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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'95 NOV 30 P3:37

BEFORE THE COMMISSION

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| In the Matter of |) | |
| |) | Docket No. 50-440-OLA-3 |
| THE CLEVELAND ELECTRIC |) | ASLBP No. 90-605-02-OLA |
| ILLUMINATING COMPANY |) | |
| |) | |
| (Perry Nuclear Power Plant, |) | (Material Withdrawal Schedule) |
| Unit 1) |) | |

NRC STAFF'S ANSWER TO LICENSEES'
PETITION FOR COMMISSION REVIEW

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PETITION FOR COMMISSION REVIEW

On November 7, 1995, the Cleveland Electric Illuminating Company, *et al.* ("Licensees") filed a "Petition for Review" ("Petition"), in which they urged the Commission to undertake a broad review of the "Memorandum and Order (Ruling on Motions for Summary Disposition)" issued by the Atomic Safety and Licensing Board in this proceeding on October 4, 1995. *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit No. 1), LBP-95-17, 42 NRC ____ (1995). The NRC Staff ("Staff") hereby files its answer to the Licensees' Petition.

For the reasons set forth below, the Staff does not oppose the Licensees' Petition, but suggests that any review that is undertaken should be limited to (a) whether the Licensing Board correctly rejected the Staff's interpretation and application of 10 C.F.R. Part 50, Appendix H, and (b) whether the Board correctly addressed the question of how future schedule changes are

to be treated, having decided that the instant license amendment is lawful -- which was the specific issue presented by the Interveners' contention.¹

BACKGROUND

On March 15, 1991, the Licensees submitted an application to amend the Perry 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 the facility's Updated Safety Analysis Report (USAR)² in accordance with GL 91-01.³ A notice of opportunity for hearing was published in the *Federal Register*, and on August 23, 1991, Ohio Citizens for Responsible

¹ The Staff submits that Commission review of the Licensing Board's decision is appropriate under 10 C.F.R. § 2.786(b)(4)(ii) and (iii), in that the decision presents a "substantial question" concerning "a necessary legal conclusion [that] is "without governing precedent" and raises "a substantial and important question of law." The Commission has not previously rendered an opinion as to the proper interpretation of 10 C.F.R. Part 50, Appendix H, or as to the proper application of Generic Letter (GL) 91-01, which authorized the removal of specimen capsule withdrawal schedules from the Technical Specifications (TS). Also, many nuclear power plant licensees have removed the withdrawal schedules from their TS in accordance with GL-91-01; the procedures for revising the schedules at these (and other) plants stand to be affected by the Board's decision.

² Letter from Michael D. Lyster to Document Control Desk, NRC, dated March 15, 1991. This request supplemented a license amendment application dated September 14, 1990, which had requested revision of the reactor vessel pressure-temperature limits.

³ Generic Letter (GL) 91-01, "Removal of the Schedule for the Withdrawal of Reactor Vessel Material Specimens from Technical Specifications," dated January 4, 1991. The Staff encouraged the removal of specimen capsule withdrawal schedules from the TS as part of the Commission's TS improvement program, as matters that are not of "controlling importance to safety" and do not require rigid "conditions of operation which cannot be changed without prior Commission approval" -- *i.e.*, matters which are 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", 58 Fed. Reg. 39132, 39136 (July 22, 1993); 10 C.F.R. § 50.36(c)(2), *as amended*, 60 Fed. Reg. 36953 (July 19, 1995); *see also* Affidavit of Barry J. Elliott, Christopher I. Grimes and Jack R. Strosnider ("Staff Affidavit"), ¶¶ 9-12, attached to "NRC Staff Response to Interveners' Motion for Summary Disposition" ("Staff Response"), dated March 7, 1994.

Energy, Inc. ("OCRE") and Susan L. Hiatt filed a timely petition for leave to intervene and request for hearing.

On March 18, 1992, the Licensing Board denied the request for hearing on the grounds that the Petitioners had not demonstrated their standing to intervene; this determination was subsequently reversed by the Commission, which concluded that the Petitioners should be allowed to file a contention questioning "whether the removal of the withdrawal schedule from the technical specifications is indeed an unlawful act."⁴ OCRE and Ms. Hiatt then filed a revised contention, which asserted 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.

This contention was admitted by the Licensing Board; and the parties then filed motions for summary disposition on the merits of the legal issue presented by the contention.

On October 4, 1995, the Licensing Board issued a "Memorandum and Order (Ruling on Motions for Summary Disposition)," in which it concluded that -- as long as 10 C.F.R.

⁴ *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 93-96 (1993), *rev'g* LBP-92-4, 35 NRC 114 (1992). The Commission found that the Intervenors 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. *Id.* at 95. The Commission stated, "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.

Part 50, Appendix H "remains in its current form" -- notice and opportunity for hearing must be provided for any future changes to the reactor vessel material specimen capsule withdrawal schedule under section 189a of the Atomic Energy Act, following the removal of the schedule from the Technical Specifications (LBP-95-17, slip op. at 23). Significantly, however, while the Licensing Board opined that future changes to the withdrawal schedule must be treated as license amendments requiring notice and opportunity for hearing, it left intact the instant license amendment which had deleted the schedule from the TS -- holding that removal of the schedule from the TS is not an unlawful act (*Id.* at 8-9 and 22-23).

DISCUSSION

- A. The Licensing Board Erroneously Rejected the Staff's Interpretation of Appendix H to 10 C.F.R. Part 50 and Erroneously Concluded that the Regulation Requires Prior NRC Approval of Any and All Schedule Changes.

In concluding that 10 C.F.R. Part 50, Appendix H, requires prior NRC approval of any and all changes to the capsule withdrawal schedule, the Board primarily relied upon the language in § II.B.3. That provision states as follows:

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.

LBP-95-17, slip op. at 14. The Licensing Board held that the "plain meaning" of the regulation is that "the NRC must approve proposed schedules before they are implemented," including "any change to an already implemented schedule, significant or otherwise." *Id.* at 15, 17-18.

The Licensing Board's interpretation of Appendix H ignored the regulatory history of the regulation (which had been summarized in the Staff's Affidavit), based on the Board's

erroneous conclusion that the regulation is unambiguous. *Id.* at 15-18.⁵ Thus, the Board rejected the Staff's view that § II.B.3 of Appendix H does not explicitly address changes to an approved schedule or how changes to an approved schedule are to be treated by the Commission; and it rejected the Staff's historical interpretation and application of the rule (Affidavit, ¶ 14), as requiring "prior approval" only for proposed schedules and schedule changes that do not conform to the ASTM Codes which are incorporated by reference in the rule. *Id.* at 18-21.⁶

The Board's conclusion that Appendix H is unambiguous is incorrect, in that the rule does not explicitly address changes to approved schedules. This ambiguity is resolved by the rule's regulatory history. As set forth in the Staff's Affidavit, the Commission has incorporated by reference ASTM E 185-79 (and the identical matters in ASTM E 185-82) in Appendix H; the approved withdrawal schedule and criteria for modifying the schedule are set forth in ASTM E 185-79 and ASTM E 185-82 (Affidavit, ¶ 6).⁷ The Commission indicated that ASTM E 185-79 contains sufficient detail for the preparation of withdrawal schedules so as to permit

⁵ In fact, the Board, itself, found it necessary to go beyond the plain words of the regulation and to interpret it, in concluding that a "proposed schedule" includes not just a proposed schedule but also any proposed changes to an approved schedule, regardless of whether those changes are insignificant or are consistent with the ASTM Codes which (the Board agreed) are incorporated by reference in the rule. *Id.* at 17-18, 19-20.

⁶ See 10 C.F.R. Part 50, Appendix H, "Introduction" (noting that ASTM E 185-73, -79 and -82, "Standard Practice for Conducting Surveillance Tests for Light-Water Cooled Nuclear Power Reactor Vessels," were approved for incorporation by reference).

⁷ 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) (noting that publication of the 1979 edition of ASTM E 185 allowed the NRC to delete specific requirements from the regulations and to replace those provisions with provisions in ASTM E 185, which was simultaneously incorporated by reference in Appendix H).

the deletion of the schedules from Appendix H; and it adopted the current formulation of Appendix H, § 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 (Affidavit, ¶ 6).⁸ Consistent with this approach, the Staff concluded that proposed withdrawal schedules or changes which are in conformance with ASTM E 185-79 (and ASTM E 185-82) satisfy the requirements of Appendix H, and do not require specific prior approval (Affidavit ¶¶ 6, 12, and 14).⁹ The Licensing Board erred in ignoring the rule's regulatory history and in concluding that prior NRC approval is required for all schedule changes, regardless of whether they are insignificant or are consistent with the ASTM Codes incorporated by reference in Appendix H.

⁸ As set forth in the Staff's Affidavit, earlier iterations of Appendix H had specified the number of capsules and specific withdrawal schedules to be followed by licensees, described the circumstances under which modifications to those schedules would be appropriate, and provided that proposed schedules "that differ from those specified in [the regulation]" were to be submitted for prior approval by the Commission (Affidavit ¶ 6). In November 1980, the Commission published a proposed amendment to Appendix H which would delete major portions thereof. 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." Proposed Rule, "Domestic Licensing of Production and Utilization Facilities; Fracture Toughness Requirements for Nuclear Power Reactors," 45 Fed. Reg. 75536, 75537 (Nov. 14, 1980). See also, Statement of Consideration, "Fracture Toughness Requirements for Light-Water Nuclear Power Reactors," 48 Fed. Reg. 24008 (May 27, 1983).

⁹ The Staff recognizes that the proper interpretation of Appendix H, § II.B.3 is subject to question. Thus, while the Board found that Appendix H was revised in 1983 to provide that schedules must conform to one of various specified ASTM Codes, and to delete the requirement that changes which differed from those schedules be submitted to the NRC for approval, it further found that a new provision was simultaneously inserted in the rule to require that "all" proposed schedules and changes be approved in advance by the NRC. LBP-95-17, slip op. at 20-21. Also, as the Board noted, the Staff's interpretation of Appendix H is at odds with certain statements in GL 91-01, which had indicated that § II.B.3 provides "controls on changes," and "mandate[s] prior NRC approval of any changes to the withdrawal schedule." *Id.* at 22 n.23.

Finally, in concluding that Appendix H requires prior NRC approval of all withdrawal schedules and changes thereto, the Licensing Board erred in concluding that all such changes constitute material "licensing actions" that trigger the public's rights to notice and opportunity for a hearing pursuant to section 189a of the Atomic Energy Act. In fact, approval of the withdrawal schedule does not always constitute a "material" licensing action. To the extent that any "material" licensing action would be associated with future changes in the withdrawal schedule, such actions would involve (a) the approval of changes in the limiting conditions for operation (LCOs) governing the related pressure/temperature (P-T) limits -- which would be brought about by changes in material specimen test results rather than changes in the withdrawal schedule, *per se*, or (b) changes to the schedule that are not consistent with the ASTM Codes incorporated by reference in Appendix H (*see* Affidavit, ¶¶ 11, 16[b]). For such "material" licensing actions, license amendments would likely be issued, preceded by the publication of a notice and opportunity for hearing (*Id.*, ¶ 14).¹⁰ No more is required under the Atomic Energy Act. Accordingly, the Licensing Board's reliance on the *UCS* and *CAN* decisions, in concluding

¹⁰ This conclusion is consistent with the Commission's decision in CLI-93-21, that the Intervenor may raise, in this proceeding, the question of whether removal of the withdrawal schedule from the TS would deprive them of the opportunity to challenge future changes to the schedule which might result in a "weakened reactor vessel" and "an accidental release of radioactive fission products into the environment if the vessel should fail." CLI-94-21, 38 NRC at 94. As set forth in the text above, the Intervenor will not lose that opportunity, since any significant changes to the schedule would likely be treated as license amendments for which notice and opportunity for hearing would be provided. *See* Affidavit, ¶ 14 (proposed changes that are not consistent with ASTM E 185-79 or -82 "would likely be deemed to involve an unreviewed safety question under the current regulatory framework and would require prior NRC approval by a license amendment as provided by 10 C.F.R. § 50.59(c)").

that any changes to the withdrawal schedule requires a license amendment and notice and opportunity for hearing,¹¹ is misplaced.

B. Having Concluded That the Capsule Withdrawal Schedule May Lawfully Be Removed From the TS, the Licensing Board Exceeded Its Authority in Determining That *Future* Changes to the Schedule Should Be Treated as License Amendments.

The instant license amendment removed the withdrawal schedule from the TS and placed it in the facility's USAR; that TS amendment was approved by the Licensing Board. With this change, if any changes to the schedule are proposed in the future, the Licensee will be obliged to determine, pursuant to 10 C.F.R. § 50.59, whether the proposed changes constitute matters which require license amendments, for which the Staff would provide notice and opportunity for hearing.¹²

Significantly, the Intervenors and Licensing Board both agreed with the Staff's view that there is no statutory or regulatory requirement for specimen capsule withdrawal schedules to be included in a facility's Technical Specifications, and the Board held that the withdrawal schedule may lawfully be removed from the TS (LBP-95-17, slip op. at 8, and 22-23). However, notwithstanding the fact that the Board reached this conclusion, it then erroneously proceeded to address the Intervenors' assertion that future changes to the schedule must be treated as license amendments.

¹¹ LBP-95-17, slip op. at 23 n.24, citing *Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1451 (D.C. Cir. 1984), and *Citizens Awareness Network v. NRC*, 59 F.3d 284, 294 (1st Cir. 1995).

¹² See 10 C.F.R. § 50.59(a)(1) (changes to a facility or to the procedures described in the FSAR may be made by a licensee without prior NRC approval, unless the change involves an unreviewed safety question or a change in the TS); see also Staff Affidavit, ¶ 14 (scheduler changes that are consistent with ASTM E 185-79 or 185-82 may be made without prior NRC approval; changes that are not consistent with the ASTM Codes would likely involve an unreviewed safety question for which a license amendment would be issued under § 50.59(c)).

The Licensing Board's determination in this regard is inherently flawed. The fundamental question before the Board was whether the instant license amendment, which removed the withdrawal schedule from the TS, should be allowed to stand, or whether the removal of the schedule from the TS violated any law or regulation. This was the specific issue presented by the Intervenor's contention (recited *supra* at 3). The license amendment at issue here did not address the question of how future changes to the schedule should be treated, since future changes to the schedule were not before the Licensing Board and were not proposed by this amendment. Having found that the schedule may lawfully be removed from the TS -- a determination which was not (and is not) contested by the Intervenor¹³ -- and having determined that the instant license amendment should be allowed to stand, the Licensing Board's consideration of the secondary issue raised by the Intervenor, as to how future schedule changes are to be treated, constitute *dictum*, at best, which should not have been addressed in this proceeding.¹⁴

C. The Commission Need Not Address, in This Adjudication, the Broad Issues of Regulatory Application Presented by the Licensees' Petition for Review.

In their Petition, the Licensees assert that the Licensing Board's decision has broad and far-reaching potential consequences, in that it may lead to the treatment of numerous approvals required under NRC regulations as license amendments (Petition at 1, 2). While the Staff agrees that the Board's decision could be read broadly, as suggested by the Licensees, its

¹³ See LBP-95-17, slip op. at 8-9 and 23; "Intervenor's Answer to Licensees' Petition for Review," dated November 15, 1995, at 2 and 7; and "[Intervenor's] Motion for Summary Disposition, dated February 7, 1994, at 6 and 7.

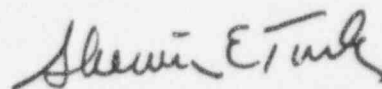
¹⁴ See, e.g., *Commonwealth Edison Co.* (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426 (1980); *Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979); *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976).

actual effect is quite limited: The only direct effect of the Board's decision is that henceforth, changes to a withdrawal schedule that has been removed from the TS are to be made by license amendment, for which notice and opportunity for hearing are to be provided -- just as they were before GL-91-01 authorized the removal of these schedules from the TS. No regulations other than Appendix H are at issue in this proceeding, and the Commission need not undertake, in this proceeding, the broad review of other regulations which the Licensees have proposed.¹⁵

CONCLUSION

For the reasons set forth above, the Staff does not oppose the Licensees' Petition, but suggests that any review should be limited to the issues as to whether the Board correctly interpreted 10 C.F.R. Part 50, Appendix H, and whether, having decided that the instant amendment is lawful, it correctly addressed the question of how future schedule changes are to be treated.

Respectfully submitted,



Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 30th day of November 1995

¹⁵ This is not to say that the Commission (or the Staff) may not undertake to consider the broader implications of the Licensing Board's decision, with respect to the numerous regulatory requirements for NRC approval of licensee submittals. The Staff suggests, however, that any such broad consideration should be undertaken on a generic basis, outside the scope of this adjudicatory proceeding. Indeed, such broad, generic consideration may well be appropriate at this time, in light of the recent *CAN* decision and the Board's decision in this proceeding. Further, the Staff believes that if a broad review is undertaken by the Commission, any interim guidance which the Commission may provide during the pendency of that review would undoubtedly be of benefit to the Staff, licensees and other interested persons.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO LICENSEES' PETITION FOR COMMISSION REVIEW" in the above-captioned proceedings have been served on the following, by deposit in the United States mail or, as indicated by an asterisk, by deposit in the Nuclear Regulatory Commission's internal mail system or, as indicated by double asterisk via facsimile transmission, this 30th day of November 1995.

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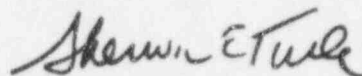
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