UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In re

STATEMENT OF POLICY:
FURTHER COMMISSION GUIDANCE FOR
POWER REACTOR OPERATING LICENSES

ORDER

The Commission being equally divided on a request filed by the Union of Concerned Scientists and Shoreham Opponents Coalition for a stay of the Commission's "Statement of Policy: Further Commission Guidance for Power Operating Licenses," 45 Fed. Reg. 41738 (June 20, 1980), the stay request is effectively denied. Separate views follow from Chairman Ahearne and Commissioner Hendrie; Chairman Ahearne; Commissioner Gilinsky; and Commissioner Bradford.

It is so ORDERED.

For the Commission,

SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, D. C.,
this 3d day of November, 1980

SEPARATE VIEWS OF CHAIRMAN AHEARNE AND COMMISSIONER HENDRIE:

Recently the Nuclear Regulatory Commission issued a Statement of Policy entitled "Further Commission Guidance for Power Reactor Operating Licenses." 45 Fed. Reg. 41738 (June 20, 1980). In essence, the Statement of Policy announced the intent of the Commission that in future actions on nuclear power reactor operating license applications, it would look to the list of "Requirements for New Operating Licenses" found in NUREG-0694 (June 1980) as setting forth requirements for new operating licenses which should be "necessary and sufficient for responding" to the accident at Three Mile Island ("TMI"). Consequently, current operating license applications were to be judged against present NRC regulations, as supplemented by these TMI-related requirements. Insofar as certain of the provisions of NUREG-0694 seek to impose operating license requirements beyond those necessary to show compliance with the regulations:

> although the [licensing and appeal] boards may entertain contentions asserting that the supplementation is unnecessary (in full or in part) and they may entertain contentions that one or more of the supplementary requirements are not being complied with; they may not entertain contentions asserting that additional supplementation is required. Id.

The Commission received a request for a stay of the effectiveness of the Statement of Policy from the Union of Concerned Scientists and the Shoreham Opponents Coalition (July 25, 1980). For the reasons stated below, we believe this request should be denied.

The core of the argument for a stay is the contention that movants have a strong likelihood of success on the merits of their challenge to the promulgation of the Statement of Policy. This is because, in their view, the Statement of Policy has inproperly cut off the rights of intervernors to raise "contentions arguing that the public health and safety requires more than the items contained in NUREG-0694." This assumption is incorrect.

Under the doctrine set forth in Maine Yankee Atomic Power Co. (Maine Yankee Nuclear Power Plant, Unit 2), ALAB-161, 6 AEC 1003 (1973), affirmed 7 AEC 2 (1974), affirmed sub nom Citizens for Safe Power v. NRC, 524 F.2d 1291 (D.C. Cir. 1975), intervenors have been precluded from raising before the Commission and the Licensing and Appeal Boards the issue of whether, on generic grounds not unique to a particular plant, something more than compliance with NRC regulations can be a prerequisite to obtaining an operating license.[1/] Although 10 C.F.R. § 2.758 provides some flexibility, that rule allows a challenge to existing rules and the imposition of stricter requirements only on a case-by-case basis when there are "special circumstances with

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1/ The Maine Yankee Atomic Power Co. case did recognize the possibility that where there are no regulations at all that address a particular subject matter, boards might fill this regulatory "gap" by imposing requirements beyond agency regulations. See Trustees of Columbia University in the City of New York, ALAB-50, WASH-1218 320 (May 18, 1972). Otherwise, Maine Yankee Atomic Power Co. stands for the proposition that compliance with the NRC's regulations is a sufficient basis upon which to grant or license.

respect to the subject matter of the particular proceeding."[2/] The Statement of Policy imposes no further restrictions, not already existing under Maine Yankee and rule 2.758, on intervenors' rights to raise issues before Licensing and Appeal Boards, or the Commission. Thus, the Statement of Policy does not cut off any rights which intervenors previously had. In fact, even though Maine Yankee suggests that intervenors were not even able to raise contentions before the Commission itself concerning the inadequacy of NRC regulations (absent a regulatory "gap"),[3/] the Statement of Policy opens up the possibility that the Maine Yankee ruling might be waived at the Commission level in individual cases.[4/]

2/ It should be noted that rule 2.758 does not foreclose the Commission itself from initiating the imposition of additional requirements, beyond present agency regulations, prior to granting a license. That rule addresses only the question of the circumstances under which a party to a licensing proceeding may "challenge" a Commission regulation. The Commission's self-initiated additional requirements find amply support elsewhere in the rules. See, e.g., 10 C.F.R. § 50.40(c), 50.50, 50.109(a).

3/ The movants seek to find support for their view that Licensing Boards must entertain challenges to the adequacy of our rules in the Court of Appeals affirmance of the Maine Yankee decision. They point to the court's statement that "in the absence of some indication or showing on a case-by-case basis to the contrary, ... it may be found that facilities complying with the NRC rule[s]" may be licensed under the Atomic Energy Act. Significantly, the court did not indicate that the case-by-case showing was required by statute to be raised initially at the licensing board level. Moreover, this statement was made in the context of the "gap" argument, so that the court's reference to the possibility of "some indication or showing on a case-by-case basis" should be read as leaving to intervenors the right to show a regulatory "gap," or perhaps a particular plant-specific problem pursuant to 10 C.F.R. § 2.758, and not the right to show some general inadequacy with Commission rules.

4/ Testifying before the Subcommittee on Environment, Energy and Natural Resources of the House Committee on Government Operations (July 2, 1980), Chairman Ahearne stated that the Statement of Policy dealt only with the Licensing and Appeal Boards (Tr. at 22).

Although it may not have been clear in the Statement of Policy itself that this avenue is open, recent Congressional testimony by Chairman Ahearne confirms this interpretation.[5/] Whether this approach would be pursued on an interlocutory basis or only after an initial decision will, like application of the rest of the Statement of Policy, have to await developments in a particular case.[6/]

Finally, we do not believe that movants have demonstrated that the Statement of Policy is likely to be viewed as having, as they allege, "the same effect as that of a rule or regulation." The Statement of Policy is only an "announce[ment of] what the agency seeks to establish as policy. A policy statement announces the agency's tentative intentions for the future." Pacific Gas & Electric Co. v. FPC, 506 F.2d 33, 38 (D.C. Cir. 1974). The Commission has changed nothing by the Statement of Policy itself, for it is a "pronouncement [which] acts prospectively ...." American Bus Ass'n. v. U.S., ___ F.2d ___ (D.C. Cir. No. 79-1207, June 25, 1980), slip op. at 9. The Statement of Policy genuinely leaves the agency free to exercise discretion. Regular Common Carrier Conference v. U.S., ___ F.2d ___ (D.C. Cir. No. 79-1249, June 30, 1980). The only aspect of the Statement of Policy which could be

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5/ At the July 2 hearing, Chairman Ahearne also stated:

> 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.

Thus, to the extent that intervenors present sound reasons for the Commission to address the merits of their contentions, and thereby to waive the Maine Yankee ruling, the Commission should consider all relevant matters -- e.g., the pleadings before it, NUREG 0694, etc. -- in determining whether the contention should be litigated.

6/ This avenue is in addition to the right that parties have always had and continue to have to raise issues on an interlocutory basis under 10 CFR §2.758 when a particular case involves "special circumstances."

consider by some as a "binding norm" that would adversely affect intervenors, Pacific Gas & Electric Co., supra, 506 F.2d at 39, is the statement that the boards "may not entertain" certain contentions which would result in imposing on licensees requirements beyond those contained in the NRC regulations and NUREG-0694. However, as we have stated, this already exists as a matter of case law in Maine Yankee, and under rule 2.758, and the Statement of Policy merely announced the non-startling conclusion that the Commission would not expect boards to veer from precedent or regulation in this regard.7/ In any event, the Commission has called the Statement of Policy "guidance" for the boards. 45 Fed. Reg. at 41739, 41740.

Although the movants' failure to show likelihood of success on the merits is an adequate ground to deny a stay, it is also useful to address their contention that they will suffer irreparable harm absent a stay. In light of the fact that the Statement of Policy itself effects no change, finally determines no rights or duties and promulgates no new binding precedent, there is nothing to stay. Any harm which might occur could occur only within the context of a particular adjudication when, and if, the Statement of Policy is

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7/ Theoretically, parties have been free to ask that boards refuse to follow Maine Yankee and instead entertain contentions that challenge the adequacy of NRC regulations. The "guidance" offered in the Statement of Policy would eliminate this possibility, if boards followed that guidance. However, it is clear that this theoretical possibility has always been only that, and that in practice boards could not be expected to ignore or overturn the precedent which limits their options. Thus, the Statement of Policy cannot be said to have made any real change in Commission policy or practice in this regard. Even if this fictional change is considered relevant and to be binding -- and not mere guidance -- it is a change in agency practice or procedure which is exempt from notice-and-comment rulemaking. 5 U.S.C. § 553(b)(3)(A).

applied, but see footnote 5, supra, although we hasten to reiterate that the Statement of Policy gives intervenors more, not fewer, opportunities to litigate contentions. Even if intervenors are harmed by the Statement of Policy, however, we do not think that the failure to accept contentions at the licensing board level can be considered as subjecting the movants to irreparable harm. See, e.g., Sampson v. Murray, 415 U.S. 61, 90 (1974). Cf. Ecology Action v. U.S.A.E.C., 492 F.2d 998 (2d Cir. 1974); Northern States Power Co. (Tyrone Energy Park, Unit 1), ALAB-492, 8 NRC 251 (1978).8/

8/ We have also considered movants' arguments that granting of the stay is more likely to result in fewer delays and consequently less harm to the Commission and to licensees than if the Commission denied the stay and that the public interest would be best served by granting of the stay. We find these arguments lacking factual support and otherwise unpersuasive.

Additional separate views of Chairman Ahearne:

I continue to support the approach outlined in the policy statement--not because I believe it is the best approach that could be devised, but because it is the best of the options I found available to me given the interaction among the Commissioners and advice from the General Counsel.

As Commissioner Bradford pointed out in a recent speech* there is "a fundamental disarray in the NRC's regulatory processes." I agree there is a disarray and with his conclusion that:

> "The disarray that I refer to has to do with a lack of synchronization among the NRC's legal requirements, its technical review processes, its inspection and enforcement efforts, and what is really going on in the nuclear power plants in operation and under construction around the country.
>
> "For nuclear regulation to be effective, these four areas must be closely linked, with each one having an understanding of the needs of the other and a quick and efficient method of appraising the significance of events in the other three spheres."

In attempting to deal with the Three Mile Island accident, the Commission went through an extensive evaluation of the consequences of the accident for licensing in general. The product and the process were far from perfect, but they were entitled to be given some weight. It made no sense for a board in an adjudicatory proceeding to start from a blank slate and ignore the effort which was reflected in the Action Plan and the resulting Commission decisions. As we said in the Policy statement:**

> "There are several reasons for this. First, this represents a major effort by the staff and Commissioners to address an almost overwhelming number of issues in a coherent and coordinated fashion. It is extremely doubtful this process can be reproduced in individual proceedings.

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* "Reasonable Assurance, Regulation, and Reality," address by Commissioner Peter A. Bradford before the ALI-ABA Course of Study on Atomic Energy Licensing and Regulation (September 24, 1980).

** "Further Commission Guidance for Power Reactor Operating Licenses; Statement of Policy," 45 Fed Reg 41738, 41740 (June 20, 1980).

> Second, the NRC does not have the resources to litigate the entire Action Plan in each proceeding, nor does it believe it would be a responsible decision to do so. Third, many of the decisions involve policy rather than factual or legal decisions. Most of these are more appropriately addressed by the Commission itself on a generic basis than by an individual licensing board in a particular case."

Based on these considerations I proposed the following approach:

> "Consequently, in determining whether the health and safety of the public would be adequately protected, the Boards are to consider whether a license application complies with the regulation as supplemented by the operating license requirements. 12/ If a party to a proceeding alleges that a longer term item or any other item must be implemented in a given case to assure safety in light of TMI accident considerations, a Board may give consideration to such items if it finds that a party is able to show cause why the issue should be litigated. The Commission intends that this require a party to identify why its position raises a significant issue and how its position might alter the results reached in the Action Plan in some material respect. 13/
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> "12/ Cf. Maine Yankee Atomic Power Company (Maine Yankee), CLI-74-2, 7 AEC 2, 4 (1974) (the Atomic Energy Act does not require consideration of residual risk after Commission requirements are met).
> "13/ Cf. Wolf Creek, 7 NRC 320, 338 (1978) (analogous standard)."

Under this approach contentions based on the Three Mile Island accident would be litigable regardless of their relation to existing regulations. However, there would be a substantial threshold which must be met* because of the Commission's effort in developing the Action Plan. I was willing to allow discussion of the decisions we had reached, but only if a party could show it had something serious to discuss. Unfortunately the General Counsel advised that this approach was illegal.

* Compare Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980).

Given that I was unable to adopt my preferred approach, I agreed to the approach outlined in the policy statement because it accommodated my concerns better than the other options which were available.

I believe this is a very good example of the problem identified by Commissioner Bradford. It is unfortunate that we were not able to better link the adjudicatory proceedings to other efforts in the agency.

SEPARATE VIEWS OF COMMISSIONER GILINSKY:

For the same reasons that I disapproved of the Policy Statement (see attachment), I would grant a stay of that portion of the Policy Statement which limits the ability of the parties to challenge the sufficiency of the new requirements.

COMMISSIONER GILINSKY'S SEPARATE VIEWS
REGARDING THE COMMISSION'S POLICY STATEMENT --
COMMISSION GUIDANCE FOR POWER REACTOR OPERATING LICENSES

I regard the Action Plan as a directive to the staff from the Commission acting in its supervisory capacity and expect that it will be given appropriate deference by the adjudicatory boards. However, in view of the fact that the Action Plan and the NTOL list are not regulations, and are not the result of a public proceeding, they cannot be given the weight of rules. Nor does the fact that the Commission spent a great deal of time developing the Action Plan change the situation. There were many items to deal with and the Commission did not spend much time on each of them and very little on some. Moreover, as Commissioner Bradford has pointed out, the industry has had extensive opportunities to comment on the Action Plan and to obtain changes, which in almost all cases have resulted in a reduction of the requirements initially proposed by the staff. To now limit litigation to the issues of whether these requirements have been satisfied or are excessive, and to exclude discussion of whether they go far enough, is a manifestly unfair and unwise policy.

SEPARATE VIEWS OF COMMISSIONER BRADFORD

I would grant the stay requested by UCS and use the time to reshape this unfortunate document into something legal and sensible. The Commission has, by its subsequent "clarifications" conceded the illegality of the Policy Statement as written.[1/] In its place, it has created a procedural

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1/ The illegality and unwisdom of the June 16 Policy Statement are discussed in my original dissent. Some problems with the modifications introduced in subsequent Commission correspondence and testimony are set forth in my July 2, 1980 testimony before the House Subcommittee on Environment, Energy and Natural Resources, Committee on Governnment Operations. The relevant portions of that testimony are as follows:

> "In its testimony before this Committee and in recent letters sent out explaining the Policy Statement, the Commission has, for the first time, stated that 'should any question be raised before the Commission itself . . . 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.' However, as to any such contention, the state of the record before the Commission will be barren indeed. The Commission has assured this by having the policy statement require the exclusion of the contention itself and all testimony, discovery and cross-examination that would have supported it. . . .
>
> "While the clarified form is not quite so offensive as the original policy statement, it is a terribly cumbersome and confusing way of dealing with issues of this sort. It would have been far better to have left this set of issues subject to litigation before licensing boards applying normal rules of evidence as to relevance and materiality. However, if the new policy is to be adhered to, it should provide for the Commission to review issues referred to it on an interlocutory basis.
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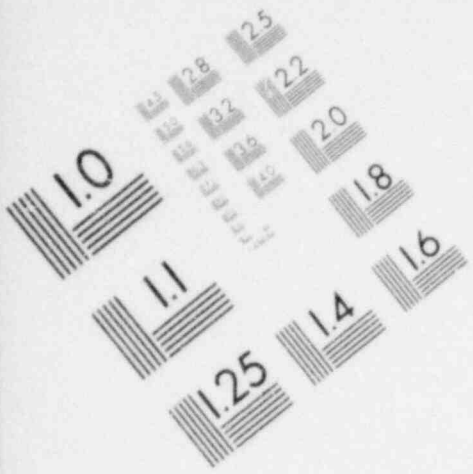
> "In the policy statement itself the Commission seeks to conceal the nature of its action behind an assertion that it 'does not in any way diminish intervenors' present rights.' That is not entirely true, but, it is entirely beside the point. After Three Mile Island, the Kemeny Report, and other studies the Commission could not imaginably have continued to license on the basis of its pre-TMI regulations alone. It would have been jeered out of every legislative or judicial forum that it appeared before. Hence, its benign assertion that its policy statement is 'in the direction of permitting parties to raise more issues, not fewer' suggests nothing so much as the shopworn political adage that 'When you've got an angry mob after you, the thing to do is to walk a little faster and pretend you're leading a parade.'



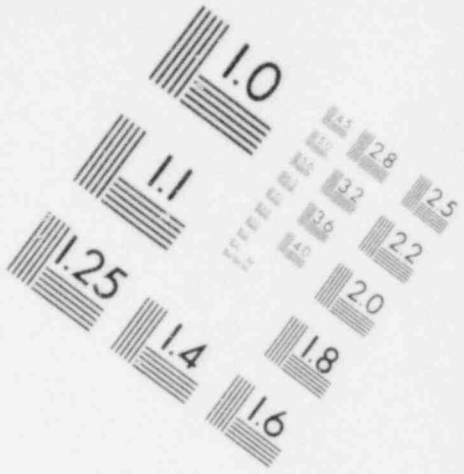


IMAGE EVALUATION
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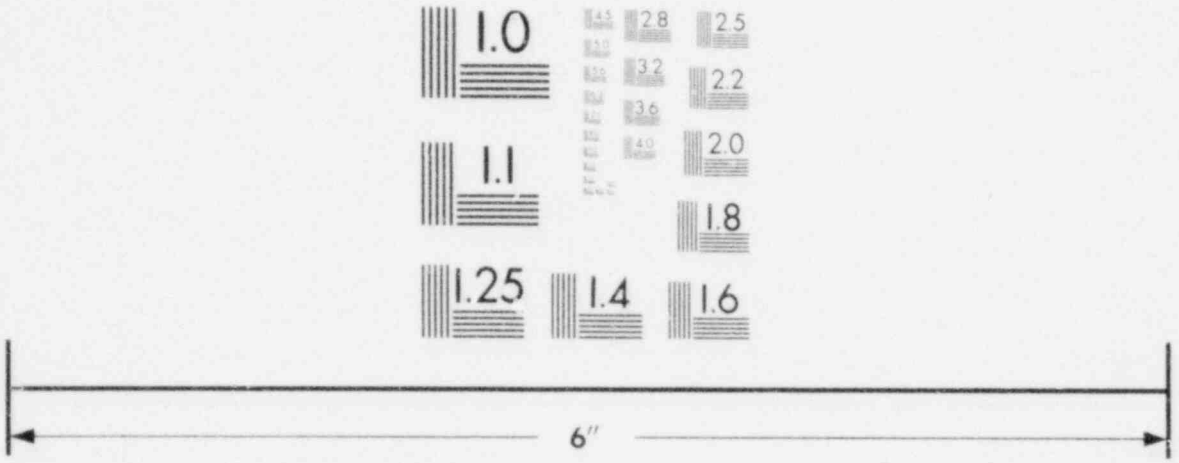

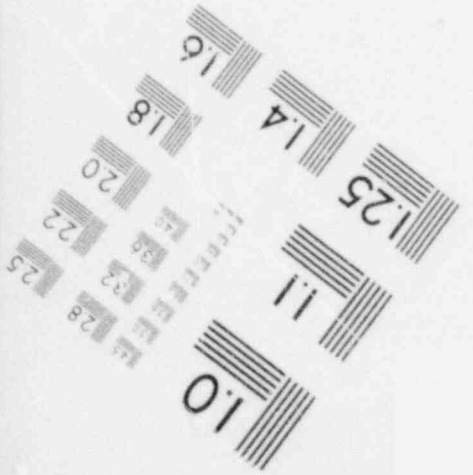

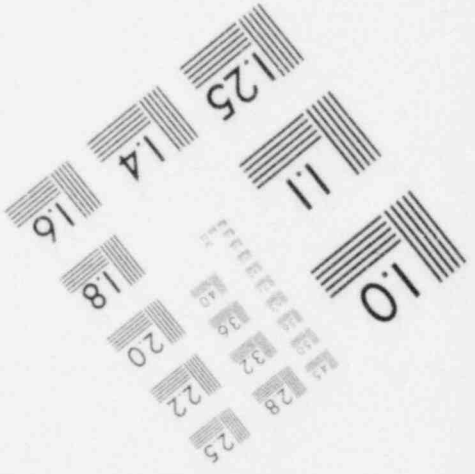

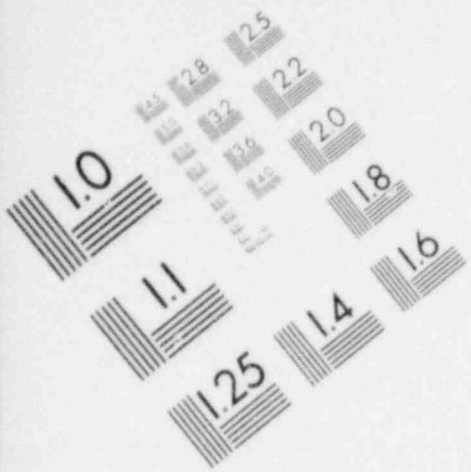

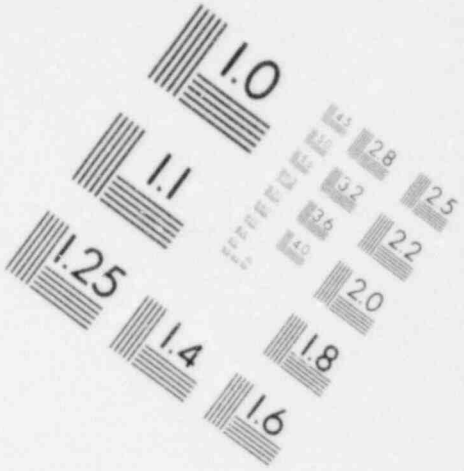

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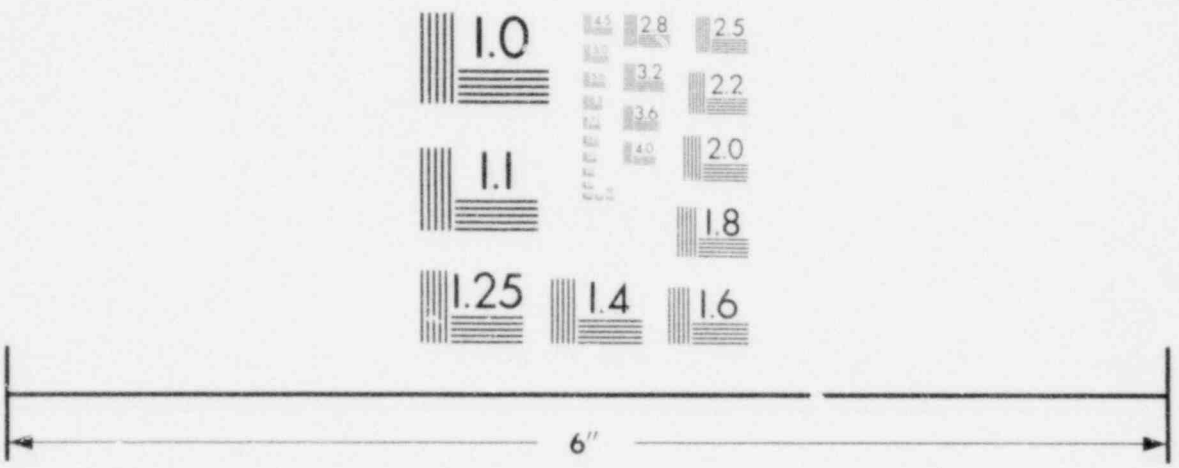

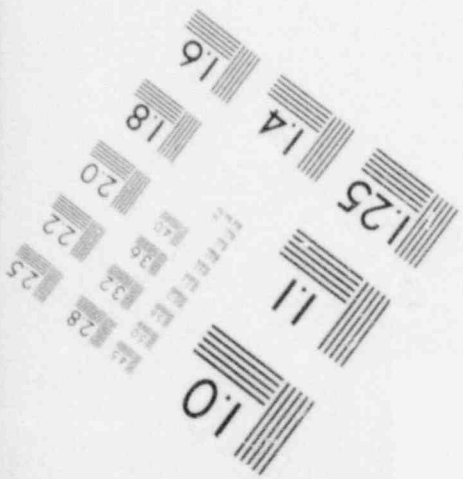

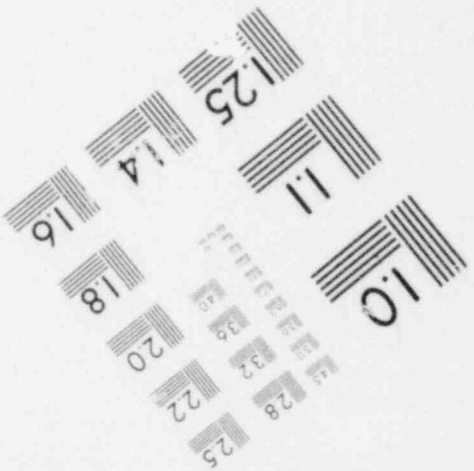

maze for the Boards, the parties, and ultimately the NRC.[2]

The best remedy would be to repeal the June 16 document and provide

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1/ (cont'd)
"The Commission is not expanding the rights of parties to raise questions. The accident at Three Mile Island did that. . . .

"The fundamental mistake being made by the Commission in this and other recent cases (notably the curtailment of the hearing offered in the NFS-Erwin matter and the Commission decisions in the Marble Hill and Point Beach cases as well as the Commission's effort to divest itself of export licensing responsibilities) is that all of these actions tend in the direction of reducing the general public's ability effectively to scrutinize matters of considerable concern to it. . . .

"I'm under no illusions as to the ability of under-funded intervenors to contribute extensively to the resolution of complex technical issues. Nor do I doubt that on a few occasions hearing rights will be abused by those seeking the delay of the licensing of a nuclear power plant, especially if the Commission continues to arouse the public through the kind of treatment it has meted out in the last few months. However, balanced against allegations of intervenor ineptitude or delay must be a realization that it would only take one group in one proceeding to raise an issue in a manner that prevented a Browns Ferry or Three Mile Island-type of accident to repay all of the cost of delay in all proceedings many times over. Furthermore, the costs to nuclear power that stem from our agency showing that it either fears or is impatient with serious questioning from concerned citizens or from intervenor groups is something far beyond the cost of the minimal delay that would be likely to occur in tightly run hearings. The public's right to be heard effectively on these questions is not to be treated as mere window dressing, dreamed up by one set of lawyers to be undone by the next. It is fundamental to acceptable and sensible governmental decisions. That is why the recent trend in Commission decisions, culminating in the policy statement and the Erwin matter, is so important and so wrong."

2/ I have some sympathy with Chairman Ahearne's desire to erect a "threshold" of some sort to the litigation of items in the Action Plan. However, such a threshold would exist if the Commission merely sanctioned the Action Plan as the determinent of the staff position. As I pointed out in my original dissent, "as a practical matter, this would have made it a document of considerable influence. In uncontested cases, it would clearly have governed. Intervenors in contested cases would have been taking on a very heavy burden in trying to go against a staff position and convince the Commission to change its mind on a document that it had already approved."

standards for consideration of issues going beyond our regulations by the Boards. The next best remedy would be to allow for interlocutory treatment of these questions by the Commission.

It is worth noting that the Commission has recently completed a set of significant modifications of many of the requirements that it proclaimed "necessary and sufficient" on June 16. These modifications are now out for public comment and could conceivably be modified again. They are clearly not graven in stone, and we should stop treating them as if they were.