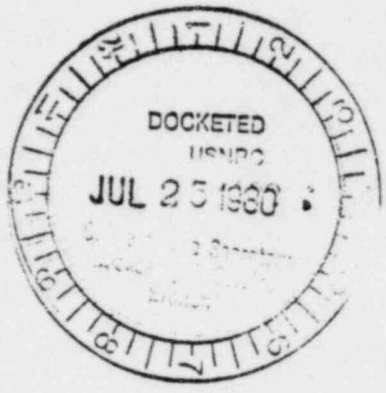
UNITED STATES OF AMERICA
BEFORE THE NUCLEAR REGULATORY COMMISSION

In the Matter of Statement of Policy, Further Commission Guidance For Power Reactor Operating Licenses, (June 16, 1980)	)



REQUEST FOR STAY OF EFFECTIVENESS OF COMMISSION STATEMENT OF POLICY ON FURTHER COMMISSION GUIDANCE FOR POWER REACTOR OPERATING LICENSES DATED JUNE 16, 1980

On June 16, 1980, the Nuclear Regulatory Commission ("Commission") issued a "Statement of Policy" entitled "Further Commission Guidance for Power Reactor Operating Licenses" ("Policy Statement"). The Union of Concerned Scientists ("UCS") and the Shoreham Opponents Coalition ("SOC") ("Movants") request the Commission to stay the implementation of the Policy Statement until the Movants have had an opportunity to obtain judicial review of the Policy Statement pursuant to the Atomic Energy Act, 42 U.S.C. §2239, and the Administrative Procedure Act 5 U.S.C. §706. Movants intend to file a Petition for Review of the Policy Statement with the United States Court of Appeals in the near future.

DS03 S01
ADD. "E"
P KREUTZER
D EISENHUT

I. PARTIES

UCS is a coalition of scientists, engineers, and other professionals supported by the financial contributions of over

90,000 persons nationwide. UCS has prepared independent technical assessments on a broad range of issues of public importance, including the nuclear power and nuclear weapons programs, energy alternatives and conservation. UCS has participated in many NRC proceedings and is presently a party in the Indian Point proceedings and the TMI-1 Restart hearings. UCS has expressed its opposition to the content of the Policy Statement in a letter to the Commission dated June 9, 1980, (a copy of which is attached hereto) and in its testimony before the Subcommittee on Environment, Energy and Natural Resources of the Committee on Government Operations of the U.S. House of Representatives.

Movant SOC is currently an intervenor in the Shoreham Unit 1 operating license proceeding. SOC Contention #7 in the Shoreham proceedings challenges the adequacy of the "NRC Action Plan Developed as a Result of the TMI-2 Accident" ("Action Plan"). This Contention was stipulated to by the NRC Staff prior to the issuance of the Policy Statement which would now prohibit the litigation of SOC Contention #7. SOC also submitted testimony against the Policy Statement before the House Subcommittee.

II. INTRODUCTION

Over the past nine months, NRC has been engaged in an effort to identify the safety problems highlighted by the accident at Three Mile Island and to identify solutions to those problems. The major result of this effort is NUREG-0660, the so-called "Action Plan." In addition, the Commission

issued NUREG-0694, "TMI-Related Requirements for New Operating Licenses." NUREG-0660 is a comprehensive document which describes a large number of safety issues related to TMI. It purports to "solve" only a minority; many of the most serious are committed to long-term studies. NUREG-0694 excerpts those portions of the Action Plan for which the Commission has identified safety improvements which it has decided to require prior to issuing new operating licenses. Neither the substance of the Action Plan as a whole nor the decision as to which items should be required for new licenses were subject to public notice and the opportunity for comment.

In its June 16 Policy Statement, the Commission endorsed NUREG-0694 and stated further that intervenors in individual licensing cases will be prohibited from raising contentions and submitting evidence to show that anything beyond NUREG-0694 is required to protect public health and safety, unless the measure in question simply "interprets" or "refines" existing regulations. Remarkably, however, applicants for licenses will be free to challenge the need for any of the new requirements.

In testimony in the United States House of Representatives and in a letter to Counsel for UCS (attached hereto), Chairman Ahearne "clarified" the Policy Statement as follows:

> In the future, should any question be raised before the Commission itself under Appendix B regarding the validity of any part of the policy statement as applied to a particular case, the Commission recognizes its obligation to consider the question and reply on the merits based on the state of the record before it.

III. STANDARDS FOR ISSUANCE OF STAY

In assessing a request for a stay pending an appeal, the Commission must consider the following four factors:

1) has the movant made a strong showing that it is likely to prevail on the merits of its appeal;

2) has the movant shown that without a stay it will be irreparably injured;

3) would issuance of a stay substantially harm other interested parties; and

4) where lies the public interest?

Virginia Petroleum Jobbers Ass'n v. F.P.C., 259 F. 2d 921 (D.C. Cir. 1958); Washington Metropolitan Area Transit Comm'n v. Holiday Tours, 559 F. 2d 841 (D.C. Cir. 1977); Westinghouse Electric Corp., (Exports to the Philippines) Opinion of Commissioners Kennedy and Hendrie, Sl.op. at 43.

The District of Columbia Circuit has held that a party seeking a preliminary injunction need not demonstrate a "likelihood of success" on the merits if it can show that the balance of hardships tips sharply in that party's favor. Instead, all that is required is a showing of a "substantial case on the merits." WMATC v. Holiday Tours, Inc., supra at 843. Indeed, a severe imbalance in the respective equities of the parties may support an award of preliminary relief even where the court's initial view of the merits is contrary to that of the Movant. Id. at 843.

In addition, the Commission recently noted that "[o]f those, the weightiest is the need to maintain the status quo -- whether the party requesting a stay has shown that it will be irreparably

injured unless a stay is granted." Westinghouse Electric Corp., supra at 43. This is consistent with recent judicial decisions:

> An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant. WMATC v. Holiday Tours, supra at 844.

IV. ARGUMENT

A. There Is A Strong Likelihood That Movants Will Prevail On The Merits

It is unlawful for the Commission to establish binding precedent without any public input. Less than a year ago, the U.S. Court of Appeals reminded the Commission that it cannot resolve issues of factual dispute by edict, State of Minnesota v. N.R.C., 602 F. 2d 412 (D.C. Cir., 1979). There are two ways in which this agency can develop precedent: by rulemaking or by adjudication. Each affords the public some right to be heard. This policy statement is neither, and it cannot lawfully be used to cut off the rights of intervenors. This is clear from the following statement of the court in Pacific Gas and Electric Co. v. F.P.C., 506 F. 2d 33, 38 (D.C. Cir., 1974):

> The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only answers what the agency seeks to establish as policy . . . When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued. An agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy. (Id. at 38-39, emphasis added).

Chairman Ahearne states in his letter of June 30, 1980, that he "recognizes that a policy statement does not have the force and effect of law, but merely indicates a policy which the Commission intends to apply in the future." Yet, the recent Policy Statement has the same effect as that of a rule or regulation; Licensing Boards are not free to disregard it. They are specifically prohibited from accepting contentions arguing that the public health and safety requires more than the items contained in NUREG-0694. The law is clear that the label the Commission applies to an exercise of its administrative power does not determine the nature of the action, rather it is the actual effect of the Policy Statement which determines whether it it is a general policy statement or a new regulation. Brown Express, Inc. v. U.S., 607 F. 2d 695, 700 (5th Cir. 1979); Lewis-Mota v. Sec. of Labor, 469 F. 2d 478, 481 (2nd Cir. 1972). The real effect of the Policy Statement is to prohibit intervenors from challenging the sufficiency of the new requirements. This is precisely the effect that a regulation would have.

The District of Columbia Circuit Court has stated that an agency must "present evidence and reasoning" whenever the agency applies policy in a particular situation. Pacific Gas, supra at 38-39. Otherwise Commission regulations can only be established lawfully with some opportunity for public comment by rulemaking or adjudication. Minnesota, supra. The rulemaking provisions of the Administrative Procedure Act were enacted "to give the public an opportunity to participate in the rulemaking process." Texaco v. Federal Power Commission, 412 F. 2d 740, 744 (5th Cir. 1969).

Chairman Ahearne's "clarification" of the Policy Statement does not undo the damage to the ability of intervenors to adequately present their case. Because intervenors will be prohibited from acquiring discovery, introducing evidence, and cross-examining witnesses regarding the sufficiency of the new requirements, intervenors must present their case to the Commission without any supporting record. According to Chairman Ahearne, the Commission would then "consider the question and reply on the merits based on the state of the record before it." The problem, of course, is that the record will include no evidence on the merits of the challenges by intervenors. Moreover, the Commission has given no guidance whatever on what threshold showing would be required of an intervenor at the Commission level in order to overcome the position enunciated in the Policy Statement that the sufficiency of the measures contained in NUREG-0694 may not be challenged. Some burden of completely undefined and presently unknowable dimension has been imposed. This is the essence of arbitrariness and unfairly discriminates between licensees and intervenors.

The attached affidavits of Robert Pollard and Gregory Minor demonstrate the manner in which the Policy Statement will operate to unreasonably prevent intervenors from raising significant technical questions going to the sufficiency of NUREG-0694 to protect public health and safety. Two examples -- hydrogen control and systems interaction -- have been chosen which illustrate the importance of the safety issues involved and show that NUREG-0694 does not adequately address these issues. These

affidavits are not offered here to persuade the Commission to change NUREG-0694, but rather to indicate the nature and importance of the technical questions which the Policy Statement would banish from licensing cases. We hope that they will persuade the Commission that suppressing these issues is ill-advised and that intervenors have an important contribution to make.

Finally, in order to provide intervenors an opportunity to present all their challenges to the adequacy of new requirements, the Commission will have to develop a record either by presiding over their own fact-finding proceedings or by remanding to the licensing board to develop a record on the precise issues which intervenors are now prevented from presenting. There can be little dispute that the Commission is not instututionally capable of sitting as a hearing board to develop a substantial factual record. It has neither the time nor the staff to do so except in extremely limited cases. This option is illusory. The second option would require the licensing board to provide a discovery period, reopen the record, take testimony and allow cross-examination of the staff, perhaps on the same requirements that the licensee had already challenged as unnecessary in the initial proceedings. The duplication of this process would be a waste of the time and resources of all parties. Because the staff will have to justify the new requirements against attacks from the licensee, it would be much more efficient to permit intervenors to challenge the sufficiency of the new requirements at the same time as the licensees are challenging their necessity. Moreover, the Commission is well aware that the pressure to issue

the license prior to final resolution of the remanded issues would be enormous.

The fact is that the Commission has bound its Licensing Boards to adopt the unchallengeable position that NUREG-0694 embodies the most that will be required of new licensees. The Commission's clarification amounts to nothing more than a promise to reconsider that policy in certain undefined circumstances if intervenors can meet some unknown burden, while prohibiting them from the discovery, submission of testimony or cross-examination necessary to build a record to meet that burden. This extraordinary scheme patently fails to comport with fundamental fairness or due process.

One further point should be made in this connection. Both in the Policy Statement and the letter to UCS counsel, the Commission asserts that it has not limited intervenors to any greater degree than normal NRC practice would limit them and has, in fact, expanded the scope of litigable issues. The Maine Yankee[1/] decision is cited as if it supports the proposition that intervenors are not now entitled to argue that some requirement beyond those contained in the regulations is necessary to adequately protect public health and safety. Nothing could be further from the truth.

1/ Maine Yankee Atomic Power Co. (Maine Yankee Nuclear Power Plant), ALAB-161, 6 AEC 1003 (1973).

The intervenors in Maine Yankee stipulated that all NRC requirements concerning low-level radiation emission were met and that no demonstration had been made of any potential harm to the public with such emissions. They raised only the narrow question of whether the Commission could legally make the finding of adequate protection to public health, given the possibility that future knowledge and experience might show a greater risk associated with these emissions. In upholding the grant of the license, the Appeal Board stated:

> In short, the Licensing Board thought it enough that the facility would operate in conformity with the regulation and that these was no evidence to indicate that they were insufficient to protect the public health and safety. Id. at 1005, Emphasis added.

The Court upheld the decision on the same grounds:

> [P]etitioners interpret the Commission's view as being that any facility meeting the requirements of the rules may be licensed because a fortiori, what meets these requirements automatically satisfies the 'reasonable assurance' and 'not inimical' tests. We do not so consider it but rather that in the absence of some indication or showing on a case-by-case basis to the contrary, and subject to the weighing of risks-benefits order NEPA, it may be found that facilities complying with the rule do so. Citizens for Safe Power v. N.R.C., 524 F. 2d 2/ 1291, 1299, (D.C. Cir. 1975, emphasis added.)

Thus, the Maine Yankee decisions are properly read as supporting the view that intervenors are entitled on a case-by-case basis to the opportunity to demonstrate to a Licensing

---

2/ See also, concurring opinion of Chief Judge Bazelon at 1302.

Board that the public health and safety requires measures in addition to those prescribed by the requirements.

B. Movants Will Suffer Irreparable Harm Unless A Stay Is Granted

In the absence of a stay of the effectiveness of the Policy Statement pending review by the Court of Appeals, the Movants will in fact be irreparably harmed. Movant UCS has initiated discussions with the Staff to determine whether and how the Policy Statement applies to the Three Mile Island Unit 1 Restart hearings. If the Policy Statement is applicable to these hearings, UCS Contentions 1-14 and 16 will each be limited or removed. The attached affidavit of Robert Pollard will further explain UCS's specific injury with respect to UCS Contention #11 on hydrogen control measures.

Movant SOC's Contention #7 which was already stipulated to by the Staff will no longer be admissable under the Policy Statement. Indeed, SOC has been ordered by the Shoreham Licensing Board by July 29, 1980, to brief the effect of the Policy Statement on its case. The attached affidavit of Gregory Minor explains the injury to SOC by limiting its presentation of evidence on system interaction.

Implicit within the right to be heard is the opportunity for timely input of the factfinders. Once decision-makers have resolved an issue, subsequent evidence has diminished impact than had it been presented with related testimony during the formulation of the initial decision. Movants are entitled to present their full case to the licensing board in the initial proceedings but cannot do so effectively if they are prohibited

from challenging the sufficiency of the new requirements where appropriate. The District of Columbia Circuit Court found irreparable harm sufficient to justify a stay of agency proceedings under similar circumstances in Clothing Co. v. Renegotiation Board, 466 F. 2d 345 (D.C. Cir. 1972). There, the agency's denial of documents requested under the Freedom of Information Act was held to constitute irreparable harm because it precluded the affected party from participating effectively in ongoing administrative proceedings. The court enjoined those proceedings until the merits of the FOIA claim could be resolved, even though Bannercraft was still entitled to de novo hearing at the next stage of agency proceedings and a subsequent de novo review by the U.S. Court of Claims. Judge J. Skelly Wright agreed with the appellees that they did not have to participate in the proceedings in the capacity limited by the agency.

> Our appellees would like to take advantage of the [administrative] process, but claim an inability to do so effectively until the Board complies with the Freedom of Information Act. If these facts are true, and it is for the trial court to determine in the first instance whether they are true or not, then appellees have demonstrated the sort of clear threat to a statutory right which can easily be categorized as an impending irreparable injury. Bannercraft, supra at 356.

C. The Granting Of A Stay Is More Likely To Result In Fewer Delays And Consequently Less Harm To The Commission And To The Licensees Than If The Commission Denied This Stay

The purpose of the Policy Statement, as articulated in that document, was to expedite the litigation of the new Action Plan requirements in operating license proceedings. Statement

of Policy, Sl.op. at 6-7. The harm to the Commission and to licensees resulting from a stay of the Policy Statement would appear to be the cost of extending such litigation. But according to Chairman Ahearne's interpretation of the Policy Statement, after a licensing proceeding is completed, the intervenors may then raise before the Commission all issues which were limited by the Policy Statement. Reopening the record and relitigating the same issues, whether before the Commission or the original licensing board, will unquestionably take more time than if the licensing board had heard the evidence initially. Since the staff must be prepared to justify the necessity of each new requirement against licensee attacks, it is appropriate and more expedient to hear any intervenor evidence on the sufficiency of any new requirements at the same time, instead of reopening the record on remand and calling back the same staff witnesses for cross-examination on the same issue later.

Moreover, as Commissioner Bradford noted in his dissent, if Movant's judicial appeal is successful, greater delays would then result from the relitigation of all issues in which intervenors were originally limited by the Policy Statement. On the other hand, should the Commission grant the stay and the Circuit Court uphold the Policy Statement, the licensing boards would simply strike any testimony not in conformance with the Policy Statement. Finally, if the Commission denies this stay and the new Chairman supports the position of Commissioners Bradford and Gilinsky, any issues resolved by

licensing boards under the Policy Statement would have to be relitigated. The Commission's and licensee's interests in finality and a prompt ultimate resolution of these issues are better served by granting this request for a stay pending review by the Circuit Court of Appeals.

If the Commission stays the effectiveness of the Policy Statement, it is free to direct the staff to adopt NUREG-0694 as its position in each case, in the same way that Regulatory Guides represent the staff's technical positions. Hearings can proceed on that basis with no further Commission action. Indeed, it has been precisely the lack of staff technical positions on TMI-related issues that has held up hearings.

D. The Public Interest Would Be Best Served By The Granting Of This Stay

From the inception of the nuclear power program, the Commission's stated position has been that "safety is first, last and a permanent consideration." Power Reactor Development Corp., 1-AEC 128, 136 (1959). The fact that the Commission feels that the new TMI-related requirements are necessary for the safe operation of nuclear plants is testimony to the importance of these modifications to the public health and safety. Consequently, the public interest would best be served by prompt and complete hearings on whether the new Action Plan requirements are sufficient to ensure the safety of new plants.

V. RELIEF REQUESTED

Movants request a stay of the Policy Statement pending judicial review. As noted above, Licensing and hearings could go forward without interruption, with NUREG-0694 representing

the staff's technical positions. In the words of Commissioner Gilinsky the Action Plan would be regarded as "a directive to the Staff from the Commission acting in its supervisory capacity and. . . would be given appropriate deference by the adjudicatory boards." (Commissioner Gilinsky's "Separate Views" on the Policy Statement, June 16, 1980). Intervenors in individual licensing proceedings would be permitted to demonstrate that measures different from or in addition to those contained in NUREG-0694 are necessary to prevent undue risk to public health and safety.

CONCLUSION

For the reasons set forth in this motion, the Movant's maintain that they meet the requisite criteria and, therefore, request this Commission to issue a stay of the Policy Statement.

Respectfully submitted,

Ellyn R. Weiss
Harmon & Weiss
1725 I Street, N.W.
Suite 506
Washington, D.C. 20006
(202) 833-9070

Counsel for the Union of Concerned Scientists

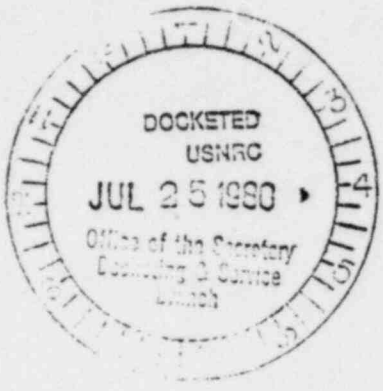
Stephen R. Latham
Twomey, Latham & Schmitt
P.O. Box 398
33 West Second Street
Riverhead, N.Y. 11901
(516) 727-2180

Counsel for Shoreham Opponents Coalition

DATED: July 25, 1980

UNITED STATES OF AMERICA
BEFORE THE NUCLEAR REGULATORY COMMISSION

In the Matter of	)
Statement of Policy, Further Commission Guidance For Power Reactor Operating Licenses (June 16, 1980)	)



CERTIFICATE OF SERVICE

I hereby certify that copies of the Request for Stay of Effectiveness of Commission Statement of Policy on Further Commission Guidance for Power Reactor Operating Licenses Dated June 16, 1980, Affidavit of Robert D. Pollard, and Affidavit of Gregory C. Minor have been hand-delivered this 25th day of July, 1980, to the following:

John Ahearne, Chairman
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

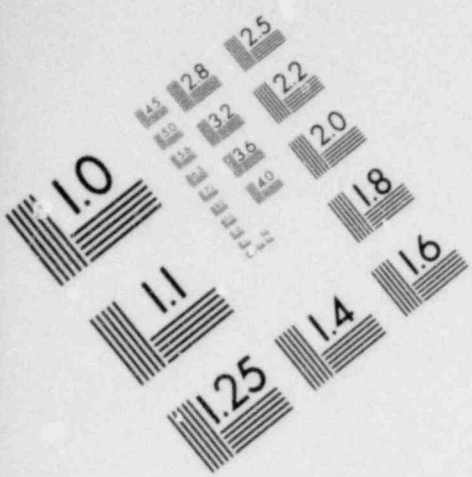
Victor Gilinsky, Commissioner
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Joseph Hendrie, Commissioner
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Peter Bradford, Commissioner
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Leonard Bickwit, Esq.
General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Ellyn R. Weiss



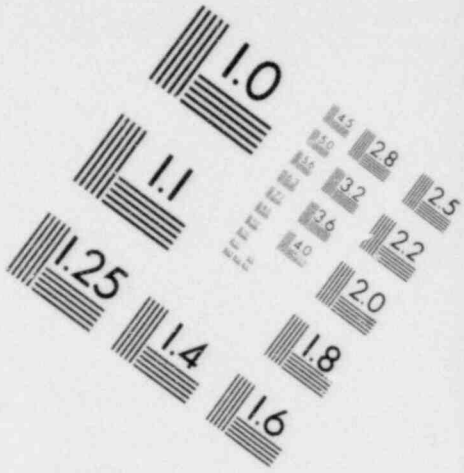
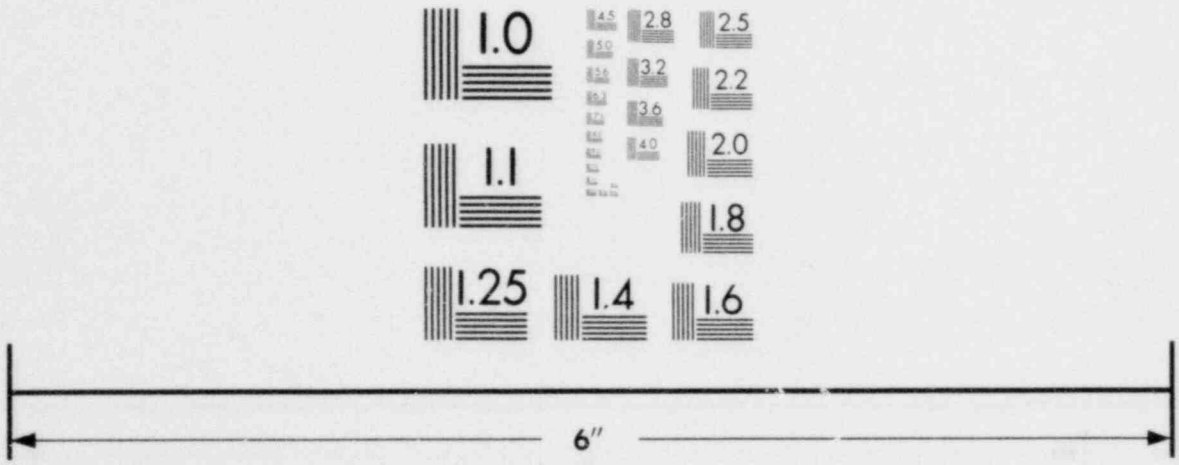
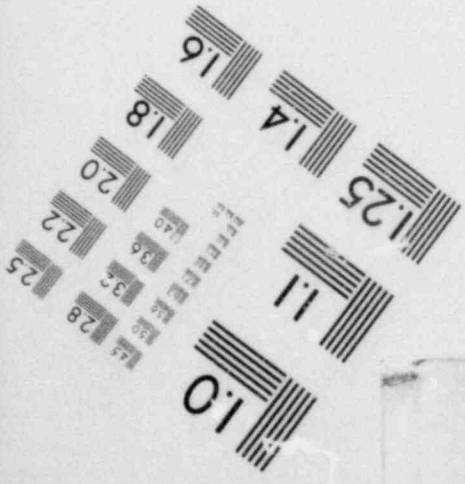
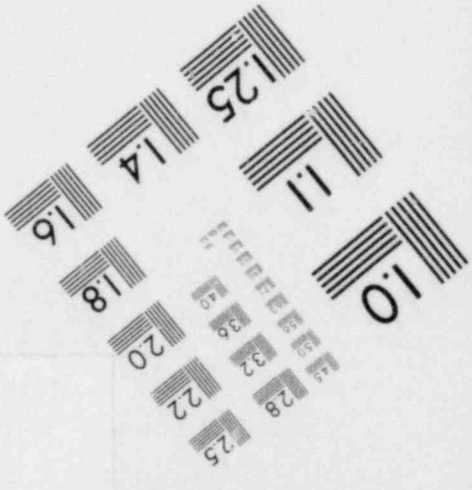


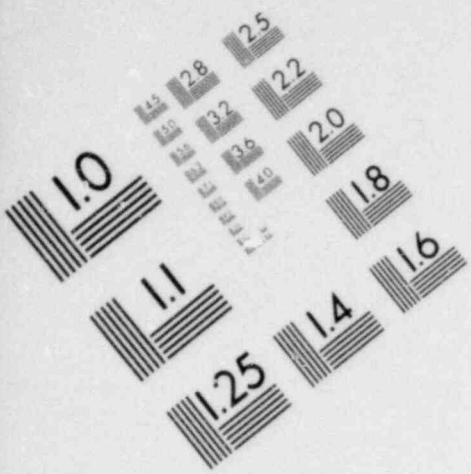
IMAGE EVALUATION
TEST TARGET (MT-3)



MICROCOPY RESOLUTION TEST CHART







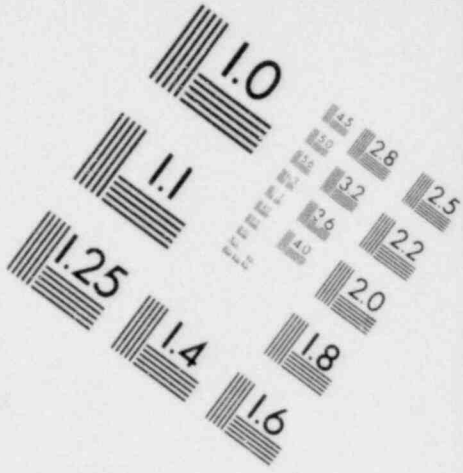
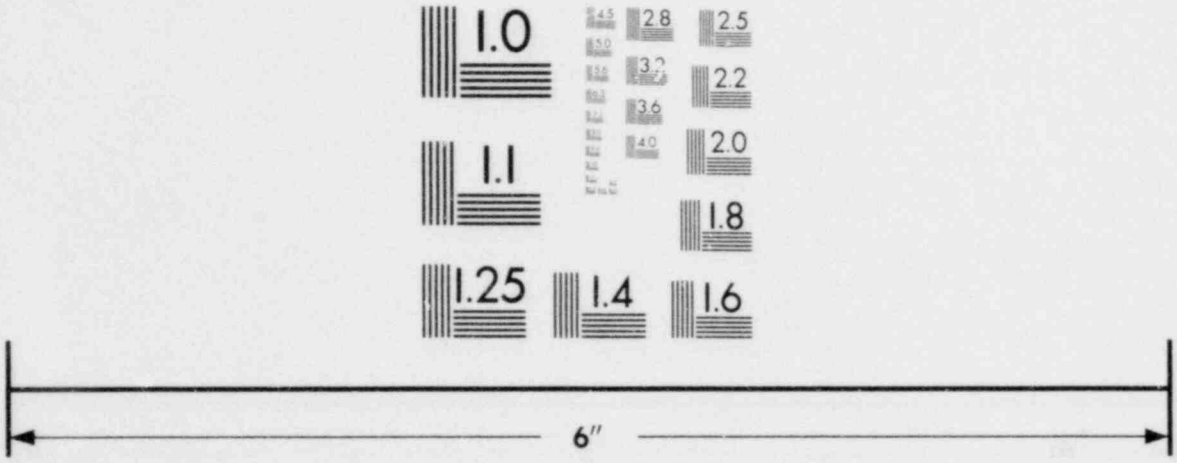
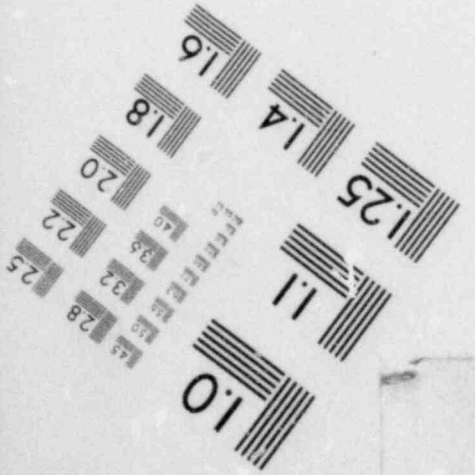
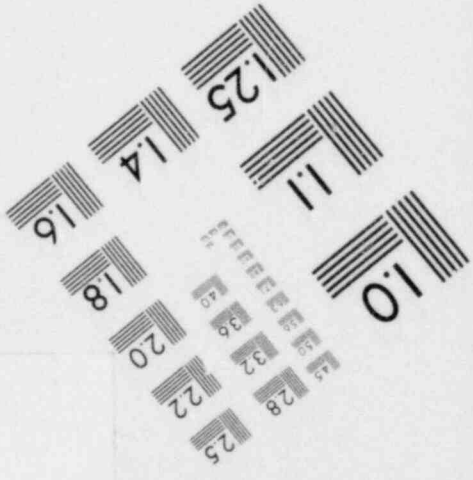


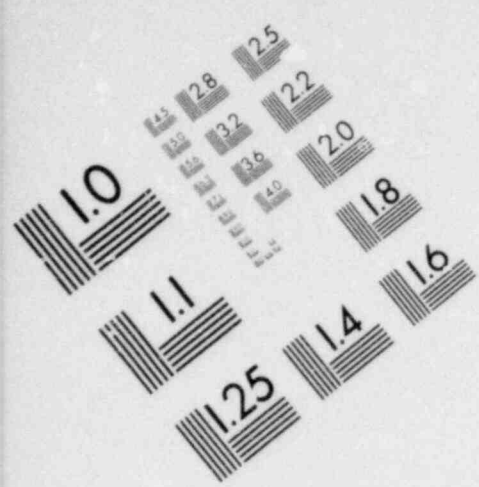
IMAGE EVALUATION
TEST TARGET (MT-3)



MICROCOPY RESOLUTION TEST CHART







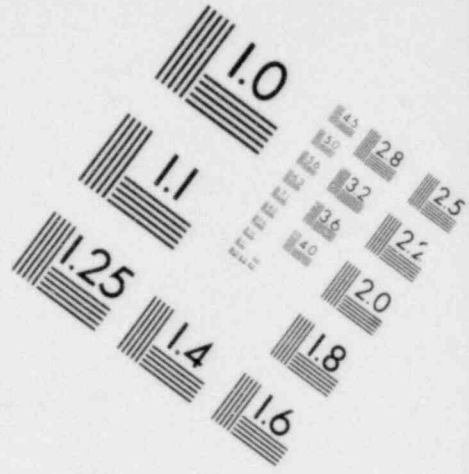
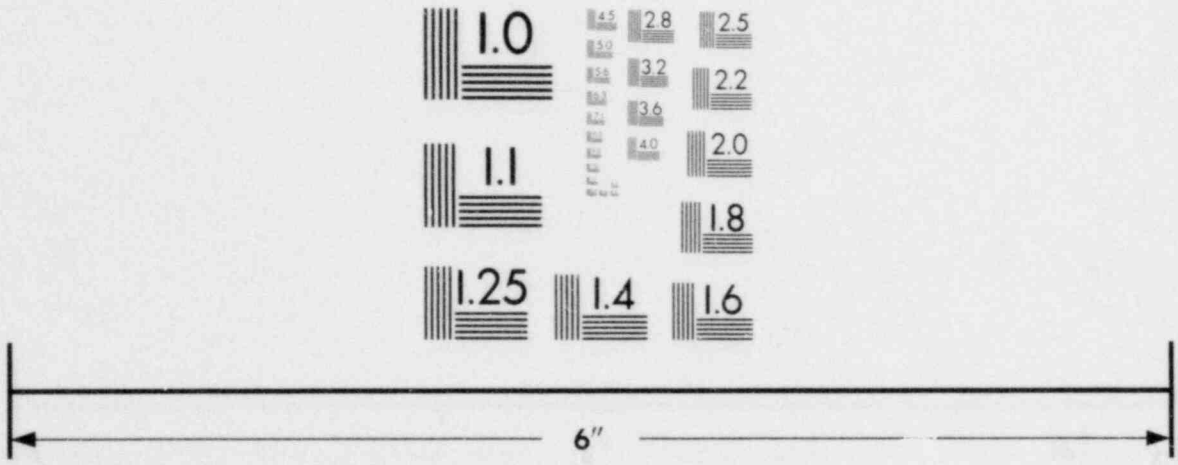
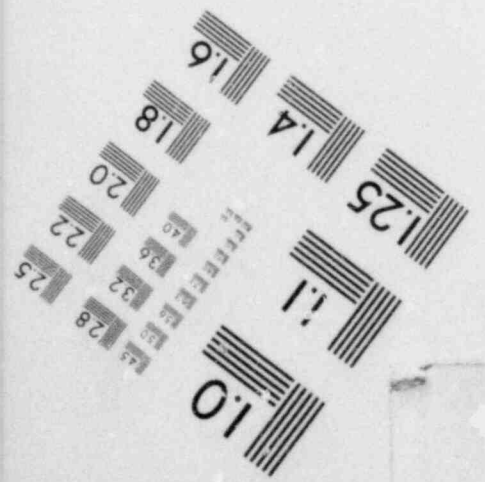
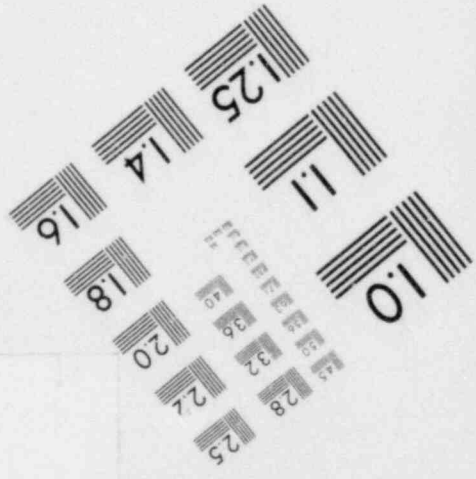


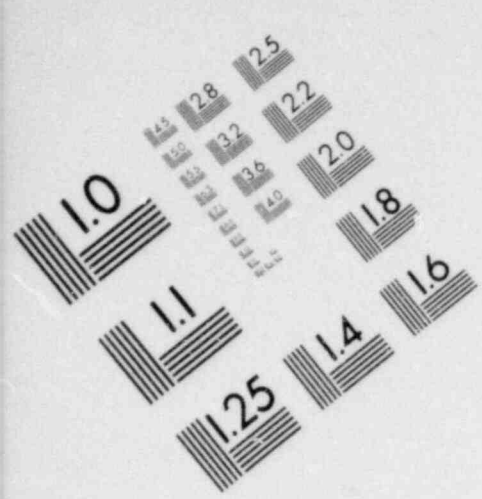
IMAGE EVALUATION
TEST TARGET (MT-3)



MICROCOPY RESOLUTION TEST CHART







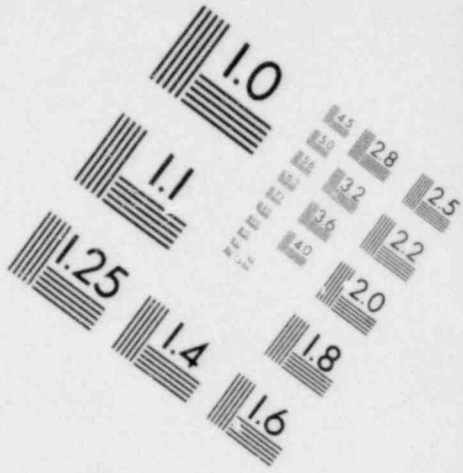
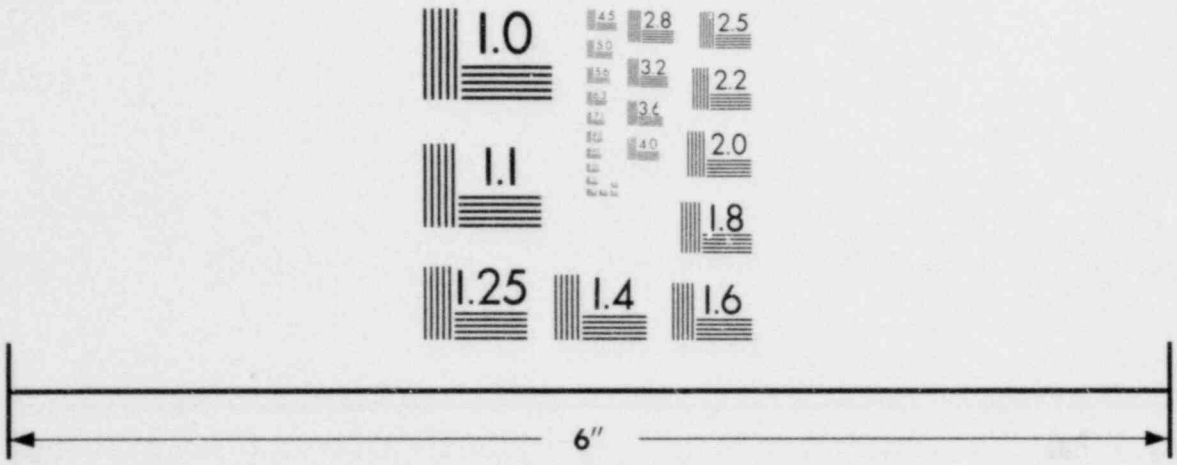
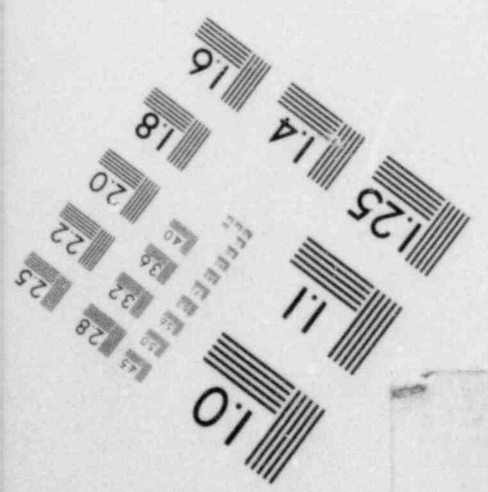
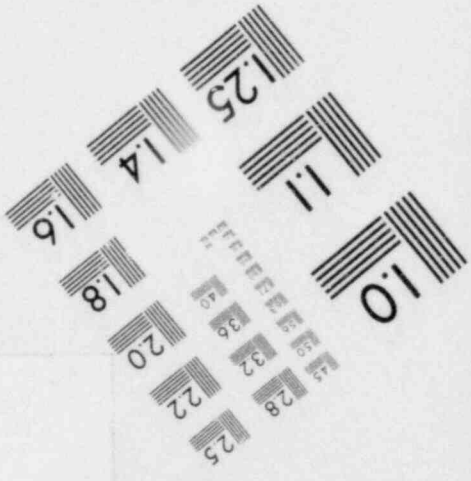


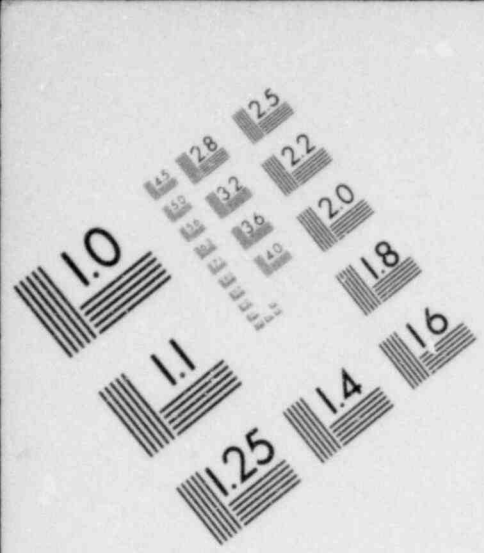
IMAGE EVALUATION
TEST TARGET (MT-3)



MICROCOPY RESOLUTION TEST CHART







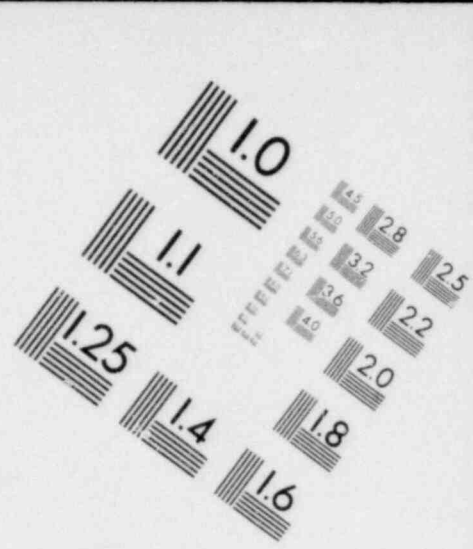
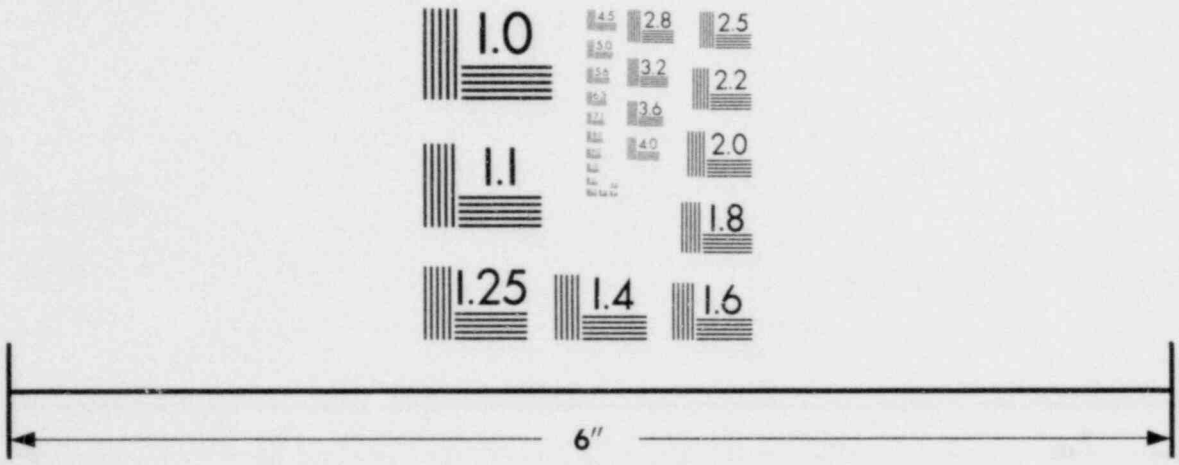
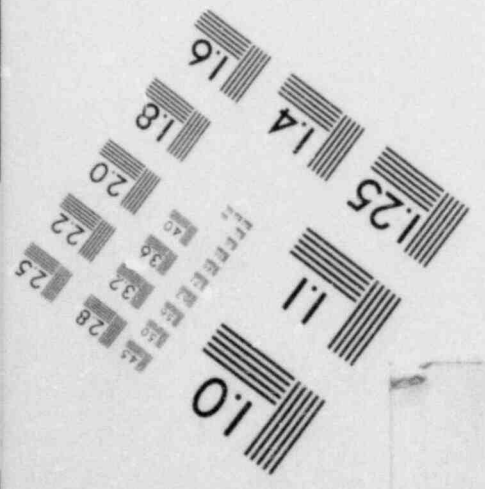
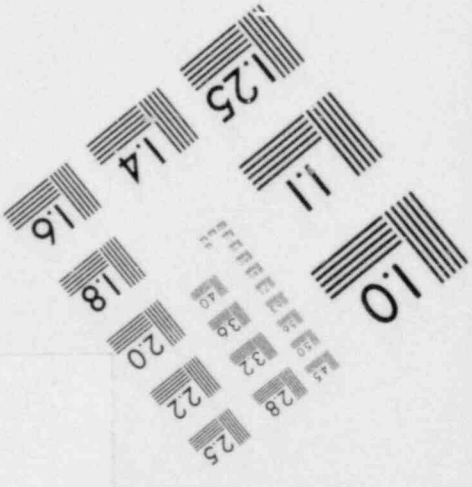


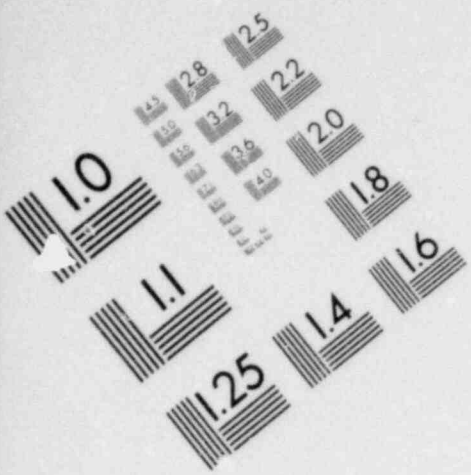
IMAGE EVALUATION
TEST TARGET (MT-3)



MICROCOPY RESOLUTION TEST CHART







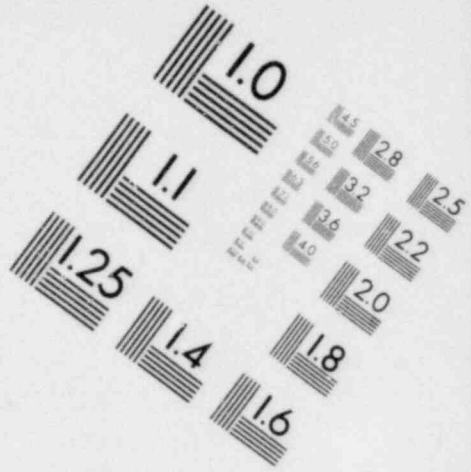
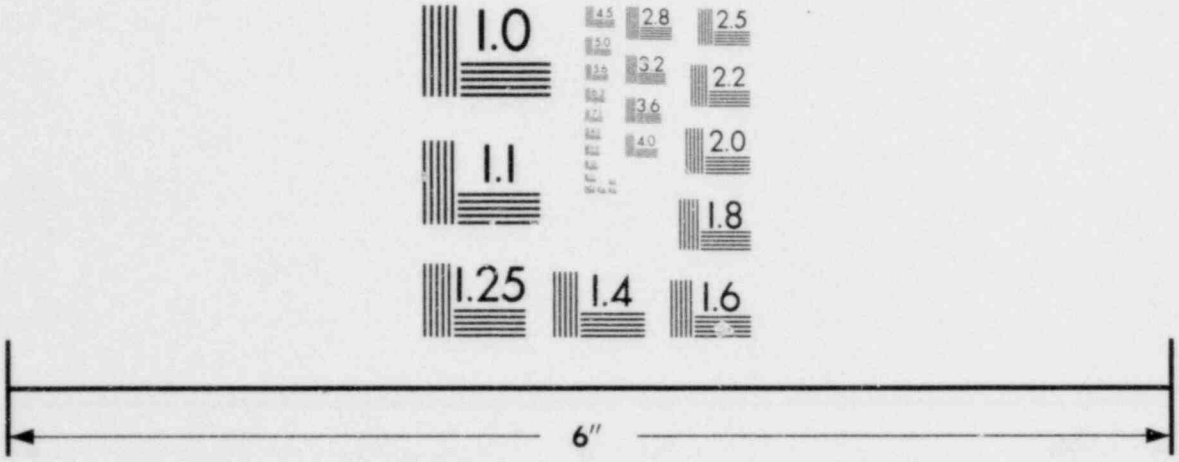
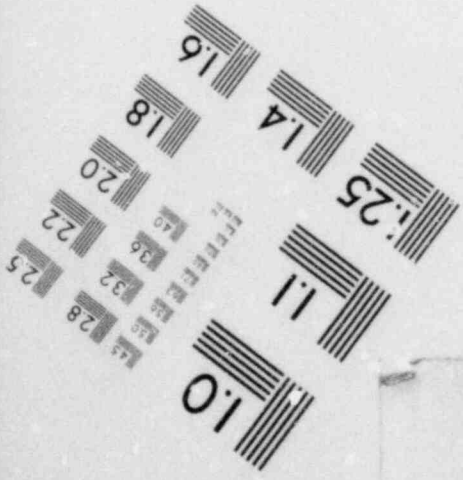
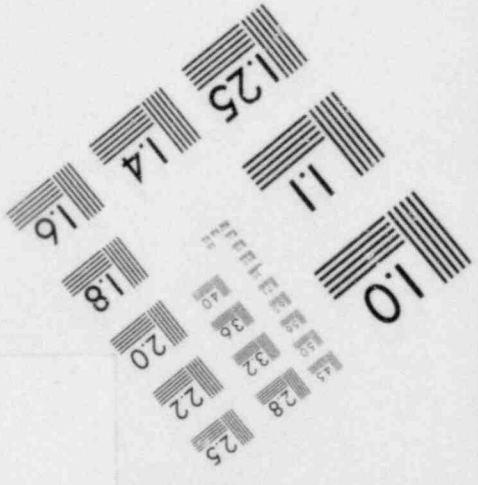


IMAGE EVALUATION
TEST TARGET (MT-3)



MICROCOPY RESOLUTION TEST CHART





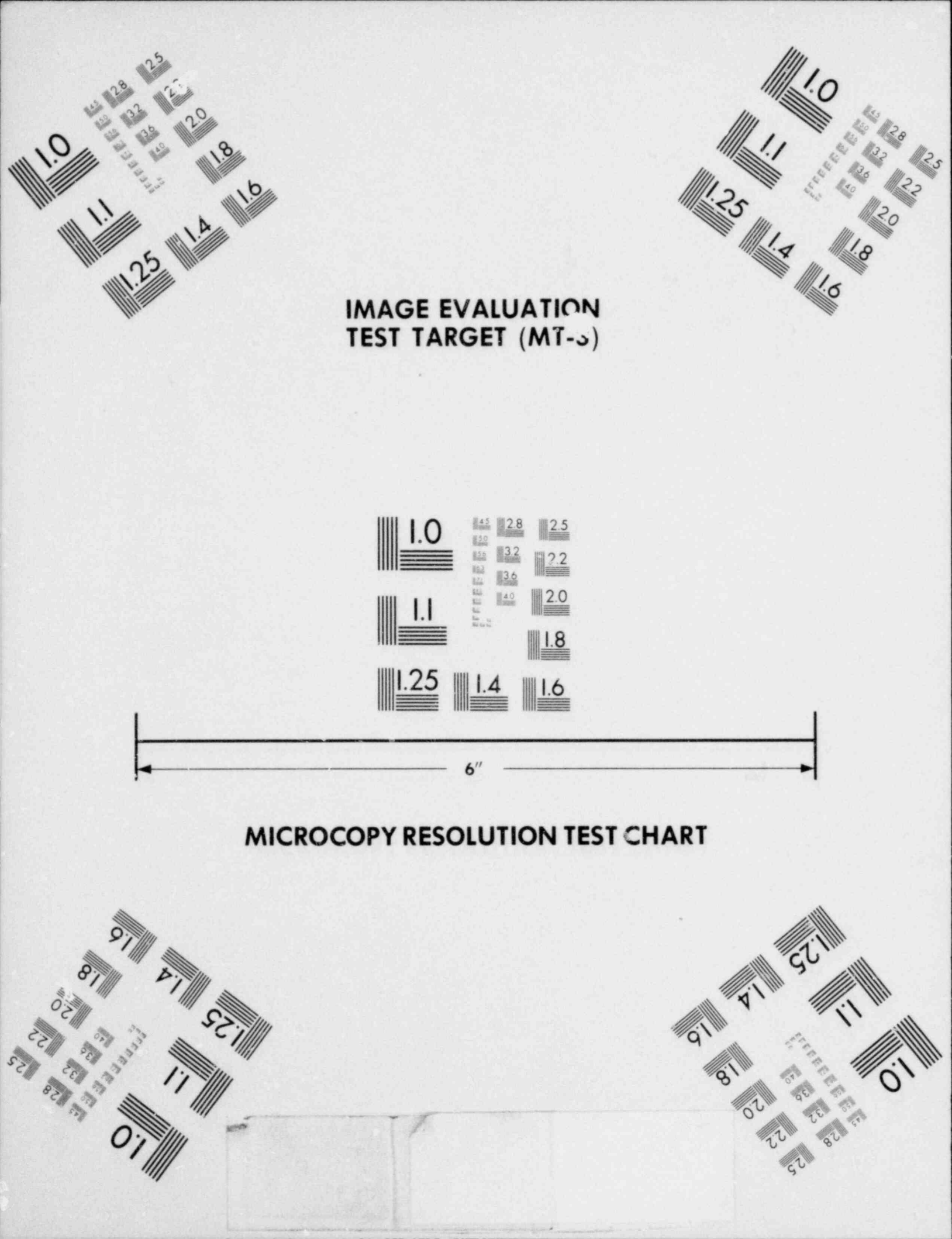
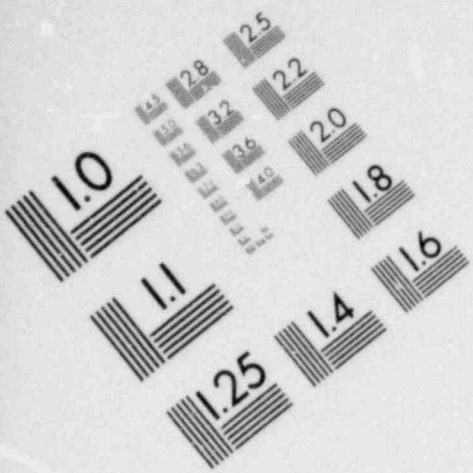


IMAGE EVALUATION
TEST TARGET (MT-3)
1.0
1.1
1.25
1.4
1.6
2.8
2.5
3.2
2.2
3.6
2.0
4.0
1.8
6"
MICROCOPY RESOLUTION TEST CHART



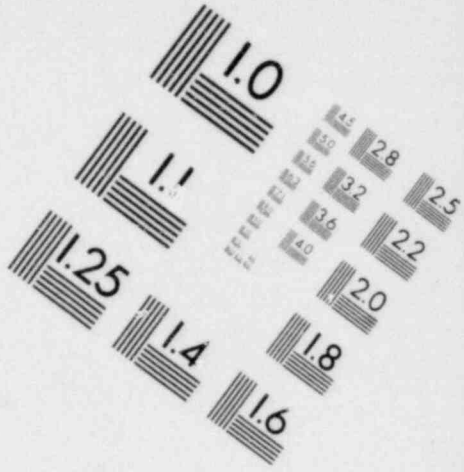
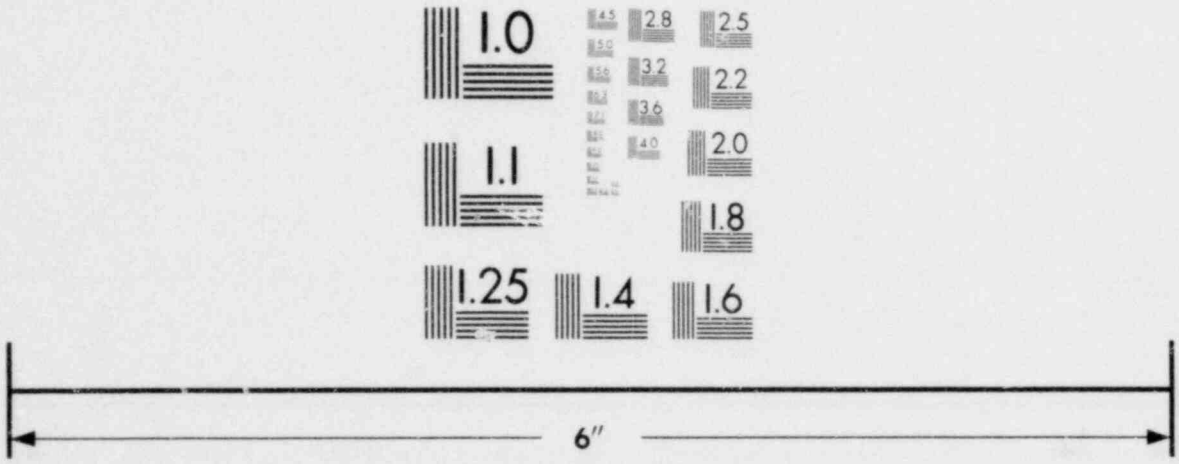


IMAGE EVALUATION
TEST TARGET (MT-3)



MICROCOPY RESOLUTION TEST CHART