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)	)	

Messrs. Barton Z. Cowan and John R. Kenrick, Pittsburgh, Pennsylvania, and Thomas M. Daugherty, Jacksonville, Florida, for applicant.

MEMORANDUM AND ORDER

September 1, 1982

(ALAB-689)

Applicant Offshore Power Systems has moved for clarification and, in the alternative, petitioned for reconsideration of our memorandum and order in ALAB-686, 16 NRC __ (August 11, 1982). The purpose of that decision was twofold. First, because no exceptions had been filed, we announced our intent to review sua sponte the Licensing Board's initial decision in LBP-82-49, 15 NRC __ (1982). We also noted in this regard that, "[a]s is ordinarily the case in such circumstances, the initial decision shall not constitute final agency action until completion of our review and further order." 16 NRC at __ (slip opinion at

2). [1] Second, we "conclude[d] that 10 CFR 2.764 does not oblige us to conduct an immediate effectiveness review in manufacturing license proceedings." Id. at __ (slip opinion at 2-3).

Applicant's concern is that the effect of this latter ruling, "coupled with the Appeal Board's purported exercise of sua sponte review authority, was to indefinitely stay, without any basis, the effectiveness of the Initial Decision rendered by the Atomic Safety and Licensing Board in this proceeding on June 30, 1982." OPS Motion (August 23, 1982) at 1. Applicant also believes that 10 CFR 2.764 applies to manufacturing license proceedings such as this (id. at 2, 3) and, presumably, that we should conduct an immediate effectiveness review. Applicant argues further that if 10 CFR 2.764 does not apply to this proceeding, 10 CFR 2.760(a) does. That provision states that initial decisions in licensing proceedings become the final action of the Commission within 45 days unless exceptions are filed or the Commission (or the Appeal Board as its delegate under 10 CFR 2.785(a)) certifies the record to it for final decision. Applicant argues that our "sua sponte review authority . . . may not be invoked in such a manner as to supercede [sic]

1/ In LBP-82-49, the Licensing Board authorized the issuance of the first license for the manufacture of standardized nuclear plants.

the Commission regulations concerning appellate review as set forth in § 2.760." Motion at 4. According to applicant, ALAB-686 "directly and adversely affects" its interests. Ibid.

We disagree with applicant both as to the need for clarification or reconsideration and as to the asserted adverse effects of our rulings on its interest. 2/ We think ALAB-686 is quite clear, understandable, noncontroversial, and unprejudicial. For that reason, we are tempted to deny applicant's motion outright. Nevertheless, we grant the motion for clarification because it evidences a basic misunderstanding of our sua sponte review authority and its relationship to the effectiveness of licensing board initial decisions.

Applicant's initial error was in attributing so much weight to the "coupl[ing]" of our two rulings in ALAB-686. Motion at 1. The two points were independent, as evidenced by the structure of our memorandum. Further, nothing in

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2/ Interestingly, nowhere in its motion does applicant quote directly from ALAB-686 in support of its strained reading and interpretation.

ALAB-686 suggests a relationship between our intent to undertake a sua sponte review and our conclusion that we have no immediate effectiveness review responsibility. Indeed, there is no relationship. 3/ Contrary to applicant's apparent but incorrect belief, an immediate effectiveness review is not a substitute for our usual sua sponte review. As shown by the discussion below, the two have nothing to do with one another.

A second shortcoming of applicant's argument is that it stems from an obvious lack of familiarity with or misunderstanding of the nature of our sua sponte review. This long standing Commission-approved appeal board practice is undertaken in all cases, regardless of their nature or whether exceptions have been filed. 4/ In this regard, ALAB-686 simply referred to our most recently reported precedent on this point, Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), ALAB-655,

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3/ We might just as easily have entered two orders at different times, conveying our rulings separately.

4/ Rather than superseding Commission regulations, as applicant contends, this practice is based on our authority under 10 CFR 2.760(a) and 2.785(a) to review the record and decisions in proceedings before according them "finality."

14 NRC 799, 803 (1981). 5/

In Rancho Seco, at the page cited, we stated (emphasis in original): "It is our practice, however, to review sua sponte 'any final disposition of a licensing proceeding that either was or had to be founded upon substantive determinations of significant safety or environmental issues.' Washington Public Power [Supply] System (WPPSS Nuclear Project No. 2), ALAB-571, 10 NRC 687, 692 (1979)." Rancho Seco also referred to another case involving our sua sponte review practice, Northern States Power Co. (Monticello Plant, Unit 1), ALAB-611, 12 NRC 301, 304 (1980), and cases cited. Both WPPSS and Monticello involved the issuance of operating licenses. 6/ That fact plus the language in Rancho Seco and WPPSS emphasizing that our sua sponte review authority extends to "any final disposition of a licensing proceeding . . ." leave no room for serious argument that our sua sponte review cannot and should not be invoked in

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5/ We did not think it was necessary to elaborate on our sua sponte review practice for the benefit of counsel so experienced in NRC litigation.

6/ Rancho Seco was a special proceeding involving an already licensed facility.

this manufacturing license proceeding.[7/]

The only "adverse effect" from our sua sponte review to which applicant refers in its motion is the "indefinite[ ] stay" of the effectiveness of the Licensing Board's initial decision. Motion at 1. But we assume applicant's real, though unstated, concern is that the Director of Nuclear Reactor Regulation may somehow be precluded by our sua sponte review from issuing the manufacturing license authorized by the Licensing Board in LBP-82-49.

Review of the above-referenced cases should relieve applicant's fears. In no instance has our conduct of a sua sponte review served (or been construed) to revoke, suspend, or defer issuance of a license. Only the finality of the Licensing Board's underlying decision is deferred pending our review; the effectiveness of the decision is not stayed. Applicant has thus simply confused the administrative

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7/ See, e.g., Jersey Central Power and Light Co. (Oyster Creek Nuclear Generating Station), ALAB-612, 12 NRC 314 (1980) (conversion of provisional to full-term operating license); Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-491, 8 NRC 245 (1978) (operating license); Boston Edison Co. (Pilgrim Nuclear Power Station, Unit 1), ALAB-231, 8 AEC 633 (1974) (amendment of technical specifications of operating license); Washington Public Power Supply System (Hanford No. 2 Nuclear Power Plant), ALAB-113, 6 AEC 251 (1973) (construction permit). See also Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 373 n.91 (1975); Louisiana Power and Light Co. (Waterford Steam Generating Station, Unit No. 3), ALAB-258, 1 NRC 45, 48 n.6 (1975).

concepts of "effectiveness" and "finality." 8/

Applicant has also misread our unrelated conclusion that "10 CFR 2.764 does not oblige us to conduct an immediate effectiveness review in manufacturing license proceedings." 16 NRC at __ (emphasis added) (slip opinion at 2-3). We know of no clearer way of stating this.

Contrary to applicant's "interpretation," we expressed no view on what obligation the Commission may or may not have to conduct an immediate effectiveness review in this type of proceeding. Motion at 1. Indeed, it would have been inappropriate for us to determine the Commission's responsibilities in this regard. Nor did we even imply that our decision not to conduct an immediate effectiveness review had any bearing whatsoever on the effectiveness of the Licensing Board's decision insofar as issuance of the

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8/ When an appeal board stays the effectiveness of an initial decision and seeks the revocation, suspension, or deferral of issuance of a license, it says so in the clearest of terms. See, e.g., Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-141, 6 AEC 576, 583-585 (1973); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-85, 5 AEC 375 (1972). Further, if our sua sponte review uncovers problems in a licensing board's decision or the record that may require corrective action adverse to a party's interest, our consistent practice is to give the party ample opportunity to address the matter, as appropriate. See, e.g., Rancho Seco, supra, 14 NRC at 803-804, 817; Monticello, supra, 12 NRC at 309-313; Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-529, 9 NRC 153 (1979); North Anna, ALAB-491, supra, 8 NRC at 249-250.

license is concerned. 9/ Again, all that we held (and reaffirm here) -- based on the wording of 10 CFR 2.764 and an exhaustive review of its history and that of related provisions -- was that the Appeal Board is not required to undertake an immediate effectiveness review in manufacturing license proceedings.

We trust that this resolves the problems applicant has perceived in ALAB-686, and we caution against such further exercises in "overinterpretation" of our decisions.

The applicant's motion for clarification is granted. 10/

9/ Assuming that there were some room for reasonable doubt as to the meaning of what we regard as a straightforward and limited holding, footnote 7 should have dispelled it. There we stated: "[E]ven 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." 16 NRC at __ n.7 (slip opinion at 7 n.7). Given that statement and the total absence of any suggestion that the license could not be issued (see pp. 6-7, supra), we are unable to find any reasonable basis for applicant's interpretation of ALAB-686.

10/ In view of this disposition, we see no need for briefing this matter, as applicant requested. Motion at 5.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board