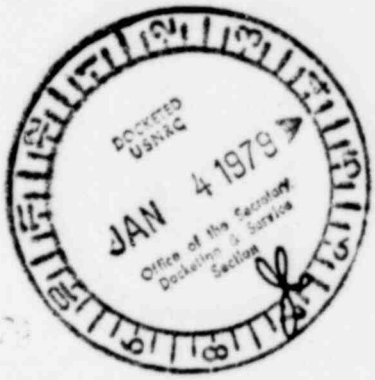
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



ATOMIC SAFETY AND LICENSING APPEAL BOARD

Richard S. Salzman, Chairman
Dr. John H. Buck
Michael C. Farrar

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In the Matter of	)	
OFFSHORE POWER SYSTEMS	)	Docket No. STN 50-437
(Floating Nuclear Power Plants)	)	

Mr. Anthony Z. Roisman, Washington, D. C., for intervenor Natural Resources Defense Council, petitioner.

Messrs. Barton Z. Cowan, Thomas M. Daugherty and John R. Kenrick, Pittsburgh, Pennsylvania, for applicant Offshore Power Systems, respondent.

Mr. Stephen Sohinki for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

January 4, 1979

(ALAB-517)

1. Before us once again is Offshore Power Systems' application for licenses to manufacture floating nuclear plants for eventual siting at unspecified shoreline or ocean locations. This time the matter at hand involves intervenor Natural Resources Defense Council's attempt to introduce the following new contention into the case:

> The Staff has failed to find any even potentially acceptable estuarine or riverine site for [a floating nuclear plant (FNP)], has identified serious real problems with such sites, has been advised by [the Environmental Protection Agency] that no estuarine, riverine or barrier island sites would be acceptable for an FNP and has therefore insufficient basis for concluding that the FNP's can with reasonable assurance be sited at shoreline sites. In effect, the Staff has attempted to justify a programmatic and generic finding of acceptability without having sufficient evidence upon which to base that finding -- a programmatic conclusion without programmatic findings.

The Licensing Board refused to admit the contention, resting its ruling on Appendix M to 10 C.F.R. Part 50. These Commission regulations provide that, where manufacturing licenses are being sought, the staff's environmental statement "... shall be directed at the manufacture of the reactor(s) at the manufacturing site; and, in general terms, at the construction and operation of the reactor(s) at an hypothetical site or sites having characteristics that fall within the postulated site parameters." (Emphasis by the Licensing Board.) [1/] The Board construed this as relieving the staff of any obligation in this proceeding to locate or evaluate any specific sites for a floating plant, holding such matters reserved for separate cases involving applications to place these plants at particular

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1/ See Appendix M, Para. 3.

locations. The Board concluded that NRDC's proposed contention amounted to a challenge to the Commission regulations cited and was therefore not cognizable in an adjudicatory hearing by virtue of 10 C.F.R. §2.758. Order of September 11, 1978 (unpublished).

NRDC moved the Board below to reconsider or to refer the matter to us. Instead, that Board reaffirmed its ruling and declined certification as inappropriate and unnecessary. Order of November 9, 1978 (unpublished). NRDC now comes to us directly.[2/]

2/ The questions which NRDC asks be taken up are:

1. May a party contend in an Appendix M proceeding that approval of a manufacturing license and a finding that there is reasonable assurance that FNPs can be sited in a certain category of sites are not permissible where there are no possible sites within the identified category?

2. In promulgating Paragraph 3 of 10 C.F.R. Part 50, Appendix M, did the Commission consider whether "hypothetical site or sites having characteristics that fall within the postulated site parameters" could include non-existent sites and, if not, does the non-existence of such sites constitute "special circumstances" within the meaning of 10 C.F.R. §2.758?

3. Where the opposition to a contention is based upon its legal invalidity, as opposed to its procedural deficiency, should the contending party at least be provided with a reasonable opportunity to reply to the answer?

4. Prior to rejecting a contention as a challenge to a Commission regulation, should the contending party be provided an opportunity to demonstrate that "special circumstances" exist warranting application of the provisions of 10 C.F.R. §2.758?

2. Under the Rules of Practice, the Licensing Board's rejection of NRDC's contention is an interlocutory order and not appealable immediately as a matter of right. These orders do not escape appellate review but, as is common in judicial practice, undergo it upon completion of the trial proceedings.[3/] Aware of the Commission policy against interlocutory appeals, intervenor invokes our discretionary authority under 10 C.F.R. §2.718(i).[4/] NRDC would have us take up by way of directed certification in advance of a final decision below what it characterizes as

> an important legal question, not previously decided by this Board or the Commission, which if not promptly resolved may result in unusual delay and injury to the public interest.[5/]

NRDC asserts that whether a license to manufacture floating plants may be granted in the absence -- according to it -- of reasonably available places to site them is a matter of first impression. We understand intervenor's

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3/ Boston Edison Co. (Pilgrim Station, Unit 2), ALAB-269, 1 NRC 411, 413 (1975), and cases there cited. See also, Power Authority of the State of New York (Greene County Plant), ALAB-434, 6 NRC 471 (1977).

4/ See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478 (1975).

5/ Intervenor quotes from our April 19, 1978 order in this case, not published, granting certification of the "class 9 accident" question.

papers to argue that if the question is not considered now, a decision below favorable to the applicant will be immediately effective, intervenor's chances of getting such a decision stayed will be slim, and the costs applicant will have "sunk" into the project by the time we can rule in the normal course will possibly tilt the NEPA "cost-benefit" balance in favor of granting the manufacturing license. Intervenor also says that the Licensing Board proceedings in this case are in effect suspended pending a Commission decision on the "class 9 accident question", [6/] thereby providing opportunity for us to consider the matter NRDC wishes heard.

3. We have previously explained that "[t]his Board has not the duty, the resources or the inclination to commence a general practice of arbitrating at the threshold disputes over what are cognizable contentions -- either under Section 2.718(i) procedures or otherwise". [7/] For this reason, "almost without exception in recent times, we have undertaken discretionary interlocutory review only

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6/ See ALAB-500, 8 NRC __ (September 29, 1978), referral accepted by the Commission December 8, 1978.

7/ Project Management Corp. (Clinch River Breeder Reactor), ALAB-326, 3 NRC 406, 407, reconsideration denied, ALAB-330, 3 NRC 613, rev'd on other grounds, CLI-76-13, 4 NRC 67 (1976).

where the ruling below either (1) threatened the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affected the basic structure of the proceeding in a pervasive or unusual manner".[8/]

NRDC's request for certification does not warrant our intrusion into the proceedings below at this juncture. The papers filed with us make plain that what is really involved here is a dispute over the Environmental Protection Agency's judgment about whether estuarine or riverine sites are suitable for floating nuclear plants. (It is not contended that all ocean sites are similarly unsuitable.) NRDC points to comments from EPA regional offices that these inshore locations "would not be environmentally acceptable."[9/] The staff and the applicant, on the other hand, stress a more recent letter from the EPA Administrator to OPS stating that his agency is not seeking a ban on all estuarine and barrier island siting of nuclear plants,

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8/ Public Service Co. of Indiana, Inc. (Marble Hill Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977).

9/ NRDC Request for Certification, at 3.

but only cautioning that these are sensitive environments which require special consideration.[10/] NRDC responds by questioning the Administrator's understanding of his own agency's position, suggests that his letter provides "an interesting insight into the differences between political operations and technical operations at EPA", and asserts that "we are entitled to an evidentiary hearing at which the principal EPA officials will clarify the EPA position."[11/]

The short of the matter is that what NRDC characterizes as an "important legal question" of first impression is actually a mixed question of law and fact -- with the factual element predominant. Our certification authority was not intended for this situation. We note that this is the only proceeding involving floating plants; our resolution of the issue which NRDC presses on us would have little (if any) precedential effect. Secondly,

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10/ EPA Administrator Costle's letter of November 3, 1978 is reproduced as Exhibit A to Applicant's Response to the NRDC Request for Directed Certification.

11/ NRDC's Reply, passim.

were we to take up the matter and resolve it in intervenor's favor -- i.e., direct the admission of its contention -- the only consequence would be a trial of this issue now; the proceeding would otherwise continue unaffected. In other words, this is not a situation where the basic conduct of the hearing would be adversely affected unless we acted.[12/]

Nor do we perceive that NRDC would be seriously, immediately or irreparably injured if appellate review is conducted in the ordinary course rather than immediately. If intervenor is entitled to a determination in this proceeding whether suitable estuarine or riverine sites for floating plants exist (a question we do not reach), and if that determination is in the negative, then presumably the Board will not license the manufacture of plants for such sites. But whether the Board below is compelled to consider the issue now as a consequence of our granting certification and ordering it to try intervenor's new

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12/ See, e.g., Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-379, 5 NRC 565 (1977).

contention, or later as a consequence of our reaching the same conclusion in the regular course of our review, the practical result is the same -- no license to manufacture floating plants for such sites will be approved. Thus NRDC's arguments about the consequences of this Commission's "immediate effectiveness" rule and its "sunk cost policy" are beside the point here.

Finally, it is not at all patent that the Board below disregarded governing law or acted arbitrarily in ruling as it did. Again without deciding the matter, it does not appear that the Board's rejection of the NRDC's contention places it on a collision course with the Commission's regulations, or that those it relied upon provide no support for its ruling.[13/]

Motion for directed certification denied.

It is so ORDERED.

FOR THE APPEAL BOARD

Margaret E. Du Flo
Secretary to the
Appeal Board

13/ In addition to whether its contention was wrongly rejected, NRDC would have us consider certain questions involving procedures for invoking the "special circumstances" exception to the general rule against attacking Commission regulations in adjudicatory hearings. 10 C.F.R. §2.758(b)-(d). See fn. 2, supra, items 2-4. We believe those questions were not squarely placed before the Licensing Board; we therefore decline to reach them.