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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al.	)	Docket No. 50-440-OLA-2
	)	ASLBP No. 90-605-02-OLA
(Perry Nuclear Power Plant, Unit No. 1)	)	
	)	

LICENSEES' CROSS MOTION FOR SUMMARY DISPOSITION AND ANSWER TO OHIO CITIZENS FOR RESPONSIBLE ENERGY, INC. AND SUSAN L. HIATT MOTION FOR SUMMARY DISPOSITION

Pursuant to 10 C.F.R. § 2.749 and the Order of the Atomic Safety and Licensing Board ("Board") dated February 16, 1994, The Cleveland Electric Illuminating Company, et al. (Licensees") submit their Cross Motion for Summary Disposition and their Answer to the Motion for Summary Disposition filed on February 7, 1994 by Ohio Citizens for Responsible Energy, Inc. and Susan L. Hiatt (collectively "OCRE"). Licensees respectfully move the Board for a decision in Licensees' favor on OCRE's contention. That contention, as set forth in OCRE's Supplemental Petition for Leave to Intervene dated November 12, 1993, and admitted by the Board's Order dated December 27, 1993 states 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

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right to notice and opportunity for a hearing on any changes to the withdrawal schedule.

Licensees agree with OCRE that this issue involves a pure issue of law and that there are no factual disputes to be heard.

I. STATEMENT OF THE CASE

Section 182(a) of the Atomic Energy Act of 1954, as amended (the "Act"), 42 U.S.C. § 2232(a), requires the applicant for a nuclear power plant operating license to submit Technical Specifications as part of its license application. These Technical Specifications become a part of the operating license. Consequently, no change can be made to a plant's Technical Specifications without first obtaining a license amendment. A license amendment application triggers the public's right to request a hearing as provided in Section 189(a) of the Act, 42 U.S.C. § 2239(a).

Historically, the reactor vessel material specimen withdrawal schedule was included in a plant's Technical Specifications. The schedule may change over the life of the plant. Because the schedule was located in Technical Specifications, a license amendment was needed before the schedule could be changed.

The NRC recognized that Technical Specifications had become extremely cumbersome and a hindrance to safe plant operation and

expressed its intention to simplify Technical Specifications, in part by focusing on technical requirements for features of controlling importance to safety. See Proposed Policy Statement on Technical Specification Improvements for Nuclear Power Plants, 52 Fed. Reg. 3788 (1987); Final Policy Statement on Technical Specification Improvements for Nuclear Power Reactors, 58 Fed. Reg. 39132 (1993). One step in this simplification process was the NRC's issuance on January 4, 1991 of Generic Letter 91-01, "Removal of the Schedule for the Withdrawal of Reactor Vessel Material Specimens from Technical Specifications."

Generic Letter 91-01 encouraged licensees to streamline their plant Technical Specifications by relocating the specimen withdrawal schedule from the plant's Technical Specifications into the Safety Analysis Report for that plant.

On March 15, 1991, Licensees supplemented a previously submitted license amendment application with an application to amend the PNPP operating license in accordance with Generic Letter 91-01 by removing the reactor vessel material surveillance program withdrawal schedule from the Technical Specifications to the Updated Safety Analysis Report ("USAR").

On July 24, 1991, the NRC published a notice of consideration of this amendment application and afforded an opportunity

for a hearing.[1/] The license amendment was issued on December 18, 1992.[2/]

On August 23, 1991, OCRE filed a Petition for Leave to Intervene and Request for Hearing. By Memorandum and Order (Ruling on Intervention Petition), LBP-92-4, 35 NRC 114 (March 18, 1992), the Board denied the Petition because of OCRE's failure to demonstrate standing. On April 2, 1992, OCRE filed a notice of appeal and on September 30, 1993, the Commission in CLI-93-21, 38 NRC 87, reversed the Board's order and remanded the case to the Board to determine the adequacy of OCRE's contention. In its Order (Admitting Contention and Establishing Schedule), dated December 27, 1993, the Board admitted OCRE's contention and directed OCRE to file a motion for summary disposition. In its February 16, 1994 Order, the Board directed Licensees to file a cross-motion for summary disposition.

II. LEGAL ARGUMENT

Section 189(a) of the Act guarantees the public an opportunity for a hearing with respect to all license and license amendment applications. Because Technical Specifications are a part

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1/ 56 Fed. Reg. 33961 (1991).

2/ Because the NRC Staff determined (and OCRE acknowledged) that the amendment involved no significant hazards considerations, see 565 Fed. Reg. 33961 (1991), the amendment could issue notwithstanding the pending request for a hearing. See 10 C.F.R. § 50.92 (1990).

of a plant's operating license, a proposal to change Technical Specifications involves a license amendment and the public therefore has a right to request a hearing. If the Technical Specifications include a particular provision that is not required by statute or regulation, the Commission is entitled to delete that item from Technical Specifications. Once it has been deleted, changes to that item may be made without the opportunity for a public hearing because no changes to Technical Specifications are required. The public would not have any independent right to a hearing with respect to such information. Thus, if the reactor vessel material withdrawal schedule is not required to be included in Technical Specifications, OCRE does not have a right to a hearing with respect to changes in the schedule once it has been deleted from Technical Specifications. Because neither statute nor regulation requires the inclusion of the schedule in Technical Specifications, relocating the schedule from PNPP's Technical Specifications into the USAR did not deny OCRE any hearing rights.[3/]

3/ See, Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), ALAB-831, 23 NRC 62, 66 (1986) (the Appeal Board refused to reopen a hearing to determine if relocating certain portions of PNPP's fire protection plan from PNPP's Technical Specifications into its Final Safety Analysis Report violated 10 C.F.R. § 50.36 in part because OCRE failed to carry its burden of demonstrating that the excluded portions of the fire protection program were required to be in PNPP's Technical Specifications).

A. The Reactor Vessel Material Withdrawal Schedule Is Not Required to Be Included in Technical Specifications.

1. The Atomic Energy Act Does Not Require that Technical Specifications Include the Reactor Vessel Material Withdrawal Schedule.

Technical Specifications for nuclear power plants are governed by Section 182(a) of the Act which provides that:

> 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.

The statutory language provides the NRC with broad discretion to determine the information that it "deem[s] necessary" to assure adequate protection for public health and safety. This expansive statutory charter is consistent with the great latitude which the Act in general provides to the NRC and has been universally recognized and observed by the courts. See Baltimore Gas & Electric Co. v. NRDC, 462 U.S. 87 (1983), Carstens v. NRC, 742 F.2d 1546, 1551 (D.C. Cir. 1984), cert. denied 471 U.S. 1136 (1985) (the "Act vests broad discretion in the NRC to establish qualifications for licensees of nuclear facilities"). See also

Union of Concerned Scientists v. NRC, 920 F.2d 50, 54 (D.C. Cir. 1990) (NRC procedural rules are given great deference because of the unique degree of authority the NRC is given to decide the means to achieve its statutory objectives); Public Service Company of New Hampshire v. NRC, 582 F.2d 77, 82 (1st Cir. 1978) ("The Atomic Energy Act of 1954 is hallmarked by the amount of discretion granted the Commission in working to achieve the statute's ends [of protecting the health and safety of the public]"); Siegel v. AEC, 400 F.2d 778, 783 (D.C. Cir. 1968) (the Act's regulatory scheme "is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objective").

Section 182(a) in particular has been interpreted as giving the NRC extremely broad discretion to carry out its statutory mandate. In addition to authorizing the NRC to determine what information should be included in Technical Specifications, Section 182(a) of the Act authorizes the NRC to determine the financial qualifications of license applicants. The court in Coalition for the Environment, St. Louis Region v. NRC, 795 F.2d 168, 174 (D.C. Cir. 1986) determined that Section 182(a) gives "'the NRC complete discretion to decide what financial qualifications are appropriate'" (quoting New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 93 (1st Cir. 1978)). The language in Section 182(a) governing financial qualification ("such . . .

information . . . as the Commission etc.") is essentially the same as the Section 182(a) language governing Technical Specifications. The NRC's discretion in the Technical Specifications context is therefore equally broad.

2. NRC Regulations Do Not Require Technical Specifications to Include the Reactor Vessel Material Withdrawal Schedule.

The NRC has implemented its authority under Section 182(a) of the Act by promulgating 10 C.F.R. § 50.36. Subsection (b) of that regulation provides that operating licenses shall include technical specifications to be derived from the analyses and evaluations included in the safety analysis reports, and amendments thereto, and such additional technical specifications as the NRC finds appropriate. More specifically, 10 C.F.R. § 50.36(c) provides that Technical Specifications will include items in the following categories: (i) safety limits and limiting safety system settings, (ii) limiting conditions for operation, (iii) surveillance requirements, (iv) design features and (v) administrative controls.

The terms of 10 C.F.R. § 50.36 are very general in nature and simply set forth broad categories of items that must be included in Technical Specifications. In addition, this regulation merely requires that Technical Specifications "will include items in the following categories." It does not require that all information which could conceivably fit within these categories

be included in Technical Specifications. The language of this regulation clearly gives the NRC the discretion to determine what must be included in Technical Specifications within the bounds of the requirements of 10 C.F.R. § 50.36.

By approving Technical Specification revisions to Perry and other facilities to relocate reactor vessel material withdrawal schedules from Technical Specifications to USARs (as recommended in Generic Letter 91-01), the NRC has acted well within the discretion afforded by 10 C.F.R. § 50.36 and Section 182(a) of the Act. That exercise of discretion would certainly be upheld by the courts. See, e.g., Citizens for Fair Utility Regulation v. NRC, 898 F.2d 51, 54 (5th Cir.), cert. denied, 498 S. Ct. 896 (1990) (courts reviewing agency actions are even more deferential when reviewing an agency's application and interpretation of its own regulations); San Luis Obispo Mothers for Peace v. NRC, 789 F.2d 26, 30 (D.C. Cir. 1986) (en banc), cert. denied, 479 U.S. 923 (1986) (agency's interpretation of its own rules should be set aside only if it is plainly inconsistent with the language of the regulations).

The NRC license amendment relocating the reactor vessel material withdrawal schedule clearly is not inconsistent with the language of 10 C.F.R. § 50.36, which, as discussed above, is quite broad. Nothing in 10 C.F.R. § 50.36 requires that Technical Specifications include the reactor vessel material withdrawal

schedule. The NRC's interpretation of 10 C.F.R. § 50.36, as reflected in Generic Letter 91-01 and in the license amendment at issue here, is a reasonable one and should not be undone.

The leading case interpreting what is required by statute and regulation to be included in Technical Specifications is Portland General Electric Company (Trojan Nuclear Plant), ALAB-531, 9 NRC 263 (1979). In that case, the licensees submitted a license amendment application, supported by a "design report," which proposed to expand the capacity of the plant's spent fuel pool. The State of Oregon, the intervenor in the proceeding, sought to have certain information contained in the "design report" included in Technical Specifications. The Atomic Safety and Licensing Appeal Board ruled that 10 C.F.R. § 50.36 did not require such information to be included.

The Appeal Board concluded that 10 C.F.R. § 50.36 does not require that every operational detail be included in Technical Specifications, but rather that:

> 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. The Appeal Board found that the information requested by the State to be included in Technical Specifications did not meet this test.

Nor does the reactor vessel material withdrawal schedule at issue in this proceeding meet the Trojan test. The form and content of the Technical Specifications is clearly a matter within the NRC's discretion. Section 50.60(a) of 10 C.F.R. requires all licensees to comply with the material surveillance program requirements of Part 50, App. H. Appendix H to 10 C.F.R. Part 50 requires compliance with ASTM E 185. Exemptions to these requirements pursuant to 10 C.F.R. § 50.12 are explicitly contemplated by 10 C.F.R. § 50.60(b). The inclusion in Technical Specifications of the material withdrawal schedule is clearly not mandated by 10 C.F.R. § 50.36. Thus, the amendment modified PNPP's Technical Specifications in a manner that is entirely consistent with the requirements of 10 C.F.R. § 50.36 and Trojan.

The Technical Specification amendment at issue in this proceeding is very similar to a situation confronted by the Appeal Board in Perry, ALAB-831, 23 N.R.C. 62. In determining whether Licensees could relocate portions of its fire protection plan from PNPP's Technical Specifications into the final safety analysis report, the Appeal Board took into consideration the fact that the license amendment carrying out that relocation included the additional license requirement that Licensees comply with the

fire protection program contained in the final safety analysis report. Id. at 66. According to the Appeal Board, this condition made it impossible for any party to claim that transferring portions of the fire protection plan from PNPP's Technical Specifications to the final safety analysis report impaired Licensees' commitment to carry out the PNPP fire protection program. Id. In the instant case, the underlying regulation itself establishes the standard -- ASTM E 185 -- to which all aspects of the surveillance program (including the withdrawal schedule) must comply.[4/]

B. That the Reactor Vessel Material Withdrawal Schedule Traditionally Has Been Included in Technical Specifications Does Not Bar the NRC From Removing It From Technical Specifications.

OCRE has asserted that the reactor vessel material withdrawal schedule must remain in PNPP's Technical Specifications because the schedule has traditionally been included in Technical Specifications.[5/] In essence, OCRE is arguing that "once a Tech Spec, always a Tech Spec." This argument clearly lacks merit.

As discussed above, Section 182(a) of the Act gives the NRC the discretion to determine what information is and is not

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4/ See NRC Staff Response to Intervenors' Motion for Summary Disposition (March 7, 1994) at 20-24, and accompanying Affidavit by Messrs. Elliot, Strosnider and Grimes at ¶¶ 6, 14.

5/ OCRE's Supplemental Petition for Leave to Intervene, November 12, 1993, at 2.

included in Technical Specifications. To hold that information once contained in Technical Specifications can never be removed would be to strip the NRC of the authority granted to it under the Act. The only constraint on the NRC's authority to control the contents of Technical Specifications is 10 C.F.R. § 50.36 and not whether such information has traditionally been included in Technical Specifications. As shown above, 10 C.F.R. § 50.36 does not require inclusion of the reactor vessel material withdrawal schedule in Technical Specifications.

The NRC has acknowledged that it has added provisions to Technical Specifications in the past without considering whether those provisions were actually required because including information in Technical Specifications was often the simplest and most expeditious means of guarantying the NRC the right to monitor that aspect of a plant's operations.[6/] The NRC would be prohibited from eliminating such extraneous material from Technical Specifications if the Board were to rule that the withdrawal schedule cannot be removed from PNPP's Technical Specifications simply because it has "traditionally" been included.

6/ 55 Fed. Reg. 3788, 3789 (1987).

C. Section 189(a) of the Act Does Not Guarantee OCRE the Right to a Hearing on Changes to the Reactor Vessel Material Withdrawal Schedule.

Section 189(a)(1) of the Act provides as follows:

> In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, . . ., the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

1. Section 189(a) of the Act Does Not Guarantee the Right to a Hearing on All Issues.

a. Section 189(a) of the Act Guarantees the Right to a Hearing Only on Matters Which Are Material to the NRC's Licensing Decisions.

The courts have interpreted Section 189(a) to require a hearing only as to the issues which are material to the NRC's licensing decision. See Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983); Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1449 (D.C. Cir. 1984). Accord, Union of Concerned Scientists v. NRC, 920 F.2d 50 (D.C. Cir. 1990)

In Bellotti, the NRC issued an order modifying the reactor operating license which required the licensee to develop a plan for reappraisal and improvement of management functions. The State Attorney General sought to intervene and requested a Section 189(a) hearing on the content of the plan, namely the continued operation of the plant, the nature of improvements to the

plant, and the adequacy of the licensee's reappraisal and its implementation. The NRC denied the request for a hearing. The court upheld the NRC's denial on the grounds that the development of the plan of action took place outside of the license amendment proceeding and therefore, was not a part of the NRC's decision to amend the license. Id. at 1382. Because the substance of the plan was not a part of the NRC's decision to modify the license, it was not a material factor in the NRC's decision, and therefore, Section 189(a) of the Act did not guarantee a right to a hearing on the substance of the plan. See id.

In Union of Concerned Scientists, 735 F.2d 1437, the NRC adopted a rule which provided that atomic safety and licensing boards did not have to consider the results of emergency preparedness exercises in licensing hearings before authorizing a full power license to operate a nuclear power plant. The NRC, however, would not actually issue the license until emergency preparedness exercises were satisfactorily completed.

Union of Concerned Scientists claimed that this rule violated its Section 189(a) right to a hearing on a material issue in licensing proceedings. Id. at 1438. The NRC admitted that it would not issue a license until emergency preparedness exercises were satisfactorily completed. As a result, the court concluded that such exercises were material to the NRC's licensing decision. Id. Therefore, the court held that the NRC rule removing

consideration of these exercises from the scope of a Section 189(a) hearing denied the public of its right to a hearing. Id. at 1438.

b. The Reactor Vessel Material Schedule Is Not Material to the NRC's Licensing Decisions.

"Material" is defined as relating to a matter that is so substantial and important as to influence a party. Black's Law Dictionary 880 (5th ed. 1979). Thus, with respect to the NRC's licensing decisions, information is material only if it is so substantial and important as to influence the NRC's decision. Although there is no statutory or regulatory guidance as to what the term "material" means in the context of an NRC licensing decision, courts have held that the NRC has great discretion to decide what matters are and are not material to its licensing decisions. Siegel, 400 F.2d at 783.

Generic Letter 91-01 clearly indicates the view of the NRC Staff that the withdrawal schedule is not material to its licensing decisions. As explained by the NRC Staff in its Response to Intervenors' Motion for Summary Disposition, the regulatory standard established in Appendix H is ASTM E 185 and that standard remains notwithstanding the relocation of the withdrawal schedule

from the Technical Specifications to the USAR.[7/] Thus, the inclusion of the withdrawal schedule in Technical Specifications is not material to the NRC's licensing decisions.

A comparison of the NRC's treatment of the withdrawal schedule with its treatment of the emergency preparedness exercises at issue in Union of Concerned Scientists, 735 F.2d 1437, further demonstrates that the schedule is not material to the NRC's licensing decisions. In Union of Concerned Scientists, the NRC conceded that emergency preparedness exercises had to be satisfactorily completed before the NRC would issue an operating license. Id. at 1438. Consequently, such exercises were found to be material to the NRC's licensing decision. In contrast, the withdrawal schedules themselves are not material to NRC's licensing decisions since, as explained by the NRC Staff, they are bounded by the regulatory standard, i.e., ASTM E 185. Only if the schedules were inconsistent with that standard would the schedules themselves be treated as material. In that case, the Staff has indicated that proposed changes would likely be treated as requests for license amendments.[8/]

7/ As described in the NRC Staff Response to Intervenors' Motion for Summary Disposition (March 7, 1994) at 27, and the accompanying Affidavit by Messrs. Elliot, Strosnider and Grimes at ¶ 14, a licensee may make changes to the withdrawal schedule without NRC approval so long as the changes are consistent with ASTM E 185.

8/ See NRC Staff Response to Intervenors' Motion for Summary Disposition, at 28.

Because the reactor vessel material withdrawal schedule itself is not material to the NRC's licensing decision, Section 189(a) of the Act does not guarantee the right to a hearing with respect to changes in the schedule, provided that any changes are consistent with ASTM E 185. Thus, OCRE has no statutory right to a Section 189(a) hearing on changes to the schedule once it is removed from Technical Specifications. OCRE cannot claim a violation of its rights under Section 189(a) as a result of relocating the schedule from PNPP's Technical Specifications into the USAR.

2. **Future Changes to the Reactor Vessel Material Withdrawal Schedule Will Not Be De Facto License Amendments Entitling OCRE to a Section 189(a) Hearing.**

OCRE argues that:

> [c]hanges to the reactor vessel material specimen withdrawal schedule, with approval by the NRC, will give Licensees the authority to operate in ways in which they otherwise could not. Thus, they are de facto license amendments, and the public must have notice and opportunity to request a hearing. Anything less is a violation of Section 189a of the Atomic Energy Act.9/

The essence of OCRE's argument is that inasmuch as the withdrawal schedule was part of PNPP's Technical Specifications and OCRE had a right under Section 189(a) to a hearing with respect to changes

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9/ OCRE's Motion for Summary Disposition at 5.

to the schedule, OCRE will always have a right under Section 189(a) to such a hearing regardless of whether the schedule is located in PNPP's Technical Specifications or in the USAR and regardless of whether the revised schedule complies with the regulatory standard (i.e., ASTM E 185).

OCRE relies on Sholly v. NRC, 651 F.2d 780 (D.C. Cir. 1980), vacated on other grounds, 435 U.S. 1194 (1983), for the proposition that the public is entitled to notice and an opportunity for hearing when there is a de facto license amendment. OCRE's Motion at 4-5. In Sholly, the NRC issued an order allowing the licensee to vent radioactive gas from Three Mile Island Unit 2, something that could not be done under the existing license. The NRC did not provide notice of an opportunity for hearing on the venting order. The court held that an action which grants a licensee the authority to do something it otherwise could not have done under its existing license authority is a license amendment within the scope of Section 189(a). An opportunity for hearing on the amendment was therefore required. Id. at 791.

Even if the Sholly decision has any remaining validity, OCRE's reliance on it is misplaced. In Sholly, the existing license authority would not have permitted the licensee to release the radioactive gas in the manner permitted by the venting order. Only the venting order permitted the licensee to operate its plant in this manner. In the instant case, however,

the PNPP operating license authority has been amended to relocate the withdrawal schedule to the USAR which can be changed without a license amendment. Thus, if the schedule is changed in the future, no license amendment will be needed. At that time, Licensees will be doing what their license authority permits them to do. Licensees will not be operating outside of the scope of their license authority and therefore will not be taking any action which is a de facto license amendment. The right to a Section 189(a) hearing will not be triggered as it was in Sholly.

The necessary implication of OCRE's de facto license amendment argument shows its flaw. Accepting this argument leads to the conclusion that once a piece of information, regardless of its technical significance or regulatory mandate, has been in Technical Specifications, the information even if removed from Technical Specifications can never be changed without first affording the public the right to a Section 189(a) hearing. If OCRE's de facto license amendment argument prevails, intervenors would be entitled to hearings on matters for which they have no statutory right.

III. QUESTIONS POSED BY THE BOARD

The Board's December 27, 1993 Order (Admitting Contention and Establishing Schedule) suggested that the parties analyze and discuss three questions. Licensees' answers are as follows:

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

As set forth in Section II above, the Commission's regulation governing Technical Specifications, 10 C.F.R. § 50.36, does not require that the reactor vessel material specimen withdrawal schedule be incorporated in the Perry facility's Technical Specifications. Since the schedule need not have been included in Technical Specifications in the first place, once it has been removed, a licensee should be able to make changes to it without NRC action so long as those changes are bounded by the regulatory standard, in this case ASTM E 185. Any other conclusion would produce absurd results, such as guaranteeing a hearing on an issue with no safety significance. For example, if the Technical Specifications at one time specified that the containment building be painted blue, and that provision were subsequently deleted as unnecessary, OCRE's theory would require that it be granted a hearing if the licensee decided to repaint the containment red.

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

As set forth in the Affidavit of Robert W. Schrauder, attached hereto, there are changes in the withdrawal schedule, assuming the removal of the schedule from the Technic ' Specifications, which would not be reflected in changes in the limiting

conditions of operation for the Perry facility. Notwithstanding this answer, Licensees agree with OCRE that this question does not appear to be relevant to OCRE's contention. The central question presented is whether a right to a hearing exists after a provision has been removed from Technical Specifications regardless of the other regulatory limits which remain.

> 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 CFR 50.36?

Licensees submit that removing from Technical Specifications a requirement that is found in an NRC regulation cannot possibly violate 10 C.F.R. § 50.36. Furthermore, a licensee should be able to make changes to the withdrawal schedule without NRC action as long as those changes are consistent with NRC regulations (i.e., App. H, § II.B.). OCRE's underlying argument that it is entitled to a hearing any time Licensees modify plant operation in a manner within regulatory standards would establish intervenors as the regulators.

IV. CONCLUSION

It is clear that the Atomic Energy Act vests the NRC with the authority to control the contents of Technical

Specifications. The reactor vessel material withdrawal schedule is not required to be included in Technical Specifications under Section 182(a) of the Act, 10 C.F.R. § 50.36, or the Trojan decision. Consequently, Section 189(a) of the Act does not guarantee a right to a hearing with respect to changes to such values if the schedule is no longer included in a plant's Technical Specifications.

Section 189(a) of the Act guarantees the public the right to a hearing only on issues that are material to the NRC's licensing decision. Because the regulatory standard is established by NRC's rules, the withdrawal schedule itself is not material so long as it is within the regulatory standard. OCRE makes no argument that the schedule violates this standard. For these and all the other reasons discussed in Sections II and III above, OCRE's rights to a hearing under Section 189(a) are not violated by relocating the reactor vessel material specimen withdrawal schedule from PNPP's Technical Specifications to the USAR.

Licensees' motion should be granted and the OCRE's contention dismissed.

Respectfully submitted,

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Dated: March 21, 1994

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STATEMENT OF MATERIAL FACTS AS TO WHICH NO GENUINE ISSUE EXISTS TO BE HEARD

1. Prior to issuance of Amendment 45 to the Perry Nuclear Power Plant Unit 1 Operating License, NPF-58, the "Reactor Vessel Material Surveillance Program - Withdrawal Schedule" was included in the plant Technical Specifications as TS Table 4.4.6.1.3-1.

2. Prior to the issuance of Amendment 45 to NPF-58, Licensees could not make changes to the withdrawal schedule without seeking an operating license amendment, of which there would be notice in the Federal Register with the opportunity for interested persons to request a hearing.

3. Amendment 45 to NPF-58, issued December 18, 1992, deleted the withdrawal schedule from the Technical Specifications and relocated the schedule to the Updated Safety Analysis Report.

4. After the issuance of Amendment 45 to NPF-58, Licensees can make changes to the withdrawal schedule without seeking an operating license amendment, without any notice in the Federal Register, and without the opportunity for interested persons to request a hearing.

5. After the issuance of Amendment 45 to NPF-58, Licensees can only make changes to the withdrawal schedule if those changes are consistent with ASTM E 185 or by obtaining appropriate NRC approval.