UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Christine N. Kohl, Chairman
Dr. W. Reed Johnson
Howard A. Wilber

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

MEMORANDUM AND ORDER

August 11, 1982

(ALAB-686)

1. On June 30, 1982, the Licensing Board issued its initial decision in this proceeding -- the first to involve an application for a license to manufacture standardized nuclear plants. LBP-82-49, 15 NRC __ (1982). See 10 CFR Part 50, Appendix M. [1/] No party has filed exceptions

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1/ Until this proceeding, the licensing of nuclear power reactors involved facilities assembled and constructed at the sites where they are to be operated. Section 103 of the Atomic Energy Act, 42 U.S.C. 2133, however, permits the Commission to issue manufacturing licenses, which authorize solely the manufacture of standardized facilities at industrial locations. Permanent sites for the operation of these plants are to be chosen later. A construction permit is required prior to commencement of necessary work at the site ultimately selected by the utility, and an operating license is required for operating the reactor. See 38 Fed. Reg. 30251-30252 (November 2, 1973).

pursuant to 10 CFR 2.762(a). Accordingly, the Board's decision is now before us for sua sponte review. See Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), ALAB-655, 14 NRC 799, 803 (1981).

Although we have already begun that review, it may be some time before it is completed, given the size of the record and the length and detail of the Licensing Board's opinion. As is ordinarily the case in such circumstances, the initial decision shall not constitute final agency action until completion of our review and further order.

2. Because this is the first manufacturing license case to reach us, we believe it is useful to state formally our view on the applicability of the Commission's "immediate effectiveness" regulation to this type of proceeding. See 10 CFR 2.764 (1982), as amended 47 Fed. Reg. 2286 (January 15, 1982). That regulation requires, in the case of construction permits, certain limited and immediate appeal board and Commission review -- and, in the case of operating licenses, Commission review only -- of the initial decision before it can become effective. Based on our analysis of the regulation itself (in both its present and earlier forms), its history, and its purpose, we conclude that 10 CFR 2.764 does not oblige us to conduct an immediate

effectiveness review in manufacturing license proceedings. 2/

a. We begin with the language of the regulation itself. Cf. Lewis v. United States, 445 U.S. 55, 60 (1980). 10 CFR 2.700 states that the general rules of subpart G (which includes 10 CFR 2.764) "govern procedure in all adjudications initiated by . . . a notice of hearing." Although a proceeding involving an application for a manufacturing license falls into that category, the more specific provisions of section 2.764 contain no reference whatsoever to manufacturing licenses. 3/ In contrast,

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2/ The only time an appeal board -- as opposed to the Commission itself -- is required to conduct an immediate effectiveness review is within 60 days of an initial decision authorizing the issuance of a reactor construction permit. 10 CFR 2.764(e)(2). (In those circumstances, we must determine, principally on the basis of the four criteria in 10 CFR 2.788(e), if a stay of the permit issuance is warranted -- regardless of whether one has been requested.) Thus, if we were required to undertake an immediate effectiveness review of an initial decision authorizing issuance of a manufacturing license, it would have to be pursuant to 10 CFR 2.764(e)(2).

3/ Earlier versions of 10 CFR 2.764 likewise contained no reference to manufacturing licenses. See 36 Fed. Reg. 828 (January 19, 1971); 44 Fed. Reg. 58559 (October 10, 1979) [post-TMI interim policy]; 44 Fed. Reg. 65049, 65050 (November 9, 1979) [10 CFR Part 2, Appendix B (1980)]; 46 Fed. Reg. 28627, 28628 (May 28, 1981); 46 Fed. Reg. 47764, 47765 (September 30, 1981).

that section contains specific references to "construction permits" and "operating licenses," as well as the less common "license for the construction and operation of an independent spent fuel storage installation" and "construction authorization or license under [10 CFR] Part 60 . . . (relating to disposal of high-level radioactive wastes in geologic repositories)." 4/ Presumably, had the Commission intended to include manufacturing licenses within the scope of its special immediate effectiveness rule, it would have done so in unmistakable terms comparable to those used in the rule for other types of licenses. 5/

4/ We see no basis for inferring that the Commission intends the term "construction permit," as used in 10 CFR 2.764(e), to encompass "manufacturing license." Throughout the agency's regulations, these terms are used to refer to distinctly separate types of licenses and activities. See, e.g., 10 CFR 2.503. See also 10 CFR 50.10(b)(2); 38 Fed. Reg. at 30252. Compare 10 CFR Part 50, Appendix M, with id., Appendix N.

5/ The special regulations applicable to manufacturing license proceedings, 10 CFR 2.500 et seq., lend further support to this view. Section 2.504 describes the provisions of subpart G (which, as noted above, includes 10 CFR 2.764) that relate to manufacturing licenses as "matters of radiological health and safety, environmental protection, and the common defense and security." Notably, the immediate effectiveness provision is not listed.

b. Given the clear absence of any reference to manufacturing licenses in connection with the immediate effectiveness review prescribed by 10 CFR 2.764, there is no particular need to resort to the underlying Statement of Consideration or Notice of Proposed Rulemaking for each relevant portion of the existing rule. Nonetheless, we have undertaken such a review and found nothing that would suggest a Commission desire for appeal board immediate effectiveness review in manufacturing license cases. Cf. Tennessee Valley Authority v. Hill, 437 U.S. 153, 184-185 (1978). These documents speak solely in terms of construction permits or authorizations, operating licenses, and amendments to them. See 46 Fed. Reg. 47764 (September 30, 1981); 46 Fed. Reg. 28627 (May 28, 1981); 46 Fed. Reg. 20215 (April 3, 1981). 6/

Only in the Statement of Consideration for the most recent amendment to section 2.764 is there any mention of manufacturing licenses. See 47 Fed. Reg. 2286. That rulemaking substantially amended 10 CFR Part 50 so as to impose additional licensing requirements (resulting from the

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6/ The explanatory statements for earlier versions of the rule are to the same effect. See 36 Fed. Reg. 828; 44 Fed. Reg. 58559; 44 Fed. Reg. 65049.

The Commission now has under way an entirely separate rulemaking in which it is considering amendments to the immediate effectiveness rule insofar as construction permits are involved. See 45 Fed. Reg. 34279 (May 22, 1980). That proposal likewise fails to mention manufacturing licenses.

accident at Three Mile Island) on applicants for construction permits and manufacturing licenses. It also made some "non-substantive," "conforming" amendments to 10 CFR 2.764. Id. at 2300. Specifically, it eliminated two statements from subsections 2.764(e)(1)(ii) and (3)(iii). See 10 CFR 2.764(e)(1)(ii), (3)(iii) (1982). The relevant portion of the accompanying Statement of Consideration explains:

> In the Notice of Rulemaking (46 FR 18045) published on March 23, 1981, under Substance of the Rule, the Commission stated, "It is the Commission's view that this new rule, together with the existing regulations, form a set of regulations, conformance with which meets the requirements of the Commission for issuance of a construction permit or manufacturing license." The Commission reaffirms this view with the exception of hydrogen control measures for the manufacturing license, and, to eliminate any ambiguity regarding its intent, is amending its special review procedures in 10 CFR 2.764 to delete the statement in paragraph (e) that compliance with existing regulations may turn out to no longer warrant approval of a license application.

47 Fed. Reg. at 2292 (emphasis added). The emphasized statement could be read to imply that the immediate effectiveness review procedures of section 2.764 pertain to manufacturing licenses. Closer examination of both this statement and the sentences actually deleted from 10 CFR 2.764, however, reveals otherwise. The phrase "to eliminate any ambiguity regarding its intent" relates to the Commission's intent that the new TMI-based regulations

adopted in this proceeding constitute the basic requirements for a construction permit or manufacturing license. This does not relate back to the phrase "the exception of hydrogen control measures for the manufacturing license."

c. Finally, the very reasons for immediate effectiveness review in construction permit and operating license cases do not pertain to manufacturing license proceedings. In the latter, no plant site has been selected and, of course, there is no completed facility awaiting approval to begin operations. See note 1, supra. Thus, there are no immediate consequences for the public health and safety necessitating such a review. 7/ (Also, on the other side of the coin, there is not the sense of urgency requiring immediate effectiveness of a favorable licensing board decision that exists when an applicant is fully ready to commence construction or operation. See generally 36 Fed. Reg. 828, the Statement of Consideration for an early version of the immediate effectiveness rule, noting the Commission's desire to "expedite the licensed operation of facilities needed for the generation of electric power without adversely affecting the public health and safety and the common defense and security.")

7/ In this connection, we note that, even if we were required to conduct an immediate effectiveness review, it is unlikely that the "irreparable injury" criterion of 10 CFR 2.788(e)(2) -- which 10 CFR 2.764(e)(2)(ii) directs us to apply -- could ever be satisfied in the case of a manufacturing license.

A recent amendment to 10 CFR 2.764 underscores the logic in our decision not to conduct immediate effectiveness reviews of manufacturing license decisions. In September 1981 the Commission deleted the requirement for its own such review of decisions authorizing fuel loading and low-power testing. It explained:

> First[,] such activities involve minimal risk to the public health and safety, in view of the limited power level and correspondingly limited amounts of fission products and decay heat, and greater time available to take any necessary corrective action in the event of an accident.
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> Second, in operating license cases since the Three Mile Island accident the Commission has generally conducted its effectiveness review on a two-stage basis, first reviewing a fuel loading and low power testing license and then reviewing a full power license. Commission experience has been that in no case has fuel loading and low power testing prejudiced the later full power decision.

46 Fed. Reg. at 47765. The risks of harm to the public health and safety and prejudice to future construction permit and full-power operating license decisions are even less in the case of a manufacturing license. A fortiori, there is no basis for conducting an immediate effectiveness review of a manufacturing license decision.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
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Secretary to the
Appeal Board