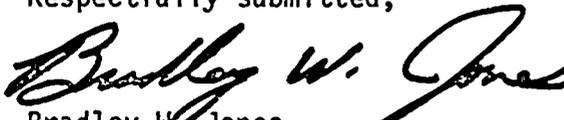
their challenge unless the contention addresses the same safety concern as the NUREG-0737 requirement. Therefore, the Joint Intervenors must show that the information in NUREG-0737 is significant new information as regards operation of the relief and safety valves during low power operation and that the information is such as would change the initial decision on low power operation. This showing was not made by the Joint Intervenors and this contention should be dismissed.

CONCLUSION

Based on the Clarification of April 1, 1981 by the Commission the Licensing Board should reconsider its decision to admit 5 of Joint Intervenors contentions and 3 of Governor Brown's subjects.

By applying the requirements for late filing and reopening the record, the Board should dismiss the contentions and subjects admitted in its February 13, 1981 order and promptly issue its decision on the fuel load and low power testing application.

Respectfully submitted,


Bradley W. Jones
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 7th day of April, 1981.



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NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
PACIFIC GAS AND ELECTRIC COMPANY) Docket Nos. 50-275 O.L.
(Diablo Canyon Nuclear Power Plant) 50-323 O.L.
Unit Nos. 1 and 2)

CERTIFICATE OF SERVICE

I hereby certify that copies of MOTION FOR RECONSIDERATION OF LICENSING BOARD'S ORDER in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 7th day of April, 1981.

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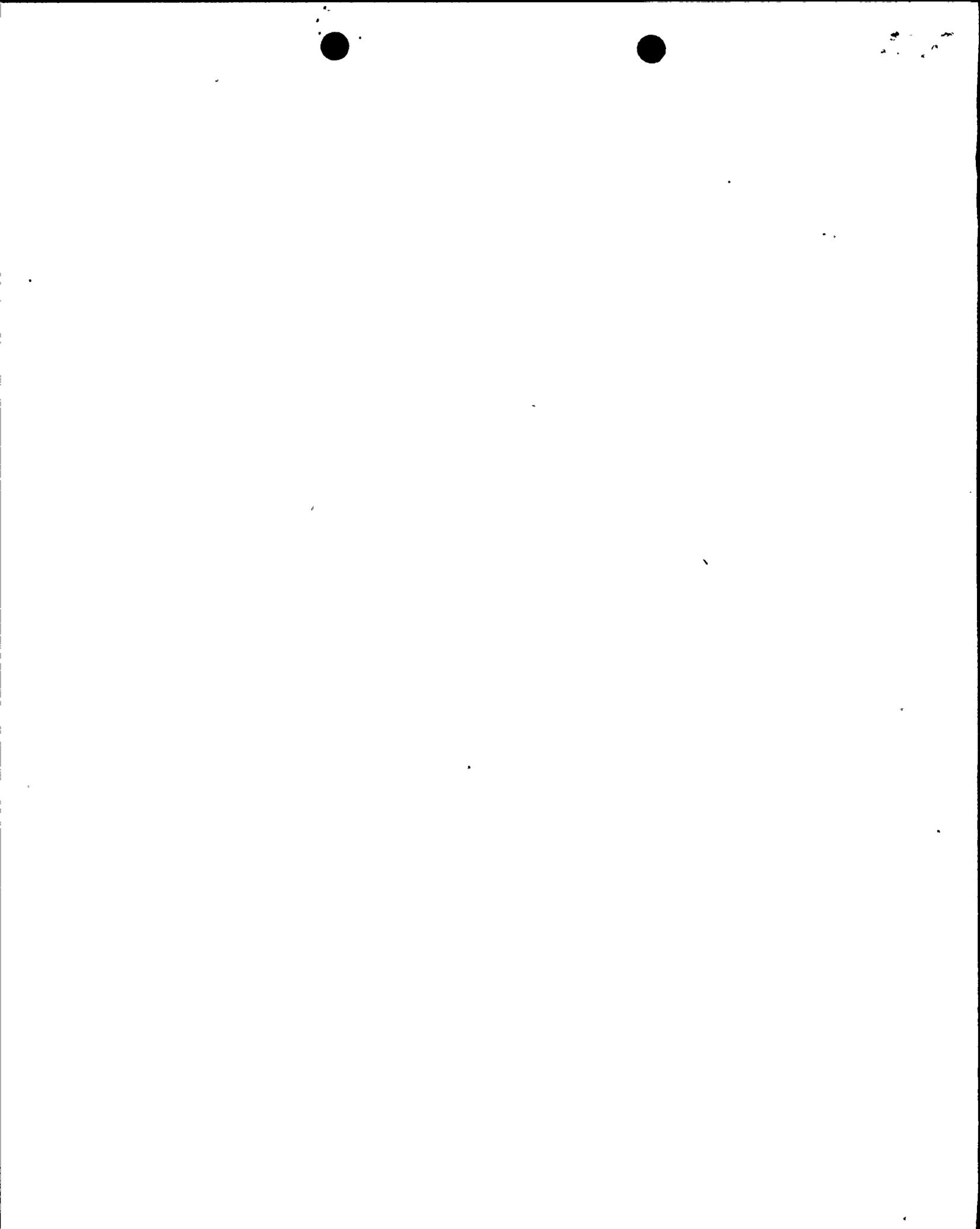
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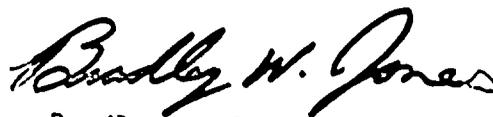
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