

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

SERVED MAY 18 1981

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Richard S. Salzman, Chairman
Dr. John H. Buck
Thomas S. Moore



In the Matter of

PENNSYLVANIA POWER & LIGHT COMPANY and
ALLEGHENY ELECTRIC COOPERATIVE, INC.

(Susquehanna Steam Electric Station,
Units 1 and 2)

Docket Nos. 50-387
50-388

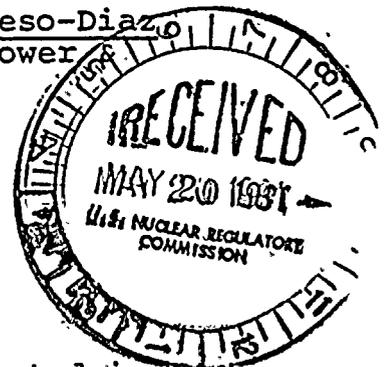
Ms. Jessica H. Lavery for the Nuclear Regulatory
Commission staff.

Messrs. Jay E. Silberg and Matias F. Travieso-Diaz
Washington, D.C., for the Pennsylvania Power &
Light Company et al., applicants.

MEMORANDUM AND ORDER

May 15, 1981

(ALAB-641)



1. On March 16, 1981, the Licensing Board granted in part applicants' motions, each supported by the NRC staff, for summary disposition on Contentions 2 and 16. The Board denied the motion with respect to that portion of Contention 2 which deals with chlorine discharges from the Susquehanna nuclear facility. LBP-81-8, 13 NRC ____ (1981). We now have before us the staff's April 14 motion, supported by the applicants, seeking directed certification of a part of the ruling denying summary disposition. Invocation of our discretionary authority under 10 CFR §2.718(i) to review issues before the

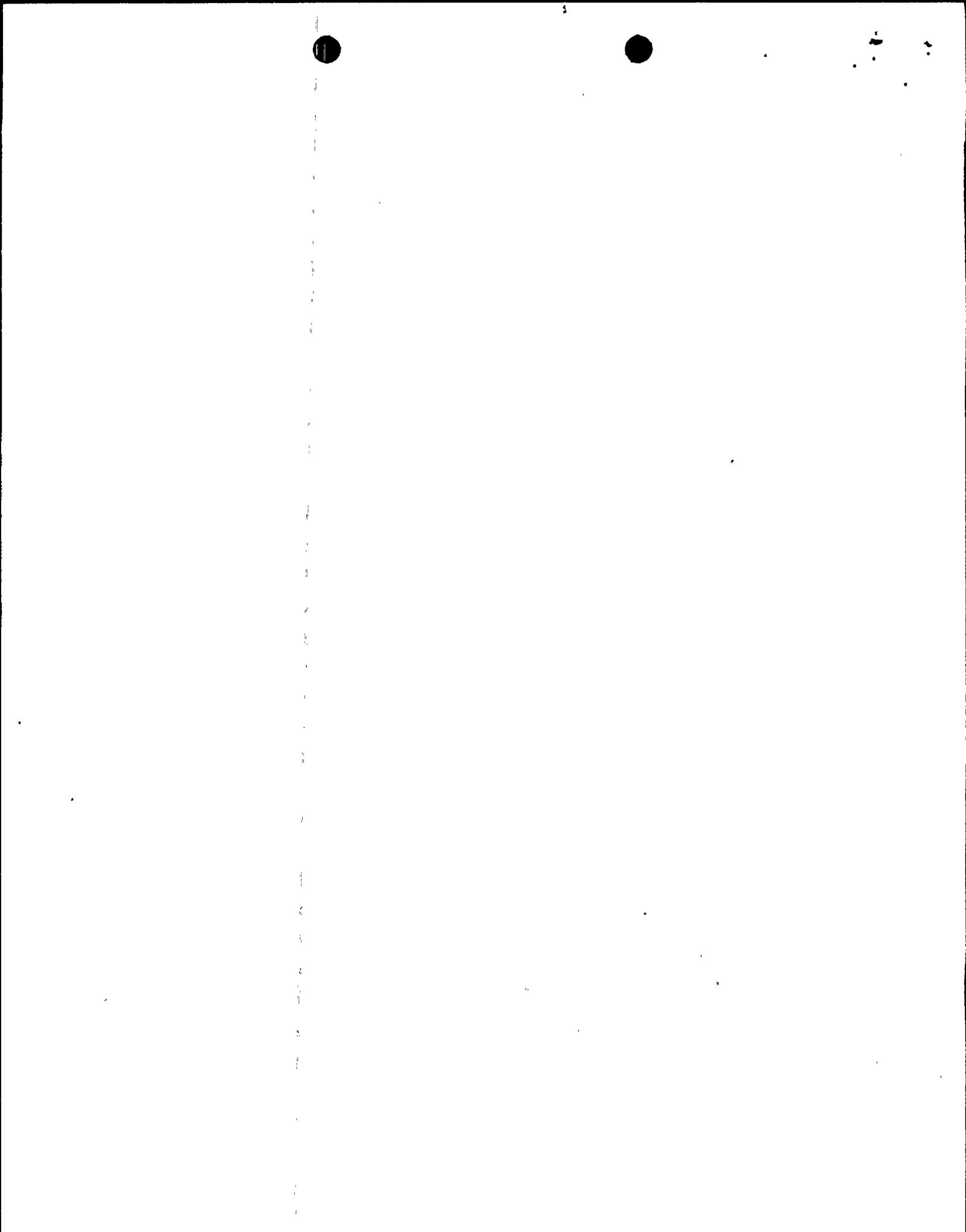
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end of the hearing is necessary because denial of partial summary disposition is an interlocutory order from which an appeal is proscribed by the Rules of Practice. 10 CFR §2.730(f); Louisiana Power and Light Company (Waterford Steam Electric Generating Station, Unit 3), ALAB-220, 8 AEC 93, 94 (1974); Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit No. 1), ALAB-400, 5 NRC 1175, 1177 (1977).

2. The exercise of jurisdiction under Section 2.718(i) is reserved for those important licensing board rulings which, absent immediate appellate review, threaten a party with serious irreparable harm or pervasively affect the basic structure of the proceeding. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977). See Puget Sound Power and Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-572, 10 NRC 693, 695 n. 5 (1979), and cases there cited. In this instance that standard is not met.

The staff argues that certification is appropriate because the Licensing Board's ruling unwarrantedly expanded the scope of the chlorine issue and, as a consequence, both the staff and applicants must be prepared to litigate two



issues which they claim are not properly part of the intervenor's original contentions.^{1/} According to the staff, trial of these issues will force them into preparing wasteful, expensive and time-consuming predictions about remote and speculative matters; their papers assert that this unnecessary expense and delay amounts to immediate and irreparable harm that cannot be alleviated by subsequent appeal. In addition, the staff argues that in expanding the issues the Board below made extra-record "findings of fact" based solely on the unsworn and unsubstantiated assertions of intervenors. In the staff's view, the Board's action is in the teeth of the Commission's regulations and the Administrative Procedure Act and therefore pervasively affects the basic structure of the proceeding.

3. In the context of the denial of a motion for partial summary disposition, the staff's arguments do little more than state the apparent. Obviously the Licensing Board's ruling will result in the trial

^{1/} As we understand its motion, the staff does not contest the denial of summary disposition with respect to part of issue 2(b) and all of issue (c) identified in Part D (the "order" portion) of the Licensing Board's March 16, 1981 ruling. LBP-81-8, supra, 13 NRC at _____ (slip opinion at 20). The applicants, on the other hand, appear to desire certification directed to all three issues, even though they only filed a response supporting the staff's motion rather than their own motion.

of issues with the concomitant investment of time and money such litigation entails. Equally obvious is the fact that once the hearing is held the time and money expended in the trial of an issue cannot be recouped by any appellate action. But the same is true any time summary disposition of an issue is denied and a litigant must go to hearing. The fact that the ruling below may have erroneously expanded the issues to be tried or done so on the basis of unsworn allegations does little to distinguish this case from any other where it is alleged that summary disposition was erroneously withheld.^{2/} Indeed, had the Licensing Board raised the challenged issue on its own motion, we think it clear that directed certification would not be appropriate. We therefore conclude that the staff's asserted injuries fall short of the standard for discretionary interlocutory review.

In reality, adoption of the staff's rationale would alter the standard for discretionary interlocutory review; certainly where a denial of summary disposition is involved it would be reduced to a simple determination whether the Licensing Board erred.

^{2/} For the same reason, applicants' argument that the ruling below will deter it from filing further summary disposition motions in this proceeding (or deter parties in other proceedings from filing such motions) is unpersuasive.

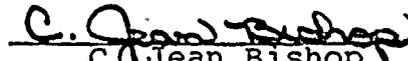
As we stated in Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-635, 13 NRC ____ (1981):

"It is scarcely necessary to expound at any length upon why a drastic alteration of existing practice to accommodate that thesis would be intolerable -- as well as in derogation of the Commission's explicit policy disfavoring interlocutory review."^{3/}

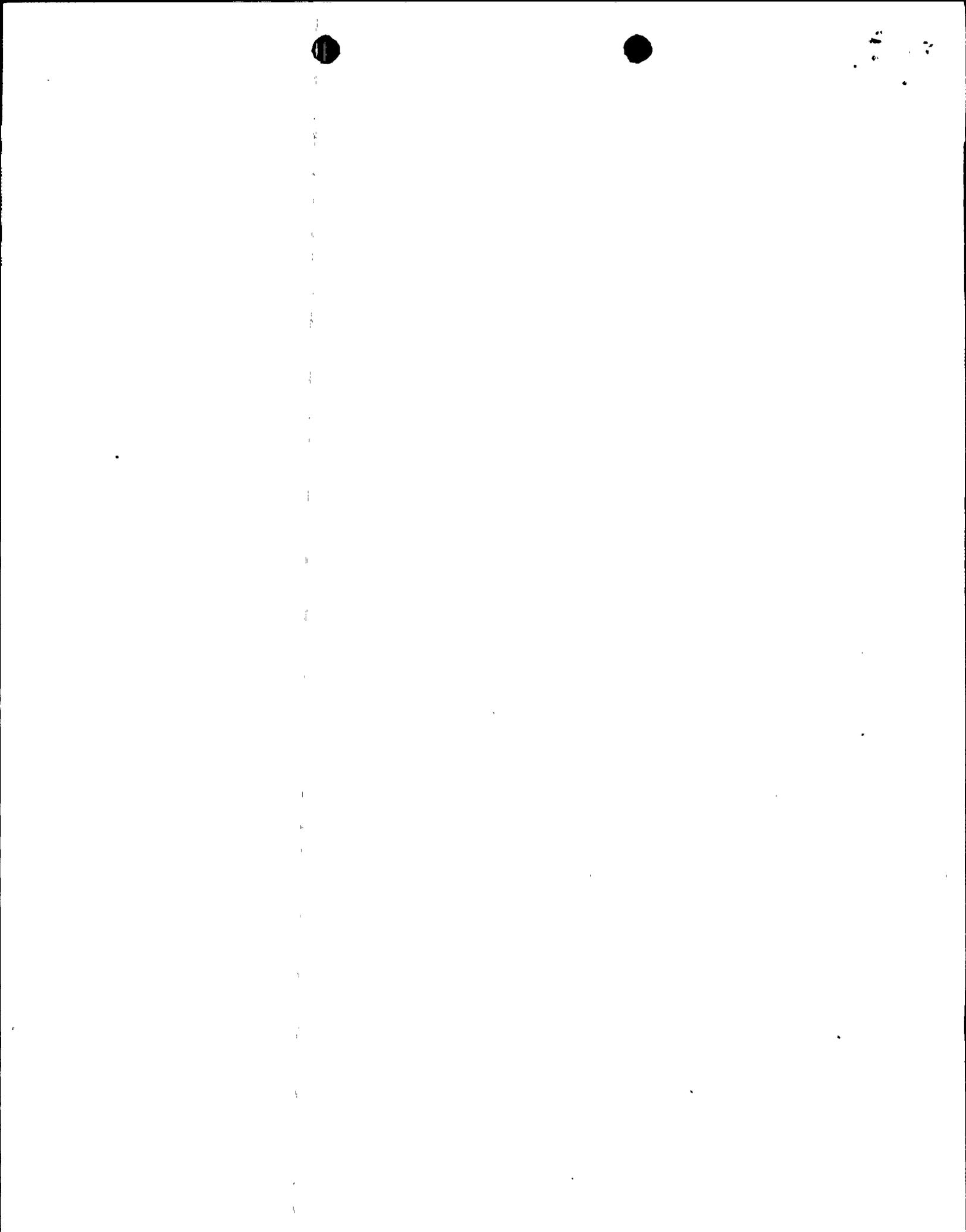
The petition is denied.

It is so ORDERED.

FOR THE APPEAL BOARD


C. Jean Bishop
Secretary to the
Appeal Board

^{3/} The staff and the applicants, of course, remain free to pursue other avenues of possible relief that remain open to them before the Licensing Board. For example, they may ask for reconsideration of the ruling and press the fuller exposition of their positions made to us on the Board below. We have no reason to believe the Board below (or any party) wishes to conduct an unnecessary hearing -- if the staff's and applicants' characterization of the situation is correct. Indeed, for that reason, the Licensing Board may wish to reconsider the issue itself on the basis of the staff's motion before us. In addition, if the staff and applicants are convinced (as their papers suggest) that the issues on which summary disposition was denied raise matters so remote and speculative as to merit no consideration under the National Environmental Policy Act, they may simply "stand pat" and seek vindication on appeal in the event the Licensing Board disagrees.



Additional views of Mr. Salzman, concurring:

My colleagues' reasons for declining to grant certification are sound ones. I am concerned, however, that the papers before us reflect misconceptions about the operation of the summary disposition rule and the Licensing Board's prerogative to explore potential safety issues not placed in controversy by the parties.

On the first point, the summary disposition rule (10 CFR §2.749) is the Commission counterpart of Rule 56 of the Federal Rules of Civil Procedure governing summary judgments; essentially the same standards govern both.^{1/} Consequently, even though a summary disposition motion may rest on affidavits technically sufficient to justify a decision in movant's favor, the absence of opposing affidavits does not mean that the relief sought must be forthcoming automatically. The courts have explained that:

Although Rule 56 of the Federal Rules of Civil Procedure states that summary judgment "shall" be rendered when the stated conditions are met, the rule is not mandatory in operation: "a motion for summary judgment is always addressed to the discretion of the court." Satisfying the basic requirements of the rule does not guarantee that the motion will be granted: "Even in cases where the movant has technically discharged his burden, the trial court in the exercise of a sound discretion may decline to grant summary judgment."^{2/}

^{1/} Cleveland Electric Illuminating Co. (Perry Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753 (1977); Tennessee Valley Authority (Browns Ferry Plant, Units 1, 2 and 3), LBP-73-29, 6 AEC 682, 688 (1973).

^{2/} In re Franklin National Bank Sec. Litigation, 478 F. Supp. 210, 223 (E.D.N.Y. 1979) (citations omitted).

In other words, "the exercise of sound . . . discretion may dictate that the motion should be denied, and the case fully developed."^{3/}

This principle is possibly more important in Commission than in judicial practice, which brings up the second point. The NRC functions as the arbiter of important safety and environmental questions. That role "does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it" ^{4/} For this reason, a licensing board may if need be explore issues not placed in controversy by the parties but which come to its attention during the course of the proceeding (or are suggested informally in unsworn limited appearance statements^{5/}).

As the Commission stressed in Indian Point:

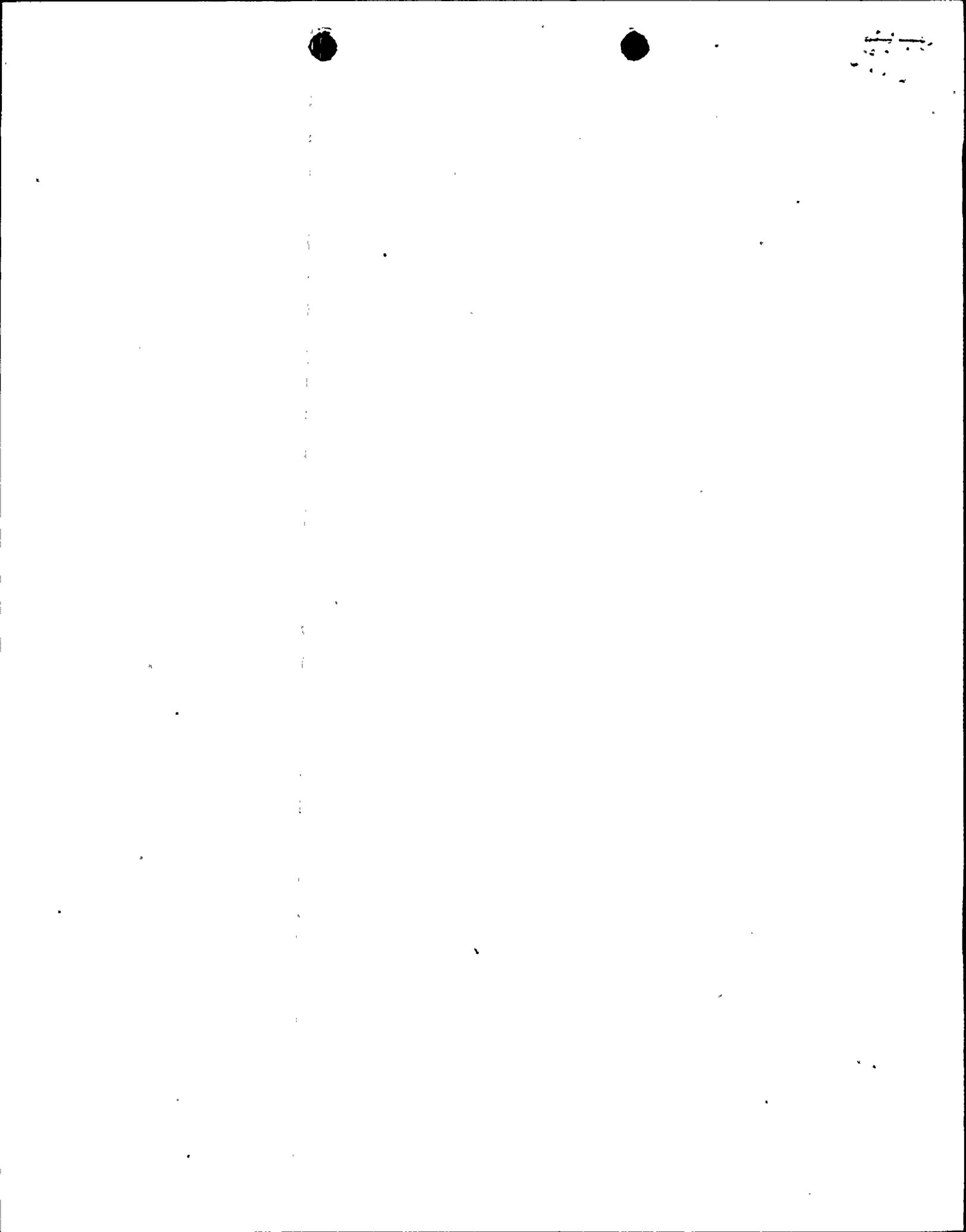
A Licensing Board, typically comprised of two technical experts and a lawyer, is this agency's primary fact-finding tribunal in the hearing process. These expert tribunals are entrusted with critical tasks in the licensing process. . . . To tie a Board's hands, when it sees an issue that needs to be explored, would be utterly inconsistent with its stature and responsibility. 6/

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- ^{3/} McLain v. Meier, 612 F.2d 349, 356 (8th Cir. 1979) (emphasis in original). Accord; Roberts v. Browning, 610 F.2d 528 (8th Cir. 1979); Browns Ferry, supra, LBP-73-29, 6 AEC at 688.
- ^{4/} Perry, supra, ALAB-443, 6 NRC at 752, quoting Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 620 (2nd Cir. 1965).
- ^{5/} See 10 CFR Part 2, App. A, SV(b) (4).
- ^{6/} Consolidated Edison Co. of New York (Indian Point, Unit 3), CLI-74-28, 8 AEC 7, 8 (1974). This decision is now codified in the regulations. 10 CFR §2.760a.

In passing on applicants' summary disposition motions, the Board below evinced apprehensions about chlorine discharges from the Susquehanna plants resulting in unacceptable water pollution levels and has called for further exploration of the question. The Board's concerns may turn out to be misplaced or later shown to be insubstantial. But it elevates form over substance to suggest that the Board is precluded from considering a safety issue that it apparently deems significant because of the way it came to light. An inadequate response to a summary disposition motion jeopardizes the respondent's rights to explore an issue, not the Licensing Board's.

The Board's misgivings are perhaps inartfully framed as "findings." But these are preliminary and obviously designed to alert the parties to the principal areas of its concern. There are means short of a full trial by which the Board's fears can be alleviated by parties (assuming, of course, that they are correct about the true situation). Applicants suggest one; there are others.^{7/} If one is selected and employed to educate the Board, it in turn will no doubt rule appropriately. There is no reason to presume that the Licensing Board wishes to go through the formalities or incur the expense of a hearing unnecessarily.

^{7/} See, e.g., Consumers Power Co. (Midland Plant), ALAB-235, 8 AEC 645, 646 (1974).





UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD PANEL
WASHINGTON, D.C. 20555

REQUEST FOR REPORTING SERVICE
Work Order No. ARC-LB- 58

Lot -1

Proceeding: Susquehanna Steam Electric Stations 1 & 2 Docket No.(s) 50-387 & 388 OL

Location of: Prehearing _____

Hearing Best Western - Genetti Motor Inn

77 E. Market Street, Wilkes Barre, PA 18701

Phone (717) 823-6152-Contact: Jane Pauciulo

Meeting _____

PERSON TO CONTACT AT HEARING LOCATION Jane Pauciulo Phone: (717) 823-6152

Estimated Duration: Prehearing _____ Hearing 3 weeks Meeting _____

Date ---- Prehearing _____ Hearing 10/6/81 Meeting _____

Time of: ---- Prehearing _____ Hearing 9:00 A.M. Meeting _____

TRANSCRIPT SERVICE REQUIRED: Prehearing _____

NOTE:

Give exact number of copies for Board, Staff(ELD) or others & when & where to be delivered.

Hearing 4 next day copies for Board delivered to hearing site; original next day to Anita McNamara; 2-5 day copies for ELD.
~~Meeting~~

In all "In Camera" Hearings, 3 copies for Board, 2 copies ELD, and 1 original are required.

Board Chairman James P. Gleason Members Glenn O. Bright Paul W. Purdom

Type of Proceeding: Operating License Hearing

Copies of transcript may (may not) be sold. Begin pagination of transcript with 1005

Date of oral request to Reporting Co. and person contacted. Date _____ Contact _____

Date of written confirmation _____

cc: JGleason, ASLBP
GOBright, ASLBP
PWPurdom, ASLBP
ASLBP
ASLAP

Reg. Files
JFouchard
Madelyn Rushbrook
ELD
EWiggins

By: _____
Atomic Safety & Licensing Board Panel
Docket Unit

SECRET





UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD PANEL
WASHINGTON, D.C. 20555

REQUEST FOR REPORTING SERVICE
Work Order No. ARC-LB- 51

Lot - 1

Proceeding: Susquehanna Steam Electric Sta., Units 1 & 2 Docket No. (s) 50-387-388

Prehearing Conference

Location of: Prehearing Best Western-Genetti Motor Inn
77 E. Market Street
Wilkes Barre, Pennsylvania 18701

Hearing _____

Meeting _____

PERSON TO CONTACT AT HEARING LOCATION Jane Paucilo Phone: (717)823-6152

Estimated Duration: Prehearing 1 day Hearing _____ Meeting _____

Date ----- Prehearing 8/12/81 Hearing _____ Meeting _____

Time of: ----- Prehearing 9 am - 5 pm Hearing _____ Meeting _____

TRANSCRIPT SERVICE REQUIRED: Prehearing Original and ^{Five} ~~xxx~~ next day to Anita McNamara,
Bethesda, Md.

NOTE:
Give exact number of copies for Board, Staff(ELD) or others & when & where to be delivered.
Hearing _____
Meeting _____

In all "In Camera" Hearings, 3 copies for Board, 2 copies ELD, and 1 original are required.

Board Chairman Judge James Gleason Members Judge Paul W. Purdom / Judge Glenn O. Brigham

Type of Proceeding: Prehearing Conference

Copies of transcript may (may not) be sold. Begin pagination of transcript with ~~continuation~~ from last number 7/22 hearing

Date of oral request to Reporting Co. and person contacted. Date 7/27/81

Contact Mary Alice Cotter

Date of written confirmation 7/27/81

By: Anita J. McNamara
Atomic Safety & Licensing Board Panel
Docket Unit

Gleason ELD
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L. Rushbrook

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