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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
James P. Gleason, Chairman
Dr. Jerry R. Kline
Mr. Glenn O. Bright

DOCKETED
USNRC

'85 SEP -3 A11:52

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of

CLEVELAND ELECTRIC ILLUMINATING
COMPANY, et al.

(Perry Nuclear Power Plant,
Units 1 & 2)

Docket Nos. 50-440-OL
50-441-OL

ASLBP No. 81-457-04 OL

August 30, 1985

SERVED SEP 3 1985

MEMORANDUM AND ORDER

(Motion to Reopen Record and Submit New Contention)

The Ohio Citizens for Responsible Energy (OCRE), Intervenor, filed a motion, opposed by the Applicants and Staff, to reopen the record and submit a new contention. The motion is directed at an exemption requested by Applicants from the provisions of 10 CFR Part 50 Appendix J, III.D.2(b)(ii). The essential facts are not in dispute. Applicants seek for their Perry facility a partial but permanent exemption under 10 CFR 50.12(a) from one of the containment leakage testing requirements in Appendix J. The requirements at issue relate to testing for air lock leaks. Applicants' exception, if granted, would allow testing of the air lock seal in lieu of testing the entire air lock in cases where the air lock has been opened during periods when containment integrity is not required. (This substitute is explicitly permitted by the regulations where the opening occurs when containment integrity is

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required). See III.D.2(b)(iii). The basis for the exemption requested is that the regulatory test requirement, if applied, would require either a lengthy and costly test method to be pursued, or, alternatively, a major design change, either of which would decrease plant availability and create substantial and unjustifiable operational cost increases. In Applicants' view the exemption does not present an undue risk to the public health and safety, is consistent with the common defense and security, and is in the public interest. A number of nuclear facilities have received the same exemption in the past. See Applicants' Answer at 3 and Staff Response at 8 and attachment.

The Applicants included notice of the planned exception from Appendix J in its initial (July 1984) and subsequent drafts of the Perry plant's technical specifications and supported with an analysis their exemption request to the Commission on April 8, 1985. See Applicants' Answer, Attachments 2, 3, 4 and 5 and OCRE Motion, Exhibit 1.

The Staff, pursuant to 10 CFR 51.35, has prepared an environmental assessment and finding of no significant impact of the requested exemption which suggests, at least, that the request will be approved. There is an added condition included therein that full pressure testing required by III.D.2(b)(ii) will have to be undertaken whenever maintenance is performed on a containment air lock.

OCRE's stated objections to the Applicants' submittal in part deals with the merits of the exemption requested and in part with the procedure being followed. All parties agree on the Commission's existing standards for reopening the record and for late-filed

contentions even though there is a sharp divergence over their application.

Intervenor's proposed new contention reflects OCRE's position that Applicants should have filed for an exemption under 10 CFR 2.758 rather than 50.12. However, OCRE also alleges a failure on Applicants' part to meet the tests required under 10 CFR 50.12 as well. This later section of the regulations provides for the Commission to grant such exemptions from the requirements of Part 50 as it determines are authorized by law and will not endanger life or property and the common defense and security and are otherwise in the public interest.

The Intervenor initially challenges the Commission's legal authority to issue exemptions from its regulations, a thrust which is beyond a licensing board's responsibility to consider. See 10 CFR 2.758(a); Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 89-90 (1974). The Commission has previously expressed its view on challenges to 10 CFR 50.12. See Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), 7 AEC 196 (1974). Intervenor next contends that Applicants' request for an exemption does not meet the standards of 50.12 alleging its primary motive for the request is avoidance of financial hardship, a claim OCRE suggests as beyond the Commission's authority to consider. In our view, the cases cited by OCRE have no direct applicability to the issue of exemptions involved here. Continuing, OCRE alleges that the grant of an exemption would increase dangers to the public health and property and as a consequence not be in

the public interest. We need not burden this order with a detailed evaluation of these particular OCRE allegations since if Applicants have validly filed a request under 10 CFR 50.12 then the grant of the requested exemption under its present posture will be a matter for the Commission to decide.

The Commission does have pending a proposed rule designed to clarify the standards that will be applied when it considers requests for exemptions under 50.12. See 50 FR 16506. Although the rule being proposed has no present application here, the Appeal Board has recently pointed out that the discussion in the notice yields useful insight on the application and purpose of the rule in its existing form. See Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-809 (June 17, 1985) (slip op. at 7, n.5). The rule proposes to include "financial or economic hardship" and "any unusual difficulties" as circumstances that could justify an exemption. As the Appeal Board noted, supra, the proposed rulemaking is intended to incorporate certain standards now being applied by the Staff as a matter of practice. The central issue before us, however, is a determination on whether Applicants' request for relief, as OCRE alleges, is required to be filed under 2.758 rather than 50.12 of the Commission's regulations. If the decision here is in the affirmative, we will need to evaluate whether the standards for reopening the record and filing a new contention have been met. If negative, no purpose is served by deciding the merits of that issue in this decision.

Section 2.758 is the basic regulation which insulates the Commission's rules and regulations from attack or challenges in an adjudicatory proceeding. It provides a method for waivers or exceptions to be made in the application of such rules or regulations to a particular subject matter of the proceeding wherein the application of the rule or regulation would not serve the purpose for which it was adopted. A petition for a waiver or exception is permissive and generally should be utilized where the interpretation or the application of a regulation to particular facts is questioned. See Washington Public Power Supply System (WPPSS Nuclear Projects, Nos. 3 and 5), CLI-77-11, 5 NRC 719, 723 (1977). The waiver petition must be accompanied by an affidavit that identifies the specific aspects of the subject matter of the proceeding as to which application of the rule would not serve the purpose for which the rule or regulation was adopted. If a licensing board finds a prima facie showing has been made, the waiver petition is then certified to the Commission for its final disposition. Petitions for waivers or exceptions should be granted only in "unusual and compelling circumstances." Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), CLI-72-81, 5 AEC 25, 26 (1972). The Applicants here make no claim that the regulatory testing requirement of III.D.2(b)(ii) does not serve their purpose but rather that compliance would result in costly delays in operation. Further, it is clear that a petition for a waiver or exception under 2.758 represents an optional procedure which may or may not be available in the circumstances of a particular proceeding.

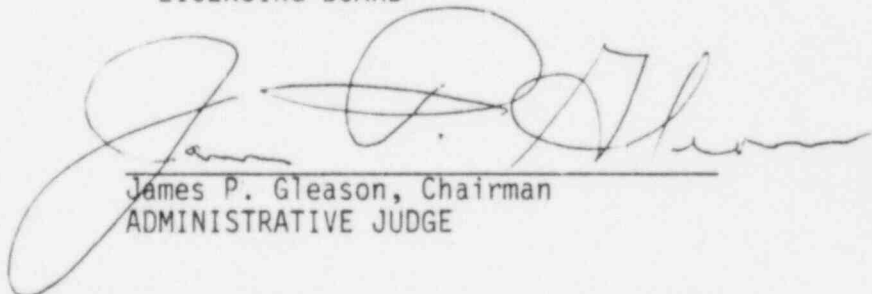
The Intervenor, citing a Commission ruling in a Shoreham case, argue that absent directions from the Commission in this case, since the Applicants are a party in an adjudicatory proceeding, they must submit their exemption request as a petition under 2.758 to the Licensing Board (emphasis added). See Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-84-8, 19 NRC 1154 (1984). The Shoreham case, as we see it, however, is not applicable since it involved an exemption request under 50.12 and that exemption was directly related to a contention being litigated in the proceeding. No similar relationship exists in the Perry proceeding. The Board is commanded by 10 CFR 2.760(a) to adjudicate only such matters as are placed in controversy by the parties. It can raise issues on its own initiative which involve serious safety, environmental, or common defense and security matters; however, the exemption Applicants seek here does not raise that matter to a level of such concern here--this is particularly true in view of the number of other facilities which have received identical exemption approvals. We, of course, do not suggest that the Commission, if it desired, could not direct this Board to consider the merits of Applicant's pending 50.12 request. It has done so in the past. See Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), CLI-74-9, 7 AEC 197, 198 (1974). Inasmuch as OCRE forwarded its communication in opposition to the Applicants' exception request to the NRC Project Manager of the Perry facility on May 8, 1985--the substance of which is identical to arguments made in the

present motion--the Commission and Staff have OCRE's views on the issue before it for any evaluation they believe may be required.

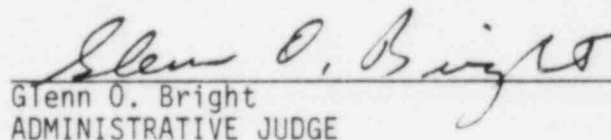
The Board concludes that no obligation rests on the Applicants to file its exemption request as a petition under 2.758, that the relief it seeks is not available from that section, and that the Intervenor's motion to open up the record to consider a contention in this area flounders for lack of any foundation. We conclude, therefore, its motion must be dismissed.

ORDERED

THE ATOMIC SAFETY AND
LICENSING BOARD



James P. Gleason, Chairman
ADMINISTRATIVE JUDGE



Glenn O. Bright
ADMINISTRATIVE JUDGE



Jerry R. Kline
ADMINISTRATIVE JUDGE

Bethesda, Maryland