

October 21, 1982



SECY-82-425

ADJUDICATORY ISSUE

For: ~~The Commissioners~~
(Affirmation)

From: Martin G. Malsch
Deputy General Counsel

Subject: OFFSHORE POWER SYSTEMS
(MANUFACTURING LICENSE FOR FLOATING
NUCLEAR POWER PLANTS) - ALAB-686 AND
ALAB-689

Facility: Eight Standardized Floating Nuclear
Power Plants

Purpose: To inform the Commission of two Appeal
Board decisions ~~which, in our opinion,~~ and to ~~s~~
suggest the issuance of the attached
Order.]

Review
Time Expires: October 22, 1982, as extended.

Discussion: This paper addresses the Appeal Board's
decision that immediate effectiveness
review does not apply to a Licensing
Board decision authorizing the issuance
of a manufacturing license.

On June 30, 1982, the Atomic Safety and
Licensing Board ("Licensing Board") for
this now uncontested proceeding
authorized the Director of Nuclear
Reactor Regulation to issue a
manufacturing license to Offshore Power
Systems ("OPS") for the manufacture of
eight standardized nuclear power plants
by the end of 1999. 1/ This is the first

1/ LBP-82-49, 15 NRC ____ (1982). In the interest of
economy, we have not attached a copy of the already
circulated voluminous decision.

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in accordance with the Freedom of Information
Act, exemptions 5
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manufacturing license considered and authorized by a Licensing Board. No party filed exceptions. Subsequently, on August 11, 1982, the Atomic Safety and Licensing Appeal Board ("Appeal Board") issued a Memorandum (ALAB-686) to announce its intention to take review sua sponte and to state its view that the regulations did not require the Appeal Board to conduct an immediate effectiveness review of a Licensing Board decision authorizing the issuance of a manufacturing license.

The Appeal Board based its decision on three factors. First, the language of the immediate effectiveness regulation does not explicitly mention applicability to manufacturing licenses. Second, neither the Statement of Consideration nor Notice of Proposed Rulemaking for the immediate effectiveness rule mentioned manufacturing licenses. Further, although such licenses are mentioned in the most recent amendment to 10 CFR 2.764, the Appeal Board found that reference to be limited to additional licensing requirements imposed on applicants in light of the TMI accident but not to require an immediate effectiveness review. ALAB-686 p. 7, 15 NRC ____ (1982). Third, the Appeal Board believes that the purposes of the immediate effectiveness review would not be served where the proceeding involved a manufacturing license because of the absence of immediate consequences to the public health and safety and the absence of urgency.

On August 23, 1982, OPS moved the Appeal Board to either clarify or, in the alternative, to reconsider the decision in ALAB-686. ^{2/} OPS was concerned that the effect of the Appeal Board decision to conduct a sua sponte review but not to conduct an immediate effectiveness review would be to indefinitely stay the

^{2/} As a precautionary measure to protect its right to appeal, OPS also filed a timely Petition for Commission review of ALAB-686.

Licensing Board's initial decision because it would not be a final decision. OPS contended that the immediate effectiveness regulations apply to manufacturing licenses because the regulations for manufacturing licenses relate them to construction permits and apply Subpart G to proceedings on such licenses. In the alternative, OPS contended that if 2.764 did not apply, then under 2.760 the Licensing Board decision became final and the Appeal Board had no jurisdiction to conduct a sua sponte review.

On September 1, 1982 the Appeal Board issued ALAB-689, a strongly worded decision intended to clarify the previous decision in ALAB-686. The Board explained that the difference between finality and effectiveness of a decision were well-established in Commission practice, and that by taking sua sponte review, the Appeal Board had only stayed the finality, but not the effectiveness, of the Licensing Board's decision. Thus, the Appeal Board found that its sua sponte review would not stay issuance of the manufacturing license. The Appeal Board also stated that its decision did not address the Commission's obligation to undertake immediate effectiveness review.

In our opinion,

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The analysis which we believe is correct is provided in the attached Order.

Recommendation:

Martin G. Malsch
Deputy General Counsel

Attachment: Order

Commissioners' comments should be provided directly to the Office of the Secretary by c.o.b. Friday, November 5, 1982.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Friday, October 29, 1982, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

This paper is tentatively scheduled for affirmation at an Open Meeting during the Week of November 8, 1982. Please refer to the appropriate Weekly Commission Schedule, when published, for a specific date and time.

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