14764

March 7, 1994

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'94 MAR -9 P3:22

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY	)	Docket No. 50-440-OLA-3
	)	
	)	(Material Withdrawal Schedule)
(Perry Nuclear Power Plant, Unit 1)	)	
	)	

NRC STAFF RESPONSE TO INTERVENORS' MOTION FOR SUMMARY DISPOSITION

INTRODUCTION

On February 7, 1994, Intervenors Ohio Citizens for Responsible Energy, Inc. ("OCRE") and Susan L. Hiatt filed a "Motion for Summary Disposition" ("Motion"), in accordance with an Order issued by the Atomic Safety and Licensing Board ("Licensing Board") on December 27, 1993. For the reasons set forth below and in the attached Affidavit of Barry J. Elliot, Jack R. Strosnider and Christopher I. Grimes ("Affidavit"), the NRC Staff ("Staff") opposes the Motion and recommends that it be denied.

BACKGROUND

On March 15, 1991, Cleveland Electric Illuminating Company, on behalf of the Licensees for the Perry Nuclear Power Plant, submitted an application to amend the plant's Technical Specifications (TS), whereby the Reactor Vessel Material Surveillance Program - Withdrawal Schedule (TS Table 4.4.6.1.3-1, pg. 3/4 4-22) would be relocated from the TS to

DS07

the facility's Updated Safety Analysis Report (USAR),[1] in accordance with Generic Letter (GL) 91-01.[2] Pursuant to the Licensees' request, a notice of consideration of issuance and opportunity for hearing was published in the *Federal Register* on July 24, 1991.[3]

On August 23, 1991, OCRE and Ms. Hiatt filed a "Petition for Leave to Intervene and Request for a Hearing" ("Petition"), in which they requested a hearing on that portion of the proposed amendment which would remove the Withdrawal Schedule from the TS and relocate it in the USAR (Petition at 4-5). OCRE and Ms. Hiatt indicated that they sought to raise a single "pure issue of law" (*id.* at 5); they agreed with the Licensees and Staff that the challenged portion of the proposed amendment "is purely an administrative matter which involves no significant hazards considerations" (*id.*); and they proposed a single contention for litigation.[4] The Licensees and Staff filed responses opposing the Petition on the grounds that OCRE and

---

[1] Letter from Michael D. Lyster to Document Control Desk, NRC, dated March 15, 1991. As indicated therein, this request constituted a supplement to a previously filed application for amendment, dated September 14, 1990, which had requested revision of the reactor vessel pressure-temperature limits.

[2] Generic Letter (GL) 91-01, "Removal of the Schedule for the Withdrawal of Reactor Vessel Material Specimens from Technical Specifications," dated January 4, 1991.

[3] "Notice of Consideration of Issuance of Amendment to Facility Operating License and Proposed No Significant Hazards Consideration Determination and Opportunity for Hearing," 56 Fed. Reg. 33950, 33961-62 (July 24, 1991).

[4] As originally formulated, the Contention asserted (Petition at 5):

> The Licensees' proposed amendment to remove the reactor vessel material specimen withdrawal schedule from the plant Technical Specifications to the Updated Safety Analysis Report violates Section 189a of the Atomic Energy Act (42 USC 2239a) in that it deprives members of the public of the right to notice and opportunity for hearing on any changes to the withdrawal schedule.

Ms. Hiatt had failed to demonstrate standing to intervene, and a reply thereto was then filed by OCRE and Ms. Hiatt in the form of an amended petition for leave to intervene.[5]

On March 18, 1992, the Licensing Board issued a Memorandum and Order in which it denied the request for hearing, on the grounds that the Petitioners had failed to demonstrate injury-in-fact to an interest which may be affected by the proceeding and that they had therefore failed to demonstrate standing to intervene. *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), LBP-92-4, 35 NRC 114 (1992). On September 30, 1993, on appeal by OCRE and Ms. Hiatt, the Commission reversed the Licensing Board's decision. *Id.*, CLI-93-21, 38 NRC 87 (1993).[6] The Commission held that OCRE and Ms. Hiatt had made a sufficient showing of standing to intervene, subject to their submission of at least one admissible contention. *Id.* at 93-96. Further, the Commission held that they "should have an opportunity to raise and have resolved, subject to our rules of practice on the admission and litigation of contentions, whether the removal of the withdrawal schedule from the technical specifications

---

[5] *See* "Licensees' Answer to Ohio Citizens for Responsible Energy, Inc. and Susan L. Hiatt Petition for Leave to Intervene and Request for Hearing," dated September 6, 1991; "NRC Staff Answer to Petition for Leave to Intervene Filed by Ohio Citizens for Responsible Energy and Susan L. Hiatt," filed September 12, 1991; and "Petitioners' Amended Petition for Leave to Intervene," dated November 22, 1991.

[6] Subsequent to the Licensing Board's decision, but prior to the Commission's issuance of CLI-93-21, the Staff issued the requested amendment. *See* Letter from James R. Hall (NRC) to Michael D. Lyster, dated December 18, 1992, issuing Amendment No. 45 to the Perry operating license; and "Notice of Issuance of Amendment to Facility Operating License," 58 Fed. Reg. 5436, 5438 (Jan. 21, 1993).

is indeed an unlawful act." *Id.* at 96.[7] Accordingly, the Commission remanded the proceeding to the Licensing Board for consideration of OCRE and Ms. Hiatt's contention. *Id.*

On November 12, 1993, OCRE and Ms. Hiatt filed a "Supplemental Petition for Leave to Intervene," which set forth a reformulated version of their contention, as follows:

> The portion of Amendment 45 to License No. NPF-58 which removed the reactor vessel material specimen withdrawal schedule from the plant Technical Specifications to the Updated Safety Analysis Report violates Section 189a of the Atomic Energy Act (42 USC 2239a) in that it deprives members of the public of the right to notice and opportunity for a hearing on any changes to the withdrawal schedule.[8]

In separate responses filed on December 13, 1993,[9] the Licensees and Staff indicated that they did not object to the admission of the contention, and requested that the Licensing Board establish a schedule for addressing the merits of the contention.

---

[7] The Commission found that OCRE and Ms. Hiatt had provided a nexus between their asserted loss of procedural rights under section 189a of the Atomic Energy Act and their asserted health and safety interests, sufficient to establish standing to intervene. CLI-93-21, *supra,* 38 NRC at 95. The Commission stated, "a fair reading of the Petitioners' claims indicates that, at bottom, OCRE and Ms. Hiatt fear that if they are deprived of the opportunity to challenge future proposals to alter the withdrawal schedule, the surveillance of the Perry reactor vessel may become lax and prevent detection of a weakened reactor vessel, and ultimately result in an accidental release of radioactive fission products into the environment if the vessel should fail." *Id.* at 94. The Commission observed, "[t]he material condition of the plant's reactor vessel obviously bears on the health and safety of those members of the public who reside in the plant's vicinity. *Id.* at 96.

[8] "Petitioners' Supplemental Petition for Leave to Intervene," dated November 12, 1993, at 1. The Supplemental Petition was filed pursuant to an Order issued by the Licensing Board on October 18, 1993, which required OCRE and Ms. Hiatt to set forth their contentions "in accordance with 10 C.F.R. § 2.714(b)(1)" and directed them to "ensure that for each of their contentions they set forth any and all factual predicates and any and all subsidiary legal issues . . . ." Order of October 18, 1993, at 2.

[9] "NRC Staff Response to Contention Submitted by OCRE and Susan Hiatt," dated December 13, 1993; "Licensees' Answer to Ohio Citizens for Responsible Energy, Inc. and Susan L. Hiatt Supplemental Petition for Leave to Intervene," dated December 13, 1993.

By Order dated December 27, 1993, the Licensing Board admitted the Intervenors' contention, directed OCRE and Ms. Hiatt to file a motion for summary disposition addressing the merits of the contention, and posed three questions for the parties to answer in their pleadings.[10] On February 16, 1994, the Licensing Board issued a further Order providing an opportunity for the Licensees to file a cross-motion for summary disposition.[11]

For the reasons set forth below and in the attached Affidavit, the Staff submits that the Intervenors' contention is without merit and that their motion for summary disposition should therefore be denied.

DISCUSSION

In their Motion, the Intervenors state that the contention "involves a pure issue of law and that there are no factual disputes to be heard." Motion at 1.[12] The Intervenors state that the withdrawal schedule "has traditionally been part of the Technical Specifications," and prior to its removal from the TS it could not be changed without notice in the *Federal Register* and opportunity for hearing; after its removal from the TS, however, Intervenors complain that the

---

[10] "Order (Admitting Contention and Establishing Schedule)," dated December 27, 1993, at 2-3. The Licensing Board's questions are set forth and addressed *infra* at 29-31, and in the attached Affidavit at 9-11.

[11] Order dated February 16, 1994, at 1. The Licensing Board also amended the schedule established in its prior Order of December 27, 1993, to reflect the Licensees' filing of a cross-motion for summary disposition; and the schedule was further revised slightly by Order of March 2, 1994 (granting the Staff's motion for an extension of time).

[12] Attached to Intervenors' Motion is a "Statement of Material Facts as to Which No Genuine Issue Exists to be Heard." The Staff does not contest the Intervenors' assertion that their contention raises only a legal issue and that no factual issues exist which must be resolved in hearing. The Staff does, however, oppose their Motion on legal grounds. In this regard, the Staff does not contest the facts recited by Intervenors in Paragraphs 1, 2 or 3 of their Statement of Material Facts; the Staff does contest Paragraphs 4 and 5 of that Statement, which contain assertions of law rather than facts, for the reasons set forth herein.

Licensees may change the schedule "without any notice or opportunity for [public] participation." *Id.* at 2. The Intervenors further assert that the Staff has retained approval of changes to the schedule pursuant to 10 C.F.R Part 50, Appendix H, Section II.B.3, so that "the only real effect of this amendment is that the public is excluded from the process." *Id.* This, they contend, has the result that any future change to the schedule would constitute a "de facto license amendment," from which the public will be excluded, contrary to the provisions of Section 189a of the Atomic Energy Act. *Id.* at 2, 4.[13]

In support of their Motion, the Intervenors cite *Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1447 (D.C. Cir. 1984), which indicated that Congress has vested in the public "a role in assuring safe operation of nuclear power plants." Motion at 3. Further, they cite the decision in *Sholly v. NRC*, 651 F.2d 780, 791 (D.C. Cir. 1980), in which the Court held that an action which grants a licensee authority to do something it otherwise could not do under the existing license is a license amendment. Motion at 4-5. The Intervenors claim that, while Generic Letter 91-01 "justifies" removal of the withdrawal schedule from the TS "as eliminating an unnecessary duplication of controls" established in 10 C.F.R. Part 50, Appendix H, the amendment contravenes the *UCS* proscription against eliminating public participation on a material issue in the interest of making the process more efficient. *Id.* at 5.

---

[13] The Intervenors also assert that absent any opportunity to request a hearing on future changes to the withdrawal schedule, their sole remedy would be to request a proceeding under 10 C.F.R. § 2.206 -- which they assert fails to provide an opportunity for "meaningful participation" and fails to "measure up to the type of proceeding afforded by Section 189a." Motion at 3.

For the reasons set forth below, the Staff submits that Intervenors' reliance upon the Court of Appeals' *Sholly* and *UCS* decisions is misplaced, and that their contention is without legal merit.

A. Standards Governing The Determination As To Which Matters Must Be Included In A Facility's Technical Specifications.

The requirement that Technical Specifications (TS) be included in the operating license for a nuclear power plant is set forth in section 182a of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2232(a) (the "Act"), and 10 C.F.R. § 50.36, the Commission's regulations which implement the Act. As discussed below, section 182a of the Act and the Commission's regulations contemplate that the TS are to be reserved for those matters as to which the imposition of rigid conditions or limitations on reactor operation is deemed necessary to avoid a situation giving rise to an immediate threat to the public health and safety.

The Appeal Board's decision in *Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 271-74 (1979), provides significant guidance in this regard. There, the State of Oregon had urged that certain matters be included in the plant's TS; in analyzing the matters proposed for inclusion in the TS, the Appeal Board observed that the central question before it was "whether the record establishes that its inclusion in the amended operating license is necessary in order to guard against the contingency of an untoward situation or event bringing about a safety threat of some immediacy." ALAB-531, 9 NRC at 274.

The Appeal Board commenced its analysis in *Trojan* by reviewing applicable requirements of law, beginning with the statutory requirement for technical specifications

contained in Section 182a of the Act. As noted by the Appeal Board, that provision requires, in pertinent part:

> In connection with applications for licenses to operate production or utilization facilities, the applicant shall state such technical specifications, including information of the amount, kind, and source of special nuclear material required, the place of the use, the specific characteristics of the facility, and such other information *as the Commission may, by rule or regulation, deem necessary in order to enable it to find that the utilization or production of special nuclear material* will be in accord with the common defense and security and will *provide adequate protection to the health and safety of the public. Such technical specifications shall be a part of any license issued.*

Id. at 272 (emphasis of the Appeal Board).

The Appeal Board then reviewed the provisions of 10 C.F.R § 50.36, which implemented this statutory directive. As noted by the Appeal Board, § 50.36 requires operating licenses to include technical specifications in accordance with the requirements set forth therein, and "such additional technical specifications as the Commission finds appropriate." *Id.*[14] The Appeal Board further noted that when § 50.36 was amended in 1968, the Commission provided guidance stating that the TS related to technical matters "should consist of those features . . . of the facility that are of controlling importance to safety," identified "by thorough safety analysis of the facility, the analysis being based on current knowledge and understanding of safety needs and techniques."[15]

---

[14] In particular, 10 C.F.R. § 50.36(c) requires that technical specifications "include items" in five specified categories, as follows: (1) safety limits, limiting safety system settings, and limiting control settings, (2) limiting conditions for operation, (3) surveillance requirements, (4) design features, and (5) administrative controls.

[15] *Trojan, supra,* 9 NRC at 273, *citing* "Guide to Content of Technical Specifications for Nuclear Reactors" (November 1968).

Having conducted this review of the place reserved for TS in the Commission's regulatory scheme, the Appeal Board in *Trojan* concluded as follows:

> From the foregoing, it seems quite apparent that there is neither a statutory nor a regulatory requirement that every operational detail set forth in an applicant's safety analysis report (or equivalent) be subject to a technical specification, to be included in the license as an absolute condition of operation which is legally binding upon the licensee unless and until changed with specific Commission approval. Rather, as best we can discern it, the contemplation of both the Act and the regulations is that *technical specifications are to be reserved for those matters as to which the imposition of rigid conditions or limitations upon reactor operation is deemed necessary to obviate the possibility of an abnormal situation or event giving rise to an immediate threat to the public health and safety.*

Id. at 273; emphasis added. As to matters "which have not been found to possess safety implications of sufficient gravity and immediacy to warrant their translation into technical specifications," the Appeal Board pointed out that such matters were adequately addressed by the reporting requirements in 10 C.F.R. § 50.59, and that the Staff is in a position to monitor both facility changes and licensee adherence to FSAR commitments and to take any remedial action that may be appropriate. *Id.* at 273-74.[16]

Shortly after rendering its *Trojan* decision, the Appeal Board had occasion to revisit this issue in *Commonwealth Edison Co.* (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419 (1980). There, the State of Illinois had argued that certain commitments made by the licensee

---

[16] Significantly, with respect to the TS additions sought by the State of Oregon, the Appeal Board found that those matters were not shown "to have such an immediate bearing upon the protection of the public health and safety" as to require "a rigid operational limitation in the form of a technical specification." *Id.* at 278. Further, the Appeal Board found that "fulfillment of the requirements of 10 CFR 50.59 will provide ample safety protection," since any departure from the licensee's commitments "will come to light and be susceptible of further evaluation by the staff well before it might impinge upon prescribed margins of safety." *Id.*

were "voluntary" and unenforceable" under 10 C.F.R. § 50.59, and that the commitments should be incorporated in technical specifications to assure their performance. *Id.* at 422. The Appeal Board rejected this argument, finding that the matters raised by the State "are clearly not of 'immediate importance to the safe operation of the facility.'" *Id.* at 423. In support of this determination, the Appeal Board cited its *Trojan* decision and a subsequent Commission statement, in which the Commission had expressed concern "that the increased volume of technical specifications may be decreasing the effectiveness of these specifications to focus the attention of licensees on matters of more immediate importance to safe operation of the facility." *Id.* at 422-23.[17]

---

[17] The Commission's statement cited by the Appeal Board appears in an Advance Notice of Proposed Rulemaking, "Domestic Licensing of Production and Utilization Facilities; Technical Specifications for Nuclear Power Reactors," 45 Fed. Reg. 45916 (July 8, 1980). As noted by the Appeal Board (12 NRC at 423 n.8), the Commission had further stated as follows:

> While each of the requirements in today's technical specifications plays a role in protecting public health and safety, some requirements have greater immediate importance than others in that they relate more directly to facility operation. These are the requirements that pertain to items which the facility operator must be aware of and which he must control to operate the facility in a safe manner. To a large extent, the relative importance of these requirements, as distinguished from those related to long term effects or concerns, has been diminished by the increase in the total volume of technical specification requirements.
>
> Moreover, the increased volume and detail of technical specifications and the resultant increase in the number of proposed change requests that must be processed, has increased the paperwork burden for both licensees and the NRC staff. . . . For changes involving matters of lesser importance to safety, the processing of a license amendment with the associated increased paperwork has had no significant benefit with regard to protecting the public health and safety.

More recently, the Appeal Board addressed this issue again in *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-831, 23 NRC 62 (1986). There, OCRE had sought to reopen the operating license proceeding, *inter alia*, to contest the relocation of certain elements of the fire protection program from the facility's TS to the Final Safety Analysis Report (FSAR). According to OCRE, all details of the fire protection program were required to be located in the TS by 10 C.F.R. § 50.36. The Appeal Board rejected OCRE's interpretation of 10 C.F.R. § 50.36, stating as follows:

> The short answer is that OCRE's interpretation of section 50.36(c)(2) is wide of the mark. Not only does the section make no specific reference to fire protection programs, but, more important, the Statement of Consideration accompanying its revision in 1968 contains a clear indication of a Commission purpose to limit the scope of operating license technical specifications to "those items that are directly related to maintaining the integrity of the physical barriers designed to contain radioactivity." Manifestly, a fire protection program is not such an item.[18]

Further, the Appeal Board emphasized its view that technical specifications should be reserved for matters which may be needed to avert the possibility of an "immediate" threat to the public health and safety, citing *Trojan* and a Commission statement drawing a distinction "between functions considered of 'immediate importance to safety'" and certain other functions.[19]

---

[18] ALAB-832, *supra*, 23 NRC at 65-66, *citing* Statement of Consideration, "Technical Specifications for Facility Licensees; Safety Analysis Reports," 33 Fed. Reg. 18610 (1968); footnotes omitted.

[19] ALAB-831, *supra*, 23 NRC at 66, nn.8 and 9 (*citing* Proposed Rule, "Technical Specifications for Nuclear Power Reactors," 47 Fed. Reg. 13369, 13371 (1982) (in which the Commission proposed to amend §§ 50.36 and 50.54 to distinguish technical specifications from supplemental specifications, in accordance with the Advance Notice of Proposed Rulemaking, discussed *supra*). The 1982 proposal to amend the regulations was never adopted.

In line with these pronouncements, the Commission recently issued a "Final Policy Statement on Technical Specifications Improvements for Nuclear Power Reactors", 58 Fed. Reg. 39132 (July 22, 1993).[20] There, the Commission reviewed its efforts to encourage the development and implementation of improved technical specifications, due to the increasing trend to include matters in the TS which need not be there. The Commission observed that "extensive use" of the TS has diverted licensee and Staff attention from more important matters, thereby resulting in an adverse impact on safety. *Id.* at 39133. The Commission determined that some requirements which do not require prior Staff approval should be relocated from the TS to other documents (such as the FSAR) and controlled by more appropriate means, such as through use of 10 C.F.R. § 50.59. *Id.* at 39134. The Commission concluded (*Id.* at 39136):

> The purpose of Technical Specifications is to impose those conditions or limitations upon reactor operation necessary to obviate the possibility of an abnormal situation or event giving rise to an immediate threat to the public health and safety by identifying those features that are of controlling importance to safety and establishing on them certain conditions of operation which cannot be changed without prior Commission approval.[21]

---

[20] The Commission noted that it had issued an interim policy statement in 1987, which led to the submission of public comments and the development of the Commission's final policy statement. *Id.* at 39133-134. *See* "Proposed Policy Statement on Technical Specification Improvements for Nuclear Power Reactors," 52 Fed. Reg. 3788 (Feb. 6, 1987).

[21] The Commission's Final Policy Statement provided four criteria for determining which items are to be included in a facility's TS, as follows (58 Fed. Reg. at 39137-38):

> (1) Installed instrumentation that is used to detect, and indicate in the control room, a significant abnormal degradation of the reactor coolant pressure boundary;
>
> (2) A process variable, design feature, or operating restriction that is an initial condition of a Design Basis Accident or

(continued...)

In light of the above discussion, it is clear that matters that are unrelated to conditions or limitations required to obviate the possibility of an abnormal situation or event giving rise to an "immediate threat" to public health and safety, need not and should not be located in a facility's TS.

B. Removal of the Withdrawal Schedule From the TS Is Not Inconsistent With Section 182a of the Act or 10 C.F.R. § 50.36.

1. Removal of Matters That Were "Traditionally" Included in the TS Is Not Improper, *Per Se*.

In their Motion, the Intervenors suggest that because the material specimen withdrawal schedule "has traditionally been part of the Technical Specification," it must remain there. Motion at 2. Nowhere, however, do the Intervenors state that the withdrawal schedule must be included in the TS in order to avert harm to the public health and safety, or that the schedule is required to be in the TS by section 182a of the Atomic Energy Act or 10 C.F.R. § 50.36; and nowhere do they address the requirements for technical specifications discussed above. To the

---

[21](...continued)

> Transient analysis that either assumes the failure of or presents a challenge to the integrity of a fission product barrier;
>
> (3) A structure, system, or component that is part of the primary success path and which functions or actuates to mitigate a Design Basis Accident or Transient that either assumes the failure of or presents a challenge to the integrity of a fission product barrier; and
>
> (4) A structure, system, or component which operating experience or probabilistic safety assessment has shown to be significant to public health and safety.

contrary, in response to a question posed by the Licensing Board, they candidly state that "Intervenors do not allege that removal of the schedule from the Technical Specifications violates 10 CFR 50.36." Motion at 7.

The Intervenors' admission that removal of the withdrawal schedule does not violate the requirements of 10 C.F.R § 50.36 is fatal to their Motion. The fundamental question at issue here is whether the withdrawal schedule is required by law or regulation to be included in the TS.[22] As indicated by the Appeal Board in *Trojan*, there is no requirement that "every operational detail" contained in a licensee's FSAR "be subject to a technical specification, to be included in the license as an absolute condition of operation which is legally binding upon the licensee unless and until changed with specific Commission approval." ALAB-531, *supra*, 9 NRC at 273. If the schedule is not required to be in the TS, there can be no basis for requiring it to remain there.

Indeed, the Appeal Board had occasion to comment upon a similar contention asserted by OCRE in ALAB-831, *supra*, where OCRE had argued that all elements of a fire protection program must be in the TS. The Appeal Board pointed out, "[i]t is of little moment here that . . . fire protection requirements have been included in the technical specifications of other operating licenses. For it does not follow from that fact that such inclusion is required by Commission regulation." *Perry*, *supra*, 23 NRC at 66 n.11. Here, as in ALAB-831, there is no merit in OCRE's argument that an item must be located in the TS merely because it "traditionally" was placed there.

---

[22] In the discussion *infra* at 15-23 and 26-27, the Staff sets forth the reasons for its determination that the withdrawal schedule is not required by law or regulation to be contained in the TS.

2. The Staff Properly Determined that the Perry Withdrawal Schedule May Be Removed From the TS and Relocated to the USAR.

As discussed in the attached Affidavit, on March 15, 1991, the Licensees for the Perry Nuclear Power Plant requested that the withdrawal schedule be removed from the Perry TS and relocated to the plant's USAR. Affidavit ¶ 13. The Licensees indicated that the request was submitted in accordance with GL-91-01 (*Id.*), discussed *infra* at 24-27. Prior to that time, the Perry TS, § 4.4.6.1.3, described this surveillance as follows:

> The reactor vessel material surveillance specimens shall be removed and examined, to determine changes in reactor pressure vessel material properties as required by 10 CFR 50, Appendix H *in accordance with the schedule in Table 4.4.6.1.3-1.* The results of these examinations shall be used to update the curves of Figure 3.4.6.1-1. (Emphasis added.)

The Licensees proposed to delete the words italicized in the text above and to relocate the referenced Table from the TS to the USAR; the remainder of the TS would remain unchanged. This request was reviewed by the appropriate Staff personnel and, on December 18, 1992, the Staff granted the requested license amendment application. Affidavit ¶¶ 3, 13.

As further indicated in the attached Affidavit, prior to granting the license amendment, the Staff determined that the material specimen withdrawal schedule is not required by law or regulation to be included in a facility's TS. Affidavit, ¶ 9. This determination was correct, as is apparent from a review of the applicable regulatory provisions.

As set forth above, section 182 of the Atomic Energy Act does not prescribe particular matters to be included in the TS for a facility. Rather, the statute requires that such information be included in the TS "as the Commission may, by rule or regulation, deem necessary" in order to enable the Commission to find "adequate protection" of the public health and safety. The

Commission, in turn, has adopted 10 C.F.R. § 50.36, implementing section 182a of the Act and setting out the matters required to be included in the TS. The regulation states that "surveillance requirements" are required to be included among a plant's TS, but it does not mention any specific surveillance requirement, nor does it specifically require inclusion of a reactor vessel material specimen withdrawal schedule in a facility's TS. Rather, the withdrawal schedule requirements are set out in 10 C.F.R. Part 50, Appendix H. *See* Affidavit ¶ 10.

As set forth in the attached Affidavit, prior to authorizing the requested amendment, the Staff reviewed applicable regulatory requirements and determined that while 10 C.F.R. § 50.36(c) requires that the TS "include" items in five listed categories, including "surveillance requirements," it nowhere specifies the particular surveillance requirements to be included in a plant's TS, nor does it require the inclusion of the capsule withdrawal schedules in the TS. Affidavit, ¶ 10. In addition, the Staff determined that as long as the schedules are available for reference in the USAR by licensees and other persons, inclusion of the withdrawal schedules in the TS is not required, and that Appendix H already provides sufficient regulatory controls to ensure the appropriateness of a capsule withdrawal schedule. *Id.*

As further indicated in the attached Affidavit, the "surveillance requirements" to be included in a facility's TS, under 10 C.F.R. § 50.36(c), are "requirements relating to test, calibration, or inspection to assure that the necessary quality of systems and components is maintained, that facility operation will be within the safety limits, and that the limiting conditions of operation will be met." The Staff has concluded that 10 C.F.R. § 50.36 does not require inclusion of the withdrawal schedule in the TS because that schedule is not "necessary to obviate the possibility of an abnormal situation or event giving rise to an immediate threat to the public

health and safety." *See* "Final Policy Statement on Technical Specifications Improvements for Nuclear Power Reactors," Section IV, 58 Fed. Reg. 39132, 39136 (1993). Instead, the TS include limiting conditions for operation and surveillance requirements for the reactor coolant system pressure and temperature (P-T) limits; these are "necessary to obviate the possibility of an abnormal situation or event giving rise to an immediate threat to the public health and safety." Maintaining the reactor coolant system within the P-T limits, along with compliance with other requirements of the regulations, will "assure . . . the necessary quality of systems and components" is maintained and that facility will be operated "within the safety limits." Affidavit ¶ 11.

These determinations that 10 C.F.R. § 50.36 does not require the material specimen withdrawal schedule to be included in the TS have nowhere been challenged by the Intervenors or shown to be incorrect.

3. Regulatory Requirements Pertaining to Material Specimen Withdrawal Schedules.

As recited in the attached Affidavit (¶ 4), Appendix H to 10 C.F.R. Part 50 provides a means for obtaining test data that can be used in monitoring the effects of neutron irradiation and the thermal environment on reactor vessel beltline materials.[23] The Introduction to Appendix H states, in part:

---

[23] In proposing to adopt Appendices G and H, the Atomic Energy Commission indicated that they were being added to the regulations to specify minimum fracture toughness requirements needed to satisfy General Design Criterion (GDC) 31. *See* Proposed Rule, "Fracture Toughness Requirements for Nuclear Power Reactors," 36 Fed. Reg. 12697 (July 3, 1971). The proposed rule was subsequently adopted, with certain modifications not relevant here, in 1973. *See* "Fracture Toughness and Surveillance Program Requirements," 38 Fed. Reg. 19012 (July 17, 1973).

> The purpose of the materials surveillance program required by this appendix is to monitor changes in the fracture toughness properties of ferritic materials in the reactor vessel beltline region of light water nuclear power reactors resulting from exposure of these materials to neutron irradiation and the thermal environment. Under the program, fracture toughness test data are obtained from material specimens exposed in surveillance capsules, which are withdrawn periodically from the reactor vessel. These data will be used as described in Sections IV and V of Appendix G to this part.[24]

More to the point, Paragraph II.B. of Appendix H provides, in pertinent part, as follows:

> B. Reactor vessels that do not meet the conditions of paragraph II.A. of this Appendix must have their beltline materials monitored by this appendix.
>
> > 1. That part of the surveillance program conducted prior to the first capsule withdrawal must meet the requirements of the edition of ASTM E 185 that is current on the issue date of the ASME Code to which the reactor vessel was purchased. Later editions of ASTM E 185 may be used, but including only those editions through 1982. For each capsule withdrawal after July 26, 1983, the test procedures and reporting requirements must meet the requirements of ASTM E 185-82 to the extent practical for the configuration of the specimens in the capsule. For each capsule withdrawal prior to July 26, 1983 either the 1973, the 1979, or the 1982 edition of ASTM E 185 may be used.

* * *

---

[24] The Introduction to Appendix H notes that "ASTM E 185-73, -79 and -82, 'Standard Practice for Conducting Surveillance Tests for Light-Water Cooled Nuclear Power Reactor Vessels,' which are referenced in the following paragraphs, have been approved for incorporation by reference by the Director of the Federal Register." For the convenience of the Licensing Board and parties, a copy of ASTM E 185-82 is attached hereto as "Attachment 1."

> 3. A proposed withdrawal schedule must be submitted with a technical justification as specified in § 50.4. The proposed schedule must be approved prior to implementation.[25]

Compliance with Appendix H is required by 10 C.F.R. § 50.60(a), although alternatives to those requirements may be proposed by a licensee pursuant to 10 C.F.R. §§ 50.60(b) and 50.12.[26] *See* Affidavit ¶ 5.

Appendix H, § II.B.1, clearly indicates that a licensee's initial specimen program must comply with the applicable edition of ASTM E 185. Appendix H, however, does not explicitly address the requirements for changes to a previously approved withdrawal schedule, and is ambiguous as to how such changes are to be reviewed and approved. Thus, while § II.B.3 states that "the proposed schedule must be approved prior to implementation," it does not explicitly address changes to an approved schedule, nor does it indicate that prior approval is required for

---

[25] In 1986, the Commission adopted certain amendments to 10 C.F.R. Part 50, providing procedures for the submission of reports and other written communications under 10 C.F.R. § 50.4. As applicable here, Appendix H, paragraph II.B.3., was revised as follows:

> 3. A proposed withdrawal schedule must be submitted with a technical justification [therefor to the Director, Office of Nuclear Reactor Regulation, for approval.] *as specified in § 50.4.* The proposed schedule must be approved prior to implementation.

Final Rule, "Domestic Licensing of Production and Utilization Facilities; Communications Procedures Amendments," 51 Fed. Reg. 40303, 40310 (Nov. 6, 1986) (deleting bracketed words and inserting words in italics).

[26] 10 C.F.R. § 50.60(b) was amended in 1985, to clarify that alternatives to the requirements described in Appendices G and H may be used when an exemption is granted under 10 C.F.R. § 50.12. Final Rule, "Specific Exemptions; Clarification of Standards," 50 Fed. Reg. 50764, 50777 (Dec. 12, 1985).

any change to an approved schedule, no matter how insignificant. In this regard, the regulatory history of Appendix H provides the necessary clarification. *See* Affidavit ¶ 6.

Some of the regulatory history for Appendix H is provided in the attached Affidavit. As noted therein, earlier iterations of Appendix H had specified the number of capsules and specific withdrawal schedules to be followed by licensees, and described the circumstances under which modifications to those schedules would be appropriate.[27] It further provided:

> g. Proposed withdrawal schedules *that differ from those specified in paragraphs a. through f.* shall be submitted, with a technical justification therefor, to the Commission for approval. The proposed schedule shall not be implemented without prior Commission approval.

10 C.F.R. Part 50, Appendix H, § II.C.3.g (1980 ed.); emphasis added. *See* Affidavit ¶ 6.

In November 1980, the Commission published a proposed amendment to its fracture toughness and material surveillance program requirements, which included a proposal to restructure Appendix H and delete major portions thereof.[28] The Commission noted that "most" of former § II.C.3 -- which had contained the specific withdrawal schedules which licensees were required to follow -- would be deleted, "because the requirements for withdrawal schedules contained in the 1979 edition of ASTM E 185 provide satisfactory criteria for scheduling surveillance information gathering." *Id.*, 45 Fed. Reg. at 75537. Further the Commission proposed to replace former paragraph II.C with new paragraph II.B; new paragraph II.B.3 would replace former paragraph II.C.3.g. (recited in the text above), to read as follows:

---

[27] Indeed, even in its initial proposed formulation, Appendix H included a specific withdrawal schedule to be followed by licensees. *See* 36 Fed. Reg. at 12699.

[28] Proposed Rule, "Domestic Licensing of Production and Utilization Facilities; Fracture Toughness Requirements for Nuclear Power Reactors," 45 Fed. Reg. 75536 (Nov. 14, 1980).

> 3. Proposed withdrawal schedules shall be submitted with a technical justification therefor to the Director of Nuclear Reactor Regulation for approval. The proposed schedule shall not be implemented without prior approval.[29]

In May 1983, the Commission adopted the proposed revisions to Appendix H in substantially similar form as the proposed rule.[30] In effect, the amendment deleted the withdrawal schedules from Appendix H, but retained the references to ASTM E 185 and the requirement that withdrawal schedules must be approved by the Staff prior to implementation. In particular, ASTM E 185 is incorporated by reference in new paragraph II.B.1, which requires "[t]hat part of the surveillance program conducted prior to the first capsule withdrawal must meet the requirements" of the edition of ASTM E 185 applicable to the particular reactor vessel; and "[f]or each capsule withdrawal after July 26, 1983 [the effective date of the rule], the test procedures and reporting requirements must meet the requirements of ASTM E 185-82 to the extent practical for the configuration of the specimens in the capsule. . . ." *See* Affidavit ¶ 6.

While the withdrawal schedule and criteria contained in Table 1 of ASTM E 185-79 and ASTM E 185-82 (which contains withdrawal schedule criteria identical to those in ASTM E 185-79) are not referred to specifically in the regulation, numerous documents published in connection with the revision of Appendix H (in addition to the "Supplementary Information" recited above) indicate the Commission's intent to incorporate those matters in the revised rule.

---

[29] 45 Fed. Reg. at 75539. This paragraph was identical to former paragraph II.C.3.g., except that it deleted the phrase, "that differ from those specified in paragraphs a. through f." (italicized in the text *supra*, at 20), and made other revisions not relevant here.

[30] Final Rule, "Fracture Toughness Requirements for Light-Water Nuclear Power Reactors," 48 Fed. Reg. 24008 (May 27, 1983).

Thus, the value/impact statement prepared in conjunction with the proposed rule, and the regulatory analysis prepared in conjunction with the final rule, both state that "parts of Appendix H are deleted and replaced by references to ASTM E 185. Publication of a new edition, E 185-79, containing much technical detail, has made it possible to shorten Appendix H."[31] In other words, the Commission indicated that the 1979 edition of ASTM E 185 (ASTM E 185-79) contained sufficient detail for the preparation of withdrawal schedules to permit the deletion of the schedules from Appendix H.

In addition, the Commission prepared responses to public comments which had been submitted with respect to the proposed rule change, in which the Commission further indicated

---

[31] *See* SECY-83-80, "10 C.F.R. Part 50 -- General Revision of Appendices G and H, Fracture Toughness and Reactor Vessel Material Surveillance Requirements," Feb. 25, 1983, Enclosure 2 ("Regulatory Analysis, Revision of Appendices G and H, Fracture Toughness and Surveillance Program Requirements)" at 1 (referred to in 48 Fed. Reg. at 24008); and SECY-80-375, Enclosure 2 ("Value/Impact Statement on Revision of Appendices G and H, Fracture Toughness and Surveillance Program Requirements)," at 1 (referred to in 45 Fed. Reg. at 75537). The regulatory analysis (and in almost identical terms, the value/impact statement) further stated:

> ¶II.B. Publication of the 1979 edition of ASTM E 185 made it necessary to amend this paragraph [*i.e.*, former ¶ II.C.] to incorporate by reference ASTM E 185 . . . and to specify the applicability of the various editions of E 185 to different parts of each surveillance program. This amendment is of value to both the NRC and licensees because there has been considerable expansion of E 185 in the 1979 edition and because deletion of large sections of Appendix H eliminates detailed requirements that are better presented as general criteria and explanatory material in the ASTM Recommended Practice.

Enclosure 2 to SECY-83-80, at 5. For the convenience of the Licensing Board and parties, a copy of SECY-83-80, together with its Enclosures, is attached hereto as "Attachment 2."

that revised Appendix H was intended to incorporate by reference the withdrawal schedule contained in Table 1 of ASTM E 185-79. The Commission stated:

> Comment 7-3 objected to the requirements for number of capsules and withdrawal schedule that are given in *Table 1 in ASTM E 185-79, which is incorporated by reference in Appendix H.* For some BWR's, 4 surveillance capsules would be required instead of 3, the number required by Appendix H prior to these amendments. . . . Commenter argued that the fourth capsule adds cost and design hardship.
>
> Response. No change has been made in the regulation, for the following reasons. Hardship and extra cost of providing an extra capsule are neither large nor imminent. The rule applies only to vessels purchased to editions and addenda of the ASME Code issued after July 1979. Thus it affects no plants now under construction. *To effect a change in the requirements would mean that E 185-79 would have to be endorsed with an exception. The language of the exception would be somewhat involved,* because the rules for number of capsules appear in the text and also in Table 1 of E 185-79. If the breakpoint between 3 or 4 capsules was changed, other changes would also be required. Continued use of the existing rules as given in Appendix H prior to these amendments is not acceptable, because the existing rules do not reflect our present judgment.[32]

In sum, numerous documents issued by the Commission upon its adoption of the revisions to Appendix H demonstrate its intent to incorporate by reference the withdrawal schedule and criteria contained in ASTM E 185-79 (and the identical matters in ASTM E-185-82). The withdrawal schedule and criteria for modifying the schedule are set forth in ASTM E 185-79 and ASTM E 185-82 (Attachment 1 hereto), and the withdrawal schedule which previously had been contained in Appendix H was deleted from the regulation. *See* Affidavit ¶ 6.

---

[32] SECY-83-80, *supra,* Enclosure 4 ("Abstract of Comments and Staff Response to Proposed Revision to 10 CFR Part 50, Appendices G and H, Fracture Toughness and Reactor Vessel Material Surveillance Program Requirements, Published for Public Comment in the Federal Register November 14, 1980)," at 10-11; emphasis added).

4. The Staff's Practice in Reviewing Material Specimen Withdrawal Schedules Prior to Issuance of GL 91-01.

As discussed above, the regulatory history of Appendix H reveals that the Commission intended to incorporate ASTM F 185-79 (and ASTM E 185-82) by reference in Appendix H, § II.B, and that the Commission adopted the current formulation of § II.B. upon determining that the criteria and withdrawal schedules in ASTM E 185-79 (and the identical matters in ASTM E 185-82) were sufficient to permit deletion of specific schedules from Appendix H as it had previously been formulated. Consistent with this approach, the Staff has determined that proposed withdrawal schedules or changes which were in conformance with ASTM E 185-79 (and ASTM E 185-82) would satisfy the requirements of Appendix H. *See* Affidavit ¶ 6.

Accordingly, subsequent to the 1983 rule change, the Staff reviewed proposed schedules and modifications to determine if they were consistent with the withdrawal schedules set forth in ASTM E 185 or were otherwise acceptable. This review was normally conducted as part of a license amendment proceeding, since matters located in a licensee's TS (such as the withdrawal schedules) could only be changed by license amendment under 10 C.F.R. § 50.59(c). *Id.*

5. The Effect of GL 91-01 on the Staff's Review of Changes to Specimen Withdrawal Schedules.

In the discussion above, the Staff recited some of the background underlying the Commission's development of an improved TS program; further information concerning the development of this program is provided in the attached Affidavit. As set forth therein, the Commission has long expressed concern over the volume of TS requirements for nuclear power reactors. This concern was evident in the Commission's proposed rule change in March 1982, whereby the volume of TSs in operating licenses would be reduced, permitting a more efficient

use of licensee and NRC resources and helping to focus licensee attention on matters of more immediate importance to safe operation of their facilities. This concern was further evidenced in the Commission's interim and final policy statements issued in February 1987 and July 1993, respectively. *See* discussion *supra* at 12, and Affidavit ¶ 7.

In accordance with the Commission's interim policy statement, among the actions taken by the Staff was the development of a program to improve the technical specifications for nuclear power reactors on a line-item basis. Several potential line-item TS improvements were identified by the Staff and reviewed by the NRC's Committee to Review Generic Requirements (CRGR), and were then made available for voluntary implementation through the issuance of generic letters. Affidavit ¶ 8.

In late 1990, as part of the line-item TS improvement program, the Staff determined that material specimen capsule withdrawal schedules need not be retained in a facility's TSs, consistent with the criteria in the Commission's interim policy statement. As described in the attached Affidavit, the Staff determined that inclusion of the withdrawal schedules in the TS (a) was not specifically required by 10 C.F.R. § 50.36 or other regulations, (b) was not required to avert an immediate threat to the public health and safety, and (c) was not necessary since Appendix H provides an adequate means of controlling proposed changes to withdrawal schedules. Affidavit ¶¶ 9, 10 and 11. *See* discussion *supra*, at 15-23.

Accordingly, on January 4, 1991, the Staff issued Generic Letter (GL) 91-01, entitled "Removal of the Schedule for the Withdrawal of Reactor Vessel Material Specimens from Technical Specifications." Therein, the Staff indicated that § II.B.3. of Appendix H requires NRC approval of a proposed withdrawal schedule prior to implementation, that "placement of

this schedule in the TS duplicates the controls on changes to this schedule that have been established by Appendix H," that "this duplication is unnecessary," and that "removal of this TS schedule as a line-item improvement is consistent with the Commission [Interim] Policy Statement on TS Improvements." Affidavit ¶ 12 (*citing* GL 91-01).

In addition, the Staff indicated as follows:

> The current STS bases provide extensive background information on the use of the data obtained from material specimens. This background information clearly defines the purpose and relationship of this information to the requirements included in the regulations and the American Society of Mechanical Engineers (ASME) Code. Therefore, the removal of the schedule for specimen withdrawal from the TS will not result in any loss of clarity related to regulatory requirements of Appendix H to 10 CFR Part 50.

Id., *citing* GL 91-01, Enclosure at 1. The Staff indicated it would approve the removal of withdrawal schedules from the TS, subject to a requirement that licensees doing so commit to include the schedules in the next revision of their Updated Safety Analysis Reports (USARs), so as to make the schedule readily available for licensees, NRC personnel and others. Affidavit ¶ 12.

As further indicated in the attached Affidavit, the removal of a licensee's withdrawal schedule from its TS, in accordance with GL 91-01, does not relieve the licensee from the requirements of 10 C.F.R. Part 50, Appendix H. ASTM E 185 was incorporated by reference in Appendix H, and the Commission indicated its intent that licensee withdrawal schedules are to be consistent with the schedule criteria contained in ASTM E 185-79 or 185-82. Therefore, the Staff has determined that, after a licensee has removed its withdrawal schedule from its TS, it may proceed to make changes to its schedule which are consistent with ASTM E 185-79 or

185-82 without prior NRC approval, and report those changes in a manner consistent with 10 C.F.R. § 50.59; however, if a licensee proposes schedule changes that are not consistent with ASTM E 185-79 or -82, the changes would likely be deemed to involve an unreviewed safety question under the current regulatory framework and would require prior NRC approval by license amendment, as provided by 10 C.F.R. § 50.59(c). Affidavit, ¶ 14.

In essence, what has changed since the promulgation of GL 91-01 is the following: Previously, the Staff generally reviewed proposed withdrawal schedule changes as a license amendment, because the schedule was contained in the TS. In contrast, under the current practice, routine schedule changes that conform to the ASTM standard (which the Commission indicated was intended to be incorporated by reference in the regulation) need not be reviewed as a license amendment, because the schedule has been removed from the TS; nonetheless, proposed schedule changes that do not conform to the ASTM criteria would likely require prior Commission approval, in the form of a license amendment.[33]

C. The Atomic Energy Act Does Not Require Notice And Opportunity For Hearing With Respect to All Future Changes To The Material Specimen Withdrawal Schedule.

At the heart of Intervenors' argument is their assertion that because any future change to the Perry withdrawal schedule would require prior Commission approval, the change

---

[33] In hindsight, it appears that GL 91-01 does not express the Staff's views on this matter with precision. As indicated in the attached Affidavit, the Staff has undertaken to review the wording of GL 91-01, and recognizes that it does not provide a clear understanding of these matters. The Staff is developing a clarification of the statements contained in that document, consistent with the statements presented by the Staff in the attached Affidavit, and will also consider whether rulemaking is necessary to make explicit in Appendix H the circumstances under which changes to a previously approved withdrawal schedule can be made. Affidavit ¶ 15.

constitutes a *de facto* license amendment. Motion at 5. As discussed above and in the attached Affidavit, however, this assertion is without merit, in that specific Commission approval is not required for changes which conform to the ASTM schedule criteria which the Commission intended to incorporate by reference in the regulation. Any such changes would be reportable under 10 C.F.R. § 50.59(b), which affords adequate regulatory controls for such matters, as stated by the Appeal Board in *Trojan*, ALAB-531, *supra*, 9 NRC at 273-74. Further, any proposed changes that do not comply with the regulation would likely be treated as a request for license amendment (in which case notice and hearing rights would be afforded).[34]

In short, the Intervenors have misinterpreted Section II.B.3 of Appendix H, and there is no basis for their assertion that all future changes to the Perry withdrawal schedule will be reviewed by the Staff as "de facto license amendments." Accordingly, Intervenors' reliance on the *Sholly* decision (*see* discussion *supra* at 6), is misplaced.

Further, while section 189a of the Atomic Energy Act provides an opportunity for members of the public to request hearings on certain matters, this Licensing Board has previously observed that the Act does not provide "an absolute, automatic right to intervene in NRC licensing proceedings."[35] Here, removal of the withdrawal schedule will eliminate the need for hearings on future changes which conform to the regulatory standard, but will not deprive the Intervenors of a right to hearing on proposed changes which fail to conform to that

---

[34] To be sure, a licensee may always apply for an exemption from the requirements of Appendix H, as indicated in 10 C.F.R. § 50.60(b). However, the issue of whether an exemption would be appropriate in a particular case, and the Intervenors' general complaint about the procedures afforded by 10 C.F.R. § 2.206, are not within the proper scope of this proceeding.

[35] *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), LBP-92-4, 35 NRC 114, 123 (1992) (finding OCRE and Ms. Hiatt lacked standing to intervene).

standard and which require Commission approval in the form of a license amendment. This is consistent with the regulatory scheme established in 10 C.F.R. § 50.59, and does not contravene section 189a of the Atomic Energy Act.

D. Questions Posed by the Licensing Board

As previously noted, the Licensing Board's Order of December 27, 1993, required the parties to respond to three Board Questions. The Staff's responses to the Board Questions are set forth in the attached Affidavit (at pp. 9-11), and are summarized here as follows.[36]

Question a. What is the relationship, if any, of 10 C.F.R § 50.36 to the petitioners' contention?

As discussed above and in the attached Affidavit, there is no relationship between the contention and 10 C.F.R. § 50.36, as the Intervenors concede. Because the withdrawal schedule is not required to be in the TS by § 50.36 and does not perform a function of "immediate importance to safety," there is no basis upon which the Board could find that removal of this item from the TS is "unlawful."

---

[36] The Staff notes that the Intervenors responded to the Board's questions by stating (a) that "there is no relationship between 10 CFR 50.36 and the contention," in that the focus of the contention is not that the schedule must remain in the TS, but only that its removal eliminates notice and hearing rights on "de facto license amendments" (Motion at 6); (b) that changes to the schedule "might be indirectly reflected in the title of TS Figure 3.4.6.1-1," but they assert that "this question is not relevant to the contention" because their contention only raises the issue of whether the NRC "can deprive members of the public of hearing rights to any changes to the . . . schedule, a matter made material by the NRC's own regulations" (*Id.* at 6-7); and (c) that they "do not allege that removal of the schedule from the [TS] violates 10 C.F.R 50.36," but only raise the issue of "loss of public hearing rights" in violation of section 189a of the Atomic Energy Act (*Id.* at 7). These responses, in the Staff's view, further demonstrate the lack of any merit in Intervenors' contention, in that they strip Intervenors' contention of any nexus to 10 C.F.R. § 50.36 and illustrate the Intervenors' misapprehension of Appendix H requirements.

Question b. Under Part 50, Appendix H, II.B.1., are there any changes in the reactor vessel material surveillance program withdrawal schedule that would not be reflected in a change in the limiting conditions of operation of the Perry facility?

As indicated in the attached Affidavit, the short answer to this question is that changes to pressure-temperature (P-T) limits (the pertinent limiting condition of operation (LCO)) would generally result from a change in withdrawal schedule only if the schedule change, in turn, was caused by the receipt of information (such as specimen test results) which indicates that the reactor vessel's material properties assumed by the licensee in its prior determination of the reactor's P-T limit curves are less conservative than is appropriate. The change in the LCO would result not from the schedule change *per se*, but from the test results which, in turn, led to the schedule change. Where tests on surveillance materials indicate that the assumed material properties for the P-T limits remain applicable, changes to the withdrawal schedule would not require a change in P-T limits. *See* Affidavit, ¶¶ 11, 16.

Question c. If, as posited in Generic Letter 91-01 (Jan. 4, 1991), the removal of the reactor vessel material surveillance program withdrawal schedule from a facility's technical specifications will not result in any loss of clarity related to the requirements of Part 50, Appendix H, how is the removal of this duplicative matter from a facility's technical specifications violative of 10 C.F.R. § 50.36?

As discussed above and in the attached Affidavit, the Commission has indicated its intent to incorporate the ASTM standard by reference and to require compliance with that standard. Upon removal of the withdrawal schedule from the TS, this regulatory requirement continues to apply. Accordingly, the removal of this item from a facility's TS would not affect the public

health and safety and would not violate 10 C.F.R § 50.36. The Commission's regulations are obligatory and enforceable in and of themselves, and need not be duplicated in a facility's TS.

CONCLUSION

For the reasons discussed above, the Staff submits that the intervenors' contention is without merit, and their Motion for Summary Disposition should be denied.

Respectfully submitted,

Sherwin E. Turk
Colleen P. Woodhead
Counsel for NRC Staff

Dated at Rockville, Maryland
this 7th day of March, 1994