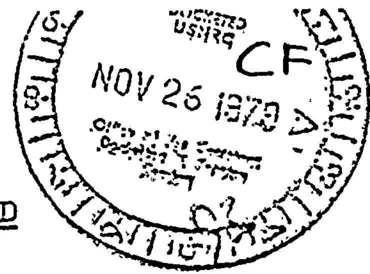
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uUNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of PENNSYLVANIA POWER AND LIGHT CO. ALLEGHENY ELECTRIC COOPERATIVE, INC. (Susquehanna Steam Electric Station, Units 1 and 2)	)	Docket Nos. 50-387 50-388 November 19, 1979

Intervenors' Response to Licensing Board Memorandum and Order of October 30, 1979.

As a result of the extraordinary and unprecedented number of interrogatories to which the Applicant in this proceeding has repeatedly demanded answers, and as a result of the shrill and unyielding demands of the NRC Staff for yet a third set of answers to its interrogatories (which were twice timely answered) the ECNP Intervenors have become virtually paralyzed in this and other (TMI-1 and TMI-2) proceedings to which ECNP is committed as Intervenors. We have repeatedly explained our position to this Licensing Board, and repeatedly requested protective orders under 10 CFR 2.740(c) of the Commission's rules (ECNP filings, June 29, 1979, and September 17, 1979,). ECNP has repeatedly explained the extremely burdensome and oppressive nature of these Staff and Applicant demands to answer Interrogatories, has repeatedly explained how the limited resources of ECNP, a non-profit public-interest organization, were being unnecessarily drained by these unreasonably burdensome exercises, and how the ability of ECNP to participate in this and other proceedings has already been seriously compromised. Now, by a Memorandum and

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Order of October 30, 1979, (M&O II), this Board acknowledges these burdens, nonetheless, totally ignores the continuing effect upon ECNP of these burdens, and now demands total compliance. Yet again we object.

In our filing of September 19, 1979, we moved that this Board grant ECNP a protective order under Part 2.740(c) of the Commission's rules. In that filing ECNP thoroughly explained to this Board the justification for this motion, in compliance with the Commission's rules, Parts 2.740(c) and 2.730(b). Under the Commission's rules, a written motion is entitled to a written decision (2.730(e)). Furthermore, under the Administrative Procedures Act of 1946 (APA), as amended, a written response from the licensing board was required. (See, e.g., Sec. 558(c)) Under the Commission's rules and the APA, the Board has not provided the required written response to this motion for a protective order.

As this Board has already noted, much time has already been wasted (M&O II, p2), and now, much more must be wasted by ECNP just to retain the status quo. The reason for this continuing problem rests not with ECNP and the other Intervenors in this proceeding, but with the Applicant, the Staff, and this Board itself.

The Applicant has drafted an extraordinarily large, detailed, and complex set of interrogatories, which amounts to well over 200 interrogatories for each single contention. ECNP, under the remedies available under Part 2.740(c)(2), has offered

to answer a reduced number of interrogatories so as to provide the information requested while simultaneously reducing the undue burden to ECNP (ECNP filings of June 29, 1979, page 2, and September 17, 1979, page 12). However, this suggested remedy has been ignored not only by the Applicant but also this Board. Apparently it is not the information that is being requested, but rather it is the expenditure of the effort to produce the information that is being unjustifiably demanded. Again, we repeat,-this expenditure of effort is unreasonable, burdensome in the extreme, oppressive, and is a gross misuse of the purpose of discovery and is not permitted under the Commission's own rules.

We ask this Board to take note that the Applicant, in an October 25, 1979, letter to this Board, attempts to mislead the Board and to mischaracterize the participation of ECNP in the TMI-2 Operating License proceeding before the Atomic Safety and Licensing Board. ECNP's member groups[1] did not at any time put forth or offer to put forth a single witness in that proceeding in support of any of its contentions as that record clearly demonstrates. The one witness ECNP's member organizations did offer was only in response to the late introduction by the NRC Staff of testimony concerning an issue not directly raised by the Intervenor in that proceeding. The offer of the ECNP groups to bring forth witnesses on the aircraft issue did not take place

1 Intervening parties in the TMI-2 Operating License case were York Committee for a Safe Environment and Citizens for a Safe Environment, both members of ECNP. Drs. Kepford and Johnsrud, as members of the organizations, were duly authorized to act on behalf of these ECNP member groups.

before the TMI-2 Licensing Board, but occurred subsequent to the Initial Decision, in further evidentiary hearings before the TMI-2 Appeal Board on December 12, 1978, long after the TMI-2 license was granted. In addition, this testimony was not in support of a particular contention of the Intervenors, but was to correct the misinformation and misrepresentation being offered to that Appeal Board by both the NRC Staff and the Applicant concerning the narrow question of whether or not TMI-2 was under a commonly used flight path by commercial airliner. Thus, the position stated by ECNP is accurate as stated.

Indeed, due to the totally unreasonable and yet unjustified demands of the Applicant in this proceeding, ECNP has already been irreparably damaged in its ability to prepare not only for this proceeding, but also for the others (TMI-1 and TMI-2), and severely hampered in its ability to carry out its normal functions. To date, the Applicant has not even bothered to offer the slightest justification for this unprecedented number of i nterrogatories, or any reason why this number cannot be reduced to achieve a less burdensome result or even eliminated entirely.

The NRC Staff has aided this entire process of intervenor prostration not only by its incessant demands for reanswers to interrogatories, but also its refusal to comply with ECNP's discovery requests and its gross misrepresentation of Staff policy with respect to discovery. We observe that the second round discovery requests of ECNP were little more than a repetition of its round one request; since the Staff had refused to make a meaningful step toward compliance, while simultaneously demanding

perfect compliance and repeated compliance of ECNP. We also note that as of this date the materials requested remain as unavailable as they were when originally requested, many months ago, except for a defective copy of a translated document and a loaned copy of the prehearing conference transcript.

Lastly, this Board itself must share much of the responsibility if the discovery process in this proceeding has gotten off the track. This Board has to date granted almost every every demand of the Staff and Applicant, while denying every request of the various Intervenors, even though the relief was properly requested by the Intervenors under the Commission's own rules (2.740(c)). Only belatedly has this Board acknowledged that the burdens imposed by the Staff and Applicant upon the Intervenors were indeed burdensome (M&O II, p. 13, 15). Yet this Board has never questioned in the slightest the need, or motive for 2700 interrogatories to be answered so as to obtain information concerning less than a dozen contentions. In addition, the offer of ECNP to answer a reduced number of interrogatories has gone totally unnoticed.

This Board then invented the allegation that the "real motives" of the Intervenors are to delay the proceeding (M&O II page 10). Whether or not, those "real motives" exist is immaterial ; in reality, Intervenors are totally powerless by themselves to carry out their "real motives," whatever they may be.

Furthermore, the refusal of ECNP to answer interrogatories was necessitated by the oppressive nature of the discovery demands rather than by any desire to delay these proceedings.

By dredging up some fanciful motives so as to cast these Intervenors in a bad light, (M&O II, page 10), this Board demonstrates clearly its unswerving bias and total inability to conduct a fair hearing. True to this bias, this Board acknowledges how both the Staff and the Applicant in this proceeding have interpreted the discovery rules with

> the effect of enormously compounding the discovery burden imposed on the intervenors. (M&O II, p. 15).

But it is far beyond the willingness of this Board to inquire into the motives behind these rule interpretations by the Staff and Applicant or the motives behind the enormous (and yet unjustified) magnitude of the discovery demands of the Staff and Applicant. It is apparently easier for this Board to heap abuse and unbearable burdens upon under-financed Intervenors whose participation is to simply protect their lives, genes, and properties from unwanted radiation exposure than it is to question the motives of the obviously "favored" parties, the NRC Staff and the Applicant, for having created these problems in the first place.

The depravity of the Board's accusation is illustrated just two pages later in the M & O II (page 12), where the Board observes that the proceeding has been delayed anyway. Furthermore, by a letter dated November 5, 1979, ECNP is advised that the schedule has beenpushed farther yet into the future. Yet no adminition whatsoever is delivered to either the Staff or the

Aplicant for their part in the repeated delays in this proceeding, or for having even having initiated this proceeding long before either the Staff or Applicant was fully prepared to defend the proposed licensing action.

Ironically, the Board states, "we are correcting this unfairness." The sole lessening of the enormous burden still upon the necks of the Intervenors is that they are not now required to answer interrogatories concerning other intervenors' contention. This gesture of "correcting this unfairness" is hollow and empty. It is a relief granted the Applicant early in the discovery game, and one which was requested months ago by various of the Intervenors, and is only now conceded by this Board. None of the other enormous burdens have been relieved. The motives of Staff and Applicant remain unjust and unjustifiable, and as yet unquestioned by this Board. The gross injustice remains intact.

ECNP has noted previously that this Board must have failed to read the materials filed by ECNP. Nothing in the M & O II suggests that ECNP has erred in this conclusion. This Board has denied to ECNP and the other Intervenors in this proceeding the protection offered all parties by Part 2.740(c) where discovery requests represent an undue burden by the Board's simply inattention to the filings before it. Apparently, the Staff and Applicant, with the complete acquiesence of this Board, are intent upon creating a vicious precedent whereby any well-financed party (Staff or Applicant) can impose any burden whatsoever upon any citizen intervenor for the sole purpose of

rendering that intervenor unable to participate altogether in the proceeding.[2] That is precisely what is in the process of occuring here. In reality, Commission proceedings must be conducted in a manner that not only enables, but encourages, public interest intervenors to participate. The Intervenors i n this proceeding are powerless to protect themselves from and prevent this ruthless and relentless attack by the Staff, Applicant, and this Licensing Board!

To add further insult to this injury and denial of rights (due process and equal protection, U.S. Constitution; Atomic Energy Act, as amended, Sec. 189; 10 CFR 2.718) this Board now threatens ECNP and other Intervenors with a denial of the right to present witnesses at the upcoming proceedings.

That this Board has forsaken its obligation to conduct a fair hearing (10 CFR 2.718) is clear. This Board has contributed by inattention to the burdens upon the Intervenors, like ECNP, to the extent that second round discovery upon the Applicant by ECNP has been completely thwarted (see ECNP filing, October 22, 1979, page 2), an occurrence not permitted even under the Commission's rules (2.740(d)). This Board in M & O II, allows ECNP only two courses of action:

1. Drop out of <u>all other</u> proceedings, spend all waking hours until December 14, 1979, answering interrogatories for the Applicant and reanswering a still unknown unspecified number of interrogatories for the Staff. (see ECNP filing, September 17,

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2 That public-interest Intervenors are important and useful participants in licensing proceedings is well known. See, for instance, "Report of the Office of Chief Counsel on the Nuclear Regulatory Commission" to the President's Commission on the Accident at Three Mile Island, p. 135 et. seq.

1979, p. 12) for all of which the total yield of tangible, useful information is negligible, or

2. Ignore M & O II, and try to keep up with the other important proceedings ECNP is involved in, even though ECNP is behind in them due to the irreplaceable time already wasted in this proceeding trying to get the attention of the Board to our filing.

This Board, we repeat, has already made it clear that the relief from undue burdens of discovery will not be applied in this proceeding to ECNP and the other Intervenors, though such relief is readily available to the Staff and Applicant. This Board has also made it clear that the <u>ritual and form</u> of interrogatory answering is of far greater importance than any information sought or conveyed, or any burden imposed, however undue, however large, however arbitrary, however oppressive, however unjustified, or unjustifiable.

This Board, in reaching its conclusions in M & O II, has gone out of its way to avoid addressing the real issue behind allof this "skirmishing" (as the Board calls it, M & O II, p. 2). This fundamental question is whether or not one party (or more, in concert) are justified in creating insurmountable hurdles for other parties for the purpose of eliminating those other parties from the proceeding. In view of the fact that the Board refuses to acknowledge the real course of this proceeding and the shameful precedent being set, ECNP is forced by this Board to accept only one of two totally unacceptable (and unjustified, unjustifiable, inappropriate, unnecessary, and

in violation of the Commission's own rules)choices. ECNP reluctantly chooses the latter choice. No combination will do, as there are not enough hours available between now and the commencement of hearings on TMI-1 restart and the remanded TMI-2 hearings to properly prepare for these alone. To add to the utter futility of having to waste hundreds or thousands of hours of unavailable time to go through a meaningless ritual to produce virtually no worthwhile information is not only unthinkable, it is physically and morally an impossibility.

Finally, the Commission's rules provide that

> If a motion for a protective order is denied in whole or in part, the presiding officer may, on such terms and conditions as are just, order that any party or person provide or permit discovery. (10 CFR 2.740(c), emphasis added.)

ECNP submits that there is no justice whatsoever in any process of discovery which has already been so misapplied, mishandled, and misused by the Staff, Applicant and Board in this proceeding. ECNP submits that this Board does not have the legal authority, in the light of the past inattention by this Board to its responsibilities, to force the above mentioned courses of action upon ECNP or any other Intervenor in this proceeding. There has been one protective order already denied by this Board, condoning and ordering discovery which was clearly not "on such terms and conditions as are just." There is still a motion for a protective order by ECNP (See September 17, 1979, ECNP filing) before this Board, and still, no justice prevails.

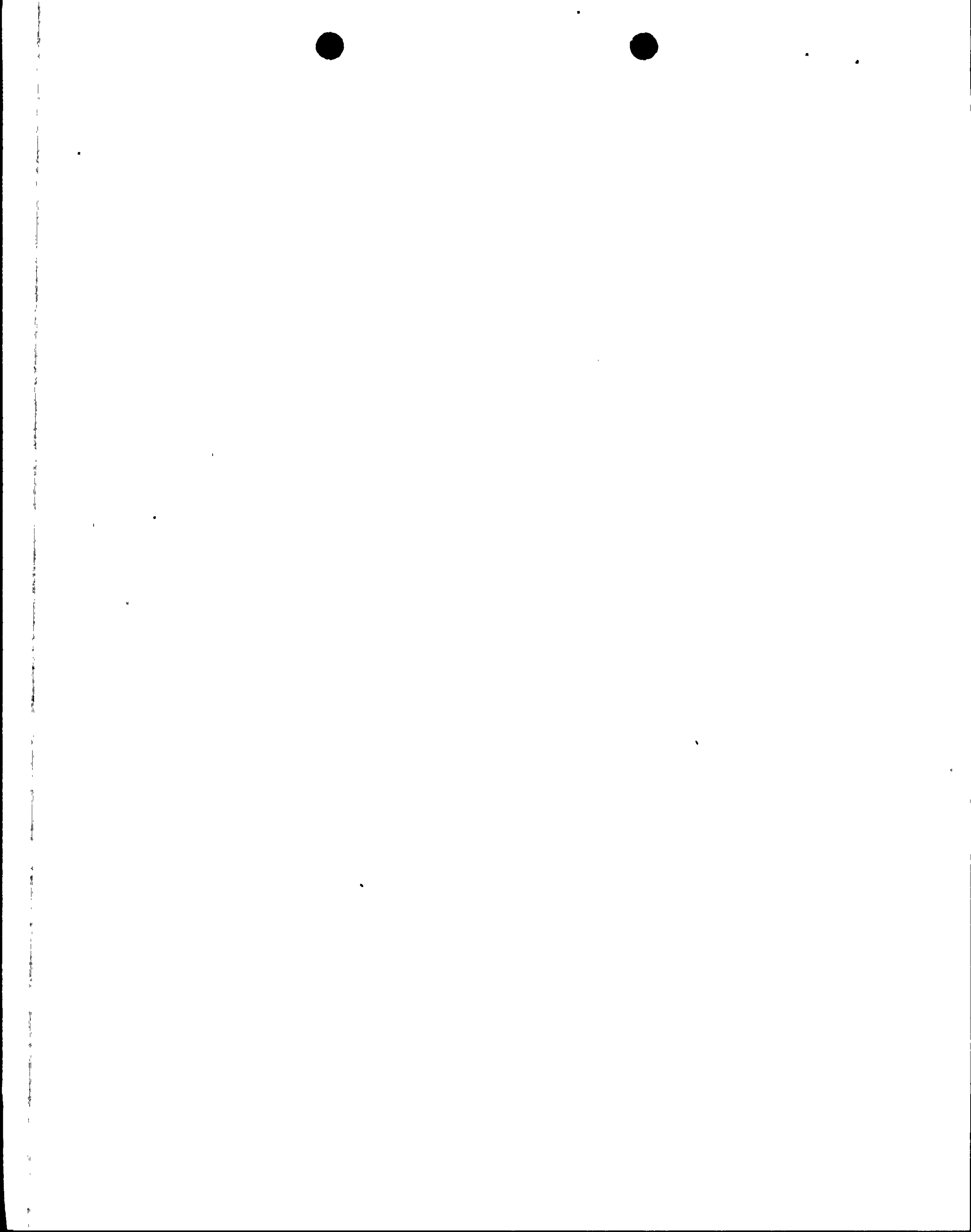
In what could be the last filing by ECNP before this Board in this Inquisition-like proceeding, and for the reasons cited in

its filings of June 29, September 10, September 17, September 25, October 12, October 22, 1979, and for the reasons cited above:

(a) ECNP yet again moves that this Board grant a protective order under Part 2.740(c) of the Commission's rules to relieve ECNP (and all other oppressed Intervenors) from the undue burden of discovery by the Staff and Applicant in this proceeding and

(b) ECNP moves that this Board order that no more discovery upon ECNP (or any other Intervenors) be permitted by the Staff and Applicant as a result of the gross misuse of the process of discovery to accomplish unjustified and illegal ends.

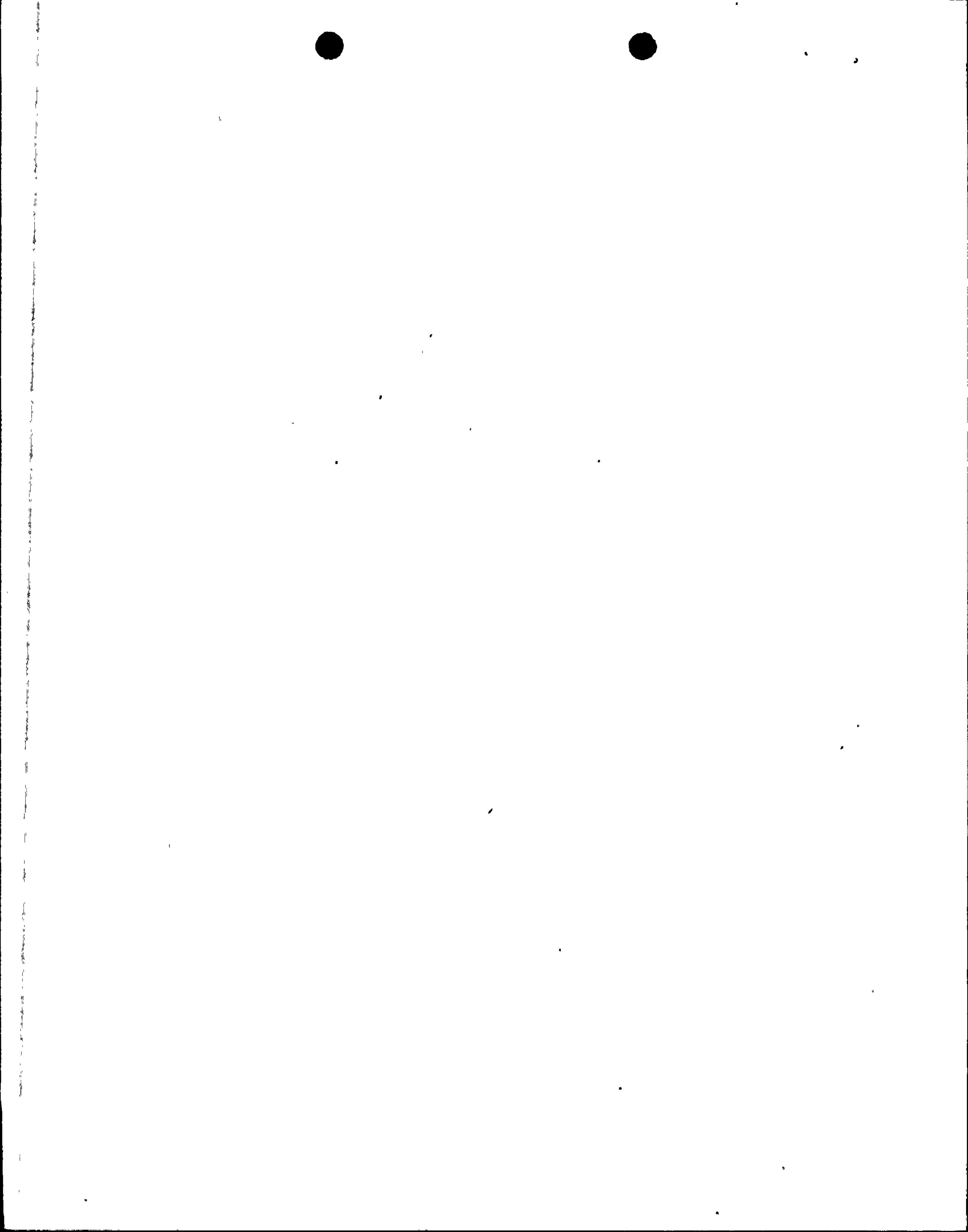
(c) ECNP moves that this Board certify to the Commission, under Part 2.718(i) of the Commission's rules, the following question: Does the NRC Staff or the Applicant have the right to create excessive demands for discovery (under Part 2.740) of an Intervenor of such a magnitude that the Intervenor is rendered incapable of further participation in that or any other NRC Proceeding?



(d) ECNP moves that this Board certify to the Commission, under Part 2.718(i) of the Commission's rules, the following question: Is it an appropriate remedy for this licensing Board to deny the Intervenors in this proceeding the right to present witnesses simply because these Intervenors have been inundated and paralyzed by the excessive, unreasonable, meritless, and unjustified discovery demands of the NRC Staff and Applicant?

(e) ECNP moves that this Board certify to the Commission, under Part 2.718(i) of the Commission's rules, the following question: Should not the entire Licensing Board in this proceeding be disbanded for gross incompetence, for its continuing refusal to address the objections by the various intervenors to oppressive discovery demands, and for the continuing refusal of this Licensing Board to even attempt to conduct a fair hearing under Part 2.718 of the Commission's rules?

(f) ECNP moves that this Board certify to the Commission, under part 2.718(i) of the Commission's rules, the following question:



As a result of the abuse of the purpose of discovery by the NRC Staff and Applicant in this proceeding, which abuse has been not only condoned, but also aided and abetted by this Licensing Board, should not this Licensing Board be reconstituted so as to include one of the NRC Commissioners who, in the past, has expressed concern about the conduct and quality of NRC licensing proceedings?

Respectfully submitted,

Chauncey Kepford
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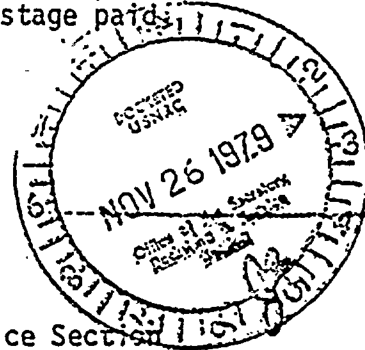
(814) 237-3900

CERTIFICATE OF SERVICE

I hereby certify that copies of INTERVENOR'S RESPONSE TO LICENSING BOARD MEMORANDUM AND ORDER OF OCTOBER 30,1979, have been served upon the following by deposit in the U. S. Mail, First Class, postage paid, on this 19 day of November, 1979:



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