

RELATED CORRESPONDENCE

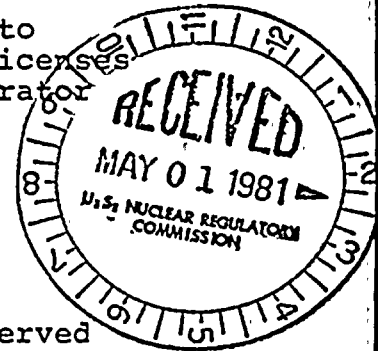
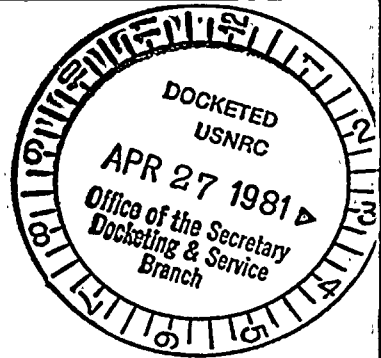
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	Docket Nos. 50-250
)	50-251
FLORIDA POWER & LIGHT COMPANY)	
)	Proposed Amendments to
(Turkey Point Nuclear)	Facility Operating Licenses
Generating Units Nos. 3)	to Permit Steam Generator
and 4))	Repair

4-20-81

LICENSEE'S RESPONSE TO INTERVENOR'S MOTION
TO CONTINUE OR DENY SUMMARY DISPOSITION



On April 15, 1981, Mark P. Oncavage (Intervenor) served "Intervenor Mark P. Oncavage's Motion to Continue or Deny Summary Disposition" (Motion). The Motion requests the Licensing Board to issue "an Order Refusing the Application for Summary Disposition or for a Continuance of the Time to Respond to the Motion for Summary Disposition." Motion, p. 1. Florida Power and Light Company (FPL) hereby submits its response to the Motion.

Before proceeding to the merits of the Motion, it would be profitable to review the context in which the Motion was filed. We believe that this context will clearly indicate that the Intervenor's Motion is without merit.

By Order of August 3, 1979,^{1/} the Intervenor was accepted as a party to this proceeding and several of his contentions

1/ "Order Ruling on the Petition of Mark P. Oncavage" (Aug. 3, 1979).

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were admitted. Shortly thereafter, the parties agreed to commence discovery on these contentions.^{2/} Discovery on the remaining admitted contentions commenced upon the issuance of the Board's order of September 25, 1979.^{3/} Thus, the Intervenor has had more than 18 months with which to conduct discovery.

On January 26, 1981, all of the parties met and agreed upon a schedule for the remainder of the proceeding.^{4/} Among other things, the schedule identified April 15, 1981, as the final date for filing discovery requests or motions for summary disposition and identified June 1, 1981, as the date for commencement of the hearing. The Board accepted this schedule on February 23, 1981.^{5/}

Although the Board accepted the negotiated schedule, it did note that the schedule was "tight" and urged the parties "to get these summary disposition motions filed very promptly so that there will be more time."^{6/} Both the NRC Staff and

^{2/} Letter from Norman A. Coll to the Licensing Board (Aug. 31, 1979).

^{3/} "Order Relative to Contentions and Discovery" (Sept. 25, 1979).

^{4/} Letter from Norman A. Coll to the Licensing Board (Jan. 28, 1981).

^{5/} "Order Accepting Negotiated Schedule" (Feb. 23, 1981). The hearing date was subsequently changed to June 2, 1981. See "Notice of Prehearing Conferences" (March 10, 1981).

^{6/} Prehearing Conference (March 24, 1981), Tr. 6, 189.

the Licensee have complied with this admonition by submitting their motions for summary disposition prior to the filing deadline.^{7/} The Intervenor's response to the motion for summary disposition of Contention 7 is due on April 26, 1981, and of Contentions 3, 6, and 8 is due on April 28, 1981.^{8/} The Board, at the request of the Intervenor, extended the Intervenor's time to respond to the motions on Contentions 2 and 4A until 10 days after the Intervenor's site inspection of Turkey Point.^{9/}

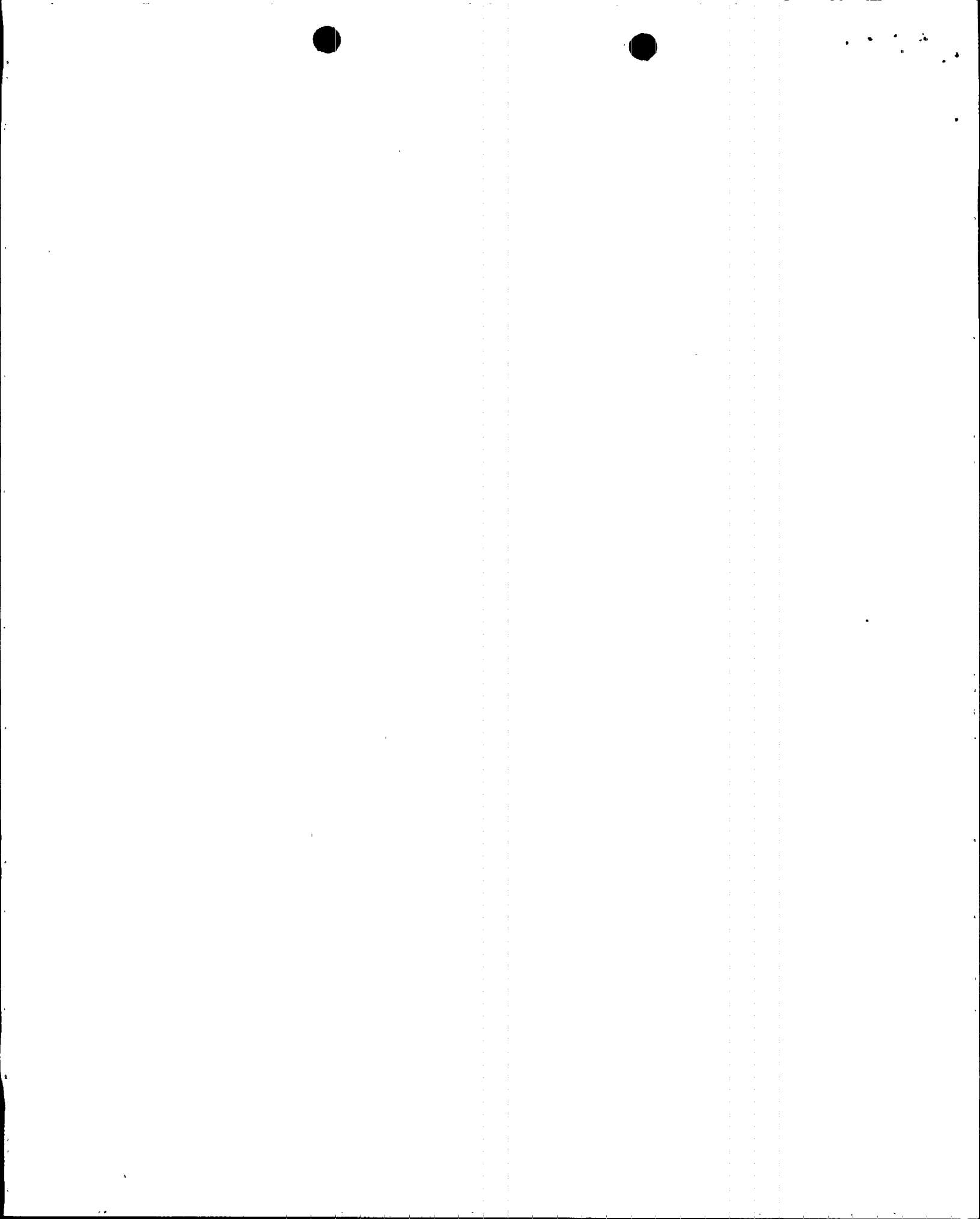
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- ^{7/} See "NRC Staff Motion for Summary Disposition" (Feb. 20, 1981); "NRC Staff Second Motion for Summary Disposition" (March 23, 1981); "Licensee's Motion for Summary Disposition of Contention 5" (April 2, 1981); "Licensee's Motion for Summary Disposition of Contention 7" (April 6, 1981); "Licensee's Motion for Summary Disposition of Contentions 3 and 6" (April 8, 1981); and "Licensee's Motion for Summary Disposition of Contention 8" (April 8, 1981).
- ^{8/} In accordance with the Board's suggestion at the prehearing conference of March 24, 1981, Tr. 41, these motions were served by hand as well as by mail.
- ^{9/} "Memorandum and Order" (April 7, 1981). The site inspection was conducted on Sunday, April 19, 1981. One of the samples collected by the Intervenor was found to contain radioactive levels above the release limits and is being shipped together with a number of other samples to an independent licensed laboratory for analysis. Consequently, by virtue of the requirements of the Memorandum and Order, the Intervenor's response to the motions on Contentions 2 and 4A is due on April 29, 1981, and any supplement to that response would be due ten days following receipt of the results of the independent laboratory analysis.

The Intervenor is now attempting to utilize his latest discovery requests,^{10/} as well as the negotiated schedule to which he agreed, as a ground for not responding or delaying a response to the various motions for summary disposition.

The Intervenor states that the deadline for "respond[ing] to the Motions for Summary Disposition prevents the Intervenor from completing its discovery and it would be manifestly unjust to provide a cut off date of discovery of April 15th and a Summary Disposition response cut off prior to the time discovery is completed." Affidavit of Neil Chonin (April 15, 1981), pp. 1-2, attached to the Motion. Additionally, the Motion asserts that "the Parties stipulated to a schedule which in and of itself should preclude this Board from ruling on any Summary Disposition Motion and requiring the Staff and the Licensee to go to trial on the merits as to all Contentions." Motion, p. 1.

The context of the Intervenor's Motion reveals that his claims are patently baseless. As previously noted, the

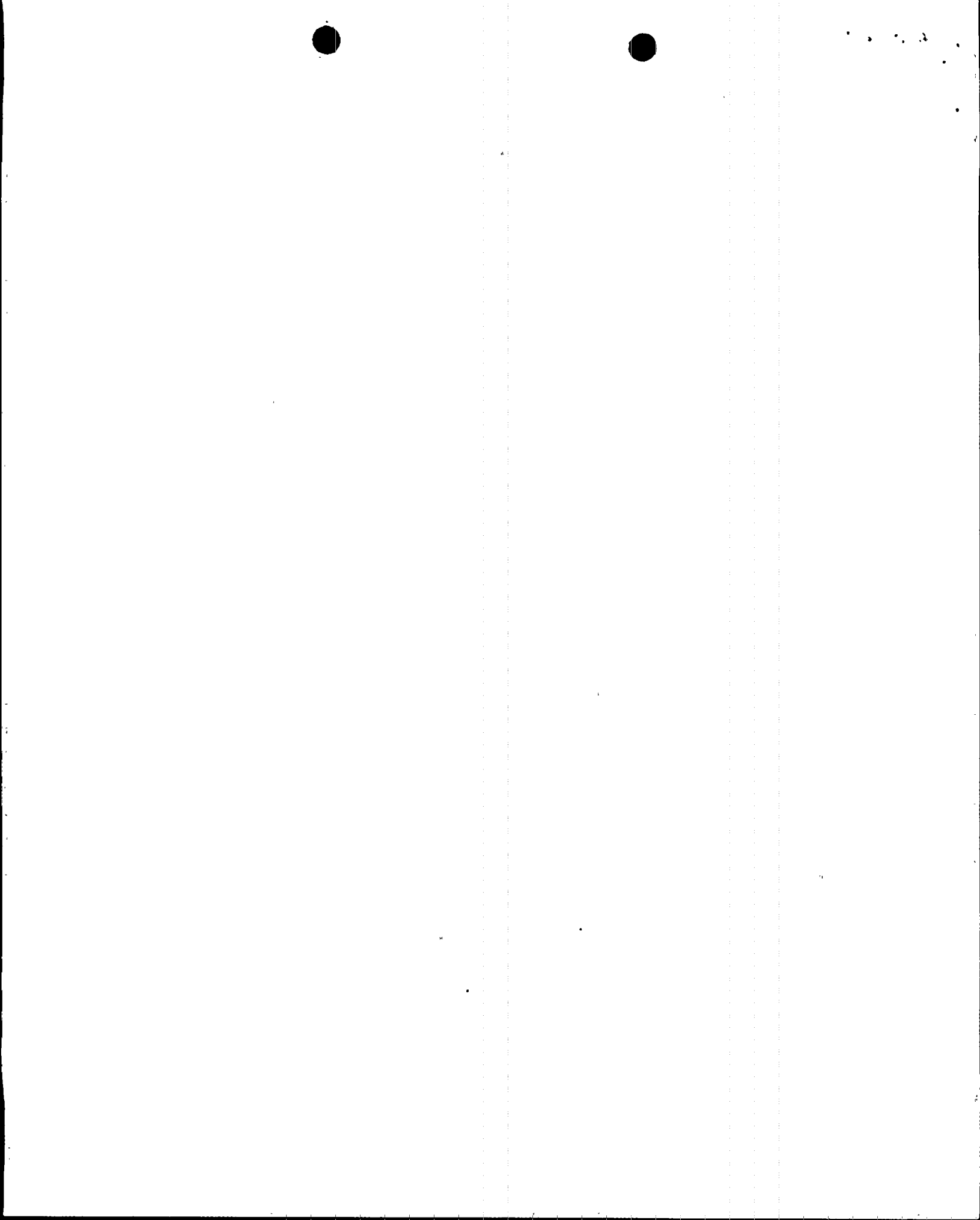
^{10/} See "Intervenor Mark P. Oncavage's Request for the Production of Documents from Licensee, Florida Power and Light Company [April 14th Request to Licensee]" (April 14, 1981); "Intervenor Mark P. Oncavage's Request to Produce Documents from Licensee, Florida Power and Light Company [April 15th Request to Licensee]" (April 15, 1981); and "Intervenor Mark P. Oncavage's Request to Produce Documents from the Staff of Florida Power and Light Company (sic) [April 15th Request to NRC Staff]" (April 15, 1981).



Intervenor has had ample opportunity to conduct discovery. There is no valid reason why the Intervenor could not have sought the requested documents before the NRC Staff and the Licensee filed their motions for summary disposition in order to enable the Intervenor to be in a position to respond to these motions. In fact, as the attached Table 1 demonstrates, the Intervenor has been aware for more than six months of all but three^{11/} of the documents now requested from FPL and the NRC Staff. Given this background, it appears that the Intervenor has filed discovery at the last possible moment in an attempt to utilize discovery as a means of delaying the proceeding and avoiding the responsibility of filing a response to the motions for summary disposition.

The Intervenor's purpose in filing the Motion is further evidenced by the fact that the Intervenor is seeking to block summary disposition of all contentions, even though his latest discovery requests are not related to several of the contentions. It is readily apparent from the face of the discovery requests that none of them is relevant to Contention 3 (disposition of laundry waste water and primary coolant), Contention 7 (costs of the repair), or Contention 8 (radiation monitoring). Consequently, the Intervenor's latest discovery requests cannot serve as a ground for prolonging the time for responding to motions for summary disposition of these contentions.

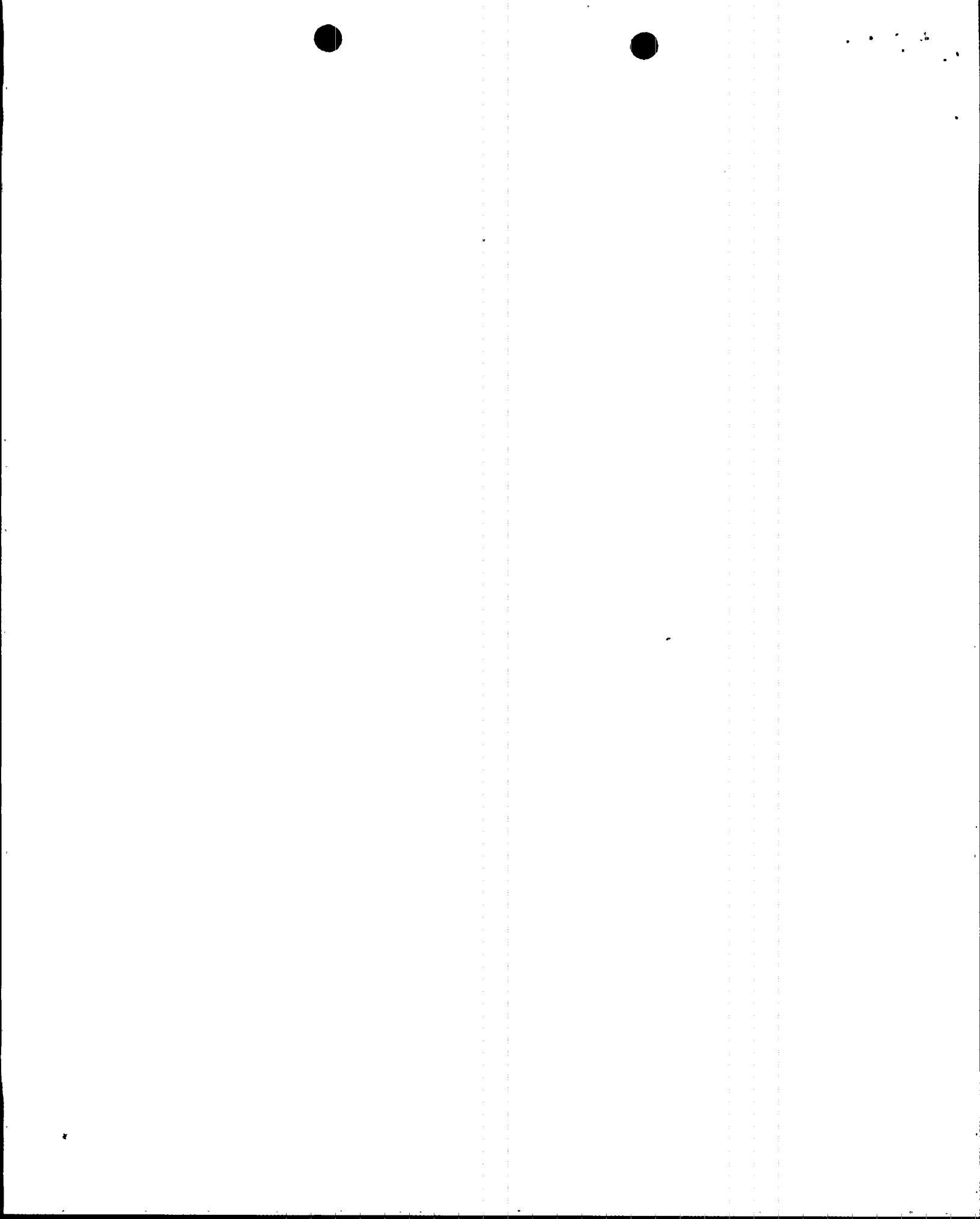
^{11/} These three documents are items 1, 2, and 3 of the April 15th Request to NRC Staff. See Table 1, p. 2.



Moreover, the Intervenor agreed to the negotiated schedule. This schedule explicitly provides for the filing of motions for summary disposition. Inherent in the schedule is the possibility that responses to motions for summary disposition would be due prior to completion of discovery. It is now inappropriate for the Intervenor to argue that the schedule "itself should preclude this Board from ruling on any Summary Disposition Motion." See Motion, p. 1.

Finally, the Motion is without support in law. 10 CFR § 2.749(c) states that a motion for summary disposition may be refused or a continuance provided if a party opposed to the motion submits an affidavit reciting the reasons why he cannot present facts essential to justify his opposition. The counterpart to Section 2.749(c) is Rule 56(f) of the Federal Rules of Civil Procedure. Cases interpreting this rule have established the following principles:

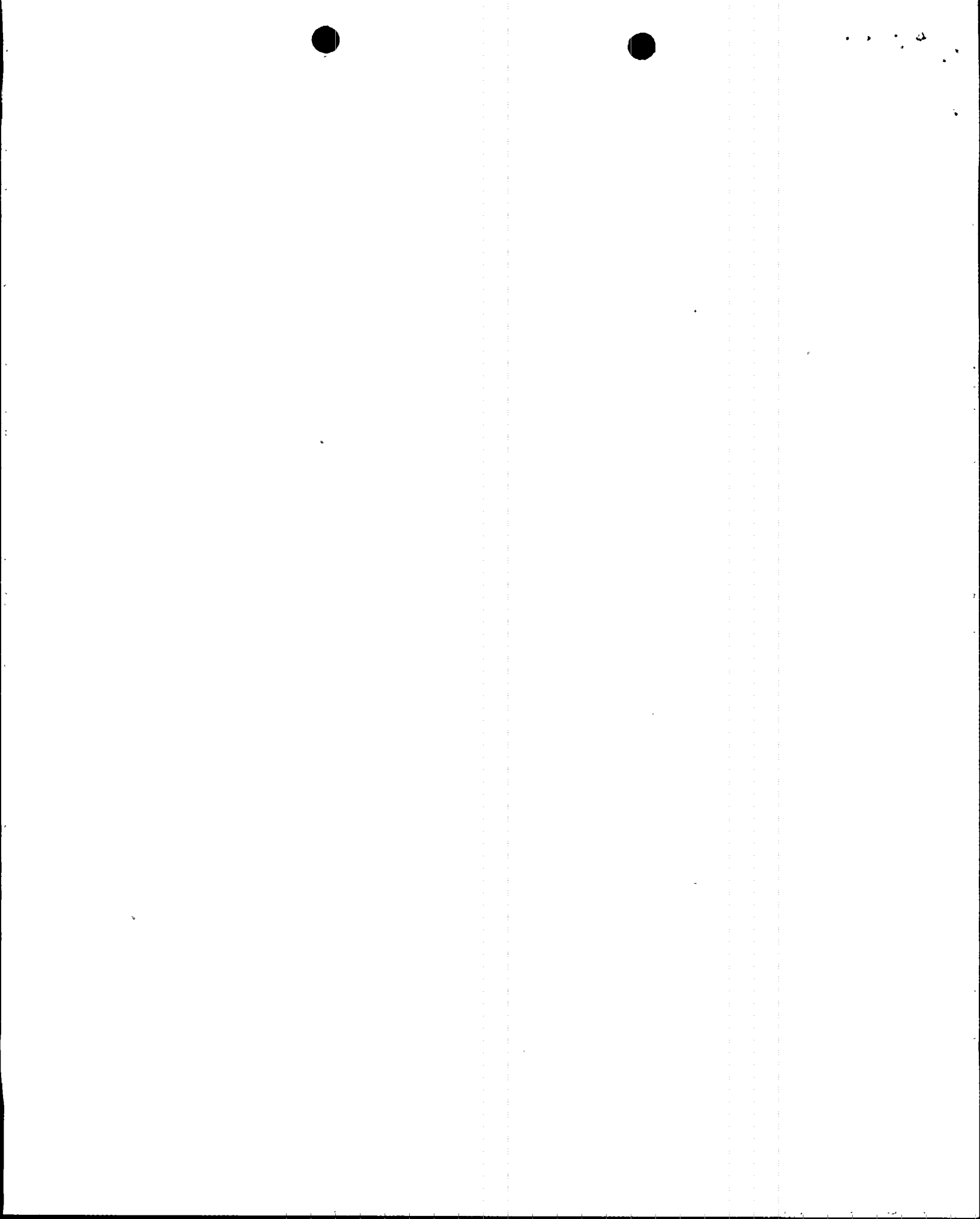
- 1) A party invoking the protections of Rule 56(f) must in good faith affirmatively demonstrate why he cannot respond to a movant's affidavits as otherwise required by Rule 56(e), and demonstrate how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact. Willmar Poultry Co. v. Morton-Norwich Products, 520 F.2d 289, 297 (8th Cir. 1975), cert. den. 424 U.S. 914 (1976). Absent such a showing, "Rule 56(f) is not a shield that can be raised to block a motion for



summary judgment." Id. Thus, relief under Rule 56(f) is unwarranted where it is clear that it would not be directed at filling a specific evidentiary gap. Searer v. West Michigan Telecasters, Inc., 381 F. Supp. 634 (W.D. Mich. 1979). See also First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 298-299 (1968).

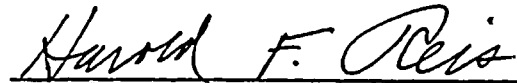
- 2) A party defending against a motion for summary disposition is generally entitled to a fair opportunity to conduct discovery in order to meet the factual basis of the motion. Illinois State Employees Union, Council 34 v. Lewis, 473 F.2d 561, 565 (1972), cert. den. 410 U.S. 928 (1973). However, the fact that discovery has not been completed is not controlling in connection with a motion for summary judgment. Green v. Medford Knitwear Mills, Inc., 408 F. Supp. 577, 578 (E.D. Pa. 1976). In those cases in which there has been ample opportunity for discovery, summary disposition is appropriate in the absence of any genuine issue of material fact. Willmar Poultry Co. v. Morton-Norwich Products, Inc., supra, 520 F.2d at 289.

The Intervenor has had ample opportunity for discovery. Although he has claimed that some of the discovery is relevant to some of his contentions, the Intervenor has not stated why he cannot justify his opposition to the summary disposition motions without further discovery and he has not stated how the latest discovery requests are designed to produce information which would establish a genuine issue of material fact. Consequently, the Intervenor's motion lacks legal justification.



In short, it appears that the Intervenor has deferred filing discovery requests until the latest date possible in an attempt to defeat the motions for summary disposition. Moreover, the Motion fails to satisfy the legal prerequisites for obtaining a continuance under 10 CFR § 2.749(c). The Motion, and the grounds for it, are without merit, and the Motion should be denied.

Respectfully submitted,



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Dated: April 20, 1981

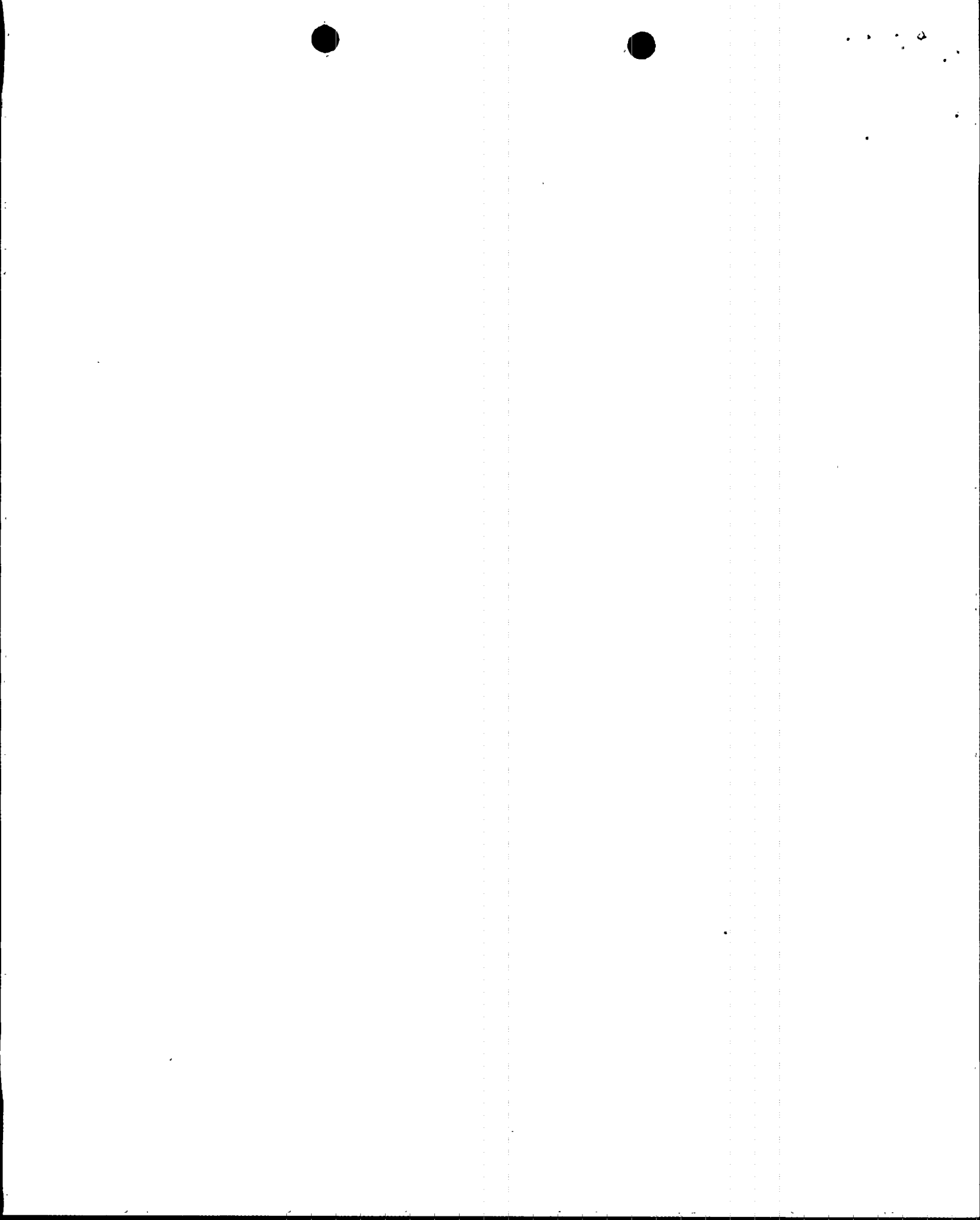


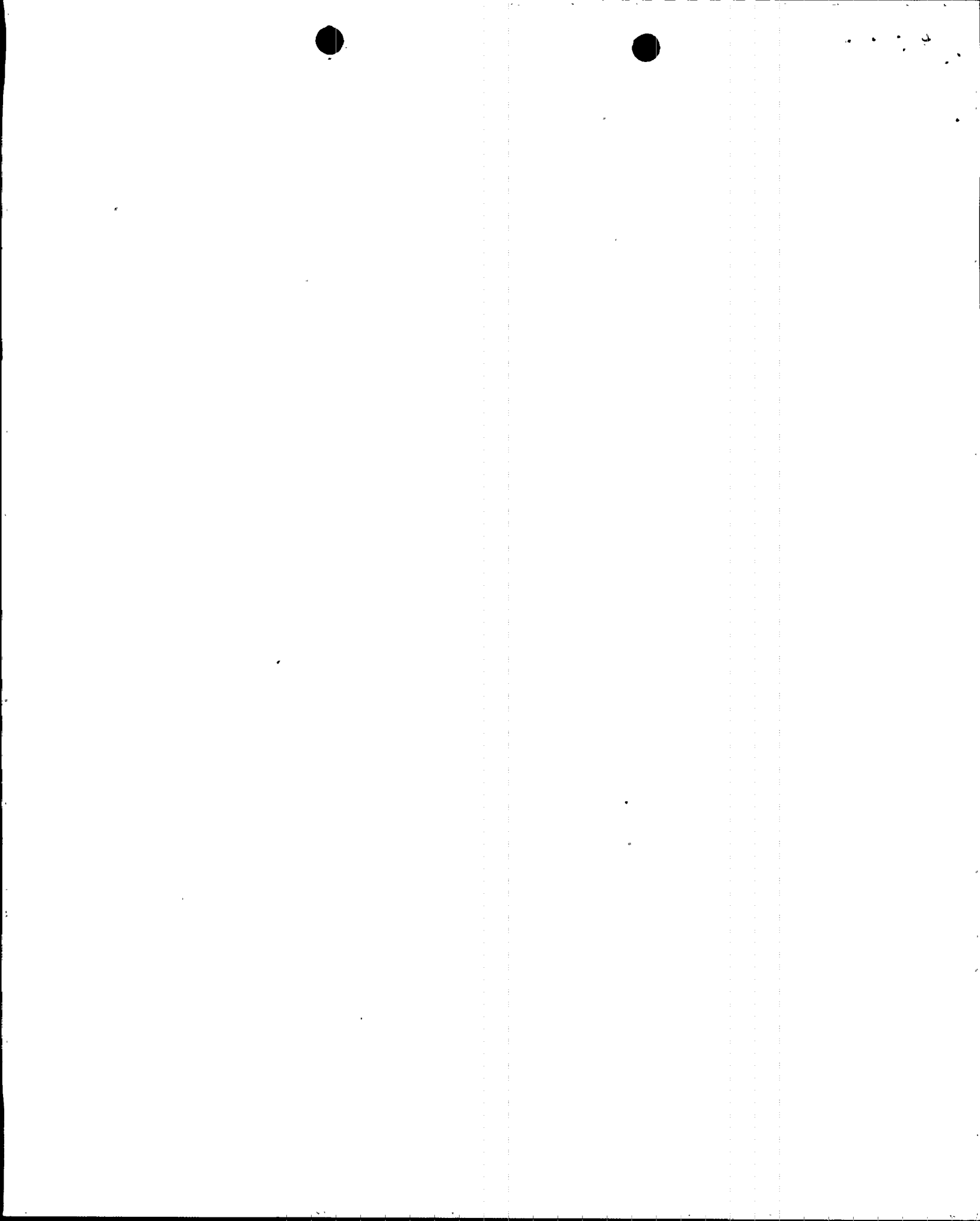
Table 1

<u>Request Number</u>	<u>Document : Requested</u>	<u>Time and Location at which the requested document was first referenced</u>
<u>April 14th Request to Licensee</u>		
1.	All documents re repair schedule	No specific reference
2.	Westinghouse Report re SGLA Inventory	September 17, 1980 - Public Meeting at Homestead, Fla. between NRC Staff and FPL.*
3.	Document re grit blasting	September 17, 1980 - Public Meeting at Homestead, Fla. between NRC Staff and FPL.*
4.	Document re Decontamination of SENA	December 20, 1977 - Steam Generator Repair Report (SGRR) § 3.4.9.
5.	Results of FPL health physics comprehensive examination	September 23, 1977 - SGRR § 3.3.5.5.

April 15th Request to Licensee

1.	FPL health physics course material	September 23, 1977 - SGRR § 3.3.5.5.
2.	FPL health physics comprehensive examination	September 23, 1977 - SGRR § 3.3.5.5.
3.	Scale models	September 23, 1977 - SGRR § 1.1.1. April 25, 1978 - SGRR § A-40.

* This meeting was attended by the Intervenor. See Appendix A.



April 15th Request to NRC Staff

1. Corrosion reports from Kure Beach March 23, 1981 - NRC Staff Second Motion for Summary Disposition, Affidavit of Bernard Turovlin on Contention 6(d), p. 2.
2. Turovlin documents re corrosion reports from Kure Beach March 23, 1981 - NRC Staff Second Motion for Summary Disposition, Affidavit of Bernard Turovlin on Contention 6(d), p. 2.
3. ICRP Publication 22 March 23, 1981 - NRC Staff Second Motion for Summary Disposition, Affidavit of John V. Nehemias on Contention 2, p. 11.
4. FPL health physics course material September 23, 1977 - SGRR § 3.3.5.5.
5. FPL health physics comprehensive examination September 23, 1977 - SGRR § 3.3.5.5.

