

ADJUDICATORY ISSUE INFORMATION

February 28, 2006

SECY-06-0042

FOR: The Commissioners

FROM: John F. Cordes, Director */RA/*
Office of Commission Appellate Adjudication

SUBJECT: ANNUAL REPORT ON COMMISSION ADJUDICATION

PURPOSE: To provide the Commission a perspective on the adjudicatory caseload and the Commission's role in adjudication during calendar year 2005.

INTRODUCTION:

The Commission has authority to review decisions of Presiding Officers and the Atomic Safety and Licensing Boards. The Office of Commission Appellate Adjudication (OCAA) assists the Commission in this adjudicatory role by monitoring cases and drafting the Commission's appellate decisions. The Commission may exercise appellate authority either when a dissatisfied party to an NRC adjudicatory proceeding seeks review of a board's or presiding officer's decision, or when the Commission, on its own initiative, determines that review is warranted. The Commission may also offer guidance to the licensing boards on significant novel questions raised in an ongoing proceeding, as when a board certifies a question or refers its ruling to the Commission. In addition, NRC regulations give the Commission original jurisdiction to resolve particular categories of adjudications, such as reactor license transfer adjudications. To ensure our continued effectiveness in providing these services to the Commission, we hired a new administrative person and a new lawyer in 2005, to replace two other long-time employees who retired earlier that year.

I am providing the Commission this report on agency adjudications for calendar year 2005 as part of OCAA's monitoring role over adjudicatory matters. This report updates information in OCAA's last Annual Report (SECY-05-0034, February 17, 2005) and includes additional information, in chart form, on the CLIs which the Commission issued in 2005.

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COMMISSION ADJUDICATORY ACTIVITIES:

1. Commission Adjudicatory Decisions in CY2005

CY2005 was a typical adjudicatory year for the Commission. The Commission issued 29 CLIs, compared with an average of 28½ over the preceding four calendar years.¹ These decisions spanned a wide variety of proceedings: e.g., reactor license amendments, early site permits, combined operating licenses for two different fuel fabrication plants, materials licenses, an off-site ISFSI, a license termination plan, a reactor license renewal, and two license transfers. In the 27 CLIs which OCAA drafted,² the Commission upheld board orders in 10 CLIs,³ partially or wholly overturned (reversed, vacated, remanded) board orders in 6,⁴ and did not address challenges to board orders in the remaining 11.⁵

The Commission's decisions continue to interpret and clarify NRC regulations, the AEA and NEPA. Significant OCAA work in CY2005 included the following:

- *Exelon Generation Co., et al.*, CLI-05-17, 62 NRC 5 (2005), (i) addressing mandatory hearings involving uranium enrichment facilities, as well as early site permits and combined operating licenses under Part 52 of the Commission's regulations, and (ii) offering guidance to current and future boards on the conduct of mandatory hearings.
- *Louisiana Energy Serv.* (National Enrichment Center), CLI-05-05, 61 NRC 22 (2005), concluding that (i) depleted uranium is properly categorized as a low-level radioactive waste, and that (ii) accordingly, pursuant to the USEC Privatization Act, disposal of LES's depleted uranium tails at a Department of Energy facility represents a "plausible strategy" for waste disposal.
- *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551 (2005), (i) denying petitioners request for a waiver of the controlling NRC regulation, (ii) finding that petitioner had not justified the tardiness of its filing, and (iii) finding that its emergency-planning contentions fell outside the scope of a license renewal proceeding.

¹ Thirty-nine in 2004, 18 in 2003, 29 in 2002, and 28 in 2001.

² OCAA acted as a consultant in the remaining two CLIs (CLI-05-3 and -6), but OGC drafted them because they fell outside OCAA's ordinary jurisdiction.

³ CLI-05-2, -4, -12, -15, -19, -21, -23, -27, -28, and -29.

⁴ CLI-05-1, -5, -14, -16, -20, and -22 (vacated as moot).

⁵ CLI-05-7, -8, -9, -10, -11, -13, -17, -18, -24, -25, and -26. These include license transfer decisions, *sua sponte* Commission orders providing guidance or direction, Commission decisions on certified questions, and initial Commission decisions on standing in uranium enrichment cases.

- *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-05-14, 61 NRC 359 (2005), (i) taking *sua sponte* review of an unchallenged Board order imposing security conditions and (ii) disapproving four Board-imposed conditions.
- *Private Fuel Storage* (ISFSI), CLI-05-19, 62 NRC 403 (2005), (i) denying review of the Board's ruling on the risks posed to the facility by a potential F-16 aircraft crash, (ii) concluding that the Board's findings and methods of addressing this issue did not constitute "clear error," and (iii) declining to reconsider its ruling that "one in a million" is the appropriate "threshold probability" for a design basis event at an independent spent fuel storage installation.
- *Exelon Generation Co.* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801 (2005), (i) declining to review a NEPA ruling on Exelon's pending early site permit application for its Clinton facility, (ii) agreeing with the Board that "energy efficiency" did not have to be considered as an "alternative," (iii) likewise agreeing with the Board that an economic cost comparison among the various technologies considered did not raise a material issue in an early site permit hearing, and (iv) concluding that there was no clear error in the Board's various fact-specific findings.

OCAA regularly provides the Commission with options on particularly difficult cases which, in 2005, included *PFS* (CLI-05-1, regarding proprietary information) and *Millstone* (CLI-05-24, regarding late-filed contention).

OCAA strives to submit all its draft orders expeditiously, and has been successful overall in meeting this goal. For instance in 2005 our overall average turnaround time (between receiving the final relevant document and filing OCAA's draft order with SECY) was 34 days.⁶

2. Pending Commission Appeals/Petitions for Review

As of the date of this Annual Report, OCAA is working on appeals or petitions for review in the following proceedings:

- *Andrew Siemaszko* (an enforcement order concerning petitions to intervene in an enforcement hearing).
- *Hydro Resources, Inc.* (a materials licensing order addressing cultural issues and also environmental issues regarding air emissions).
- *USEC* (a Board order finding no admissible contentions).

⁶ In CY2005, we submitted 16 of our 19 ordinary draft orders within the 60-day target period for such orders, with an average turnaround time of 26 days. And we submitted 8 of our 9 draft orders on complex matters within the 90-day target period for complex orders, with an average turnaround time of 53½ days. See attached Chart.

3. Anticipated Adjudicatory Matters

OCAA expects that the Commission will face the following important adjudicatory matters in CY2006:

- The Board in *Louisiana Energy Serv.* is expected in early 2006 to rule on contentions relating to decommissioning costs, the costs of managing and disposing of depleted uranium hexafluoride, and the environmental impacts of depleted uranium disposal. A mandatory hearing on uncontested matters is scheduled for March 2006. The Board's decisions on these matters and the Board's final decision on the license application are likely to come before the Commission.
- The fourth and last partial initial decision in Phase II of the *Hydro Resources* materials license proceeding is expected in March 2006. OCAA expects this long-pending proceeding to conclude by July 2006.
- Important decisions and appeals are expected in the *Vermont Yankee* power uprate request.
- Ongoing license renewal disputes such as the pending ones in *Oyster Creek* and *Palisades*, plus expected ones for Pilgrim and Vermont Yankee, likely will lead to appeals on significant issues.
- More disputes over PAPO rulings in *Yucca Mountain* may arise.

4. OCAA Involvement in Yucca Mountain Pre-Adjudicatory Activities

In 2004, OCAA helped establish the "Commission Adjudicatory Technical Support" (CATS) office, to provide technical advice to Commission in the anticipated *Yucca Mountain* proceeding. In 2005, OCAA began to establish a working relationship with CATS, e.g., by using CATS to find technical advisors in *Catawba*, *PFS*, and *Hydro*, and by consulting on CATS's office protocols. OCAA attorneys also participated in the interviews of about 100 prospective adjudicatory employees for the *Yucca Mountain* proceeding.

OCAA has also sent some of its attorneys to key meetings on LSN and electronic courtroom projects for *Yucca Mountain*.

In anticipation of DOE's *Yucca Mountain* application, OCAA has reserved in its budget one FTE for the high-level waste repository proceeding. (OCAA also plans to request additional FTE to address new reactor licensing proceedings, e.g., early site permits and, more significantly, combined operating licenses.)

ATOMIC SAFETY AND LICENSING BOARD PANEL:

In 2005, the Board opened 10 new proceedings, managed 19, closed 18, and also issued 33 LBPs. The following 15 cases were pending before the Board at the end of 2005:

- Andrew Siemaszko, enforcement
- Big Rock Point 1 (indefinitely suspended as a result of GESMO decision) (old Pt. 2)
- Clinton, ESP
- Davis H. Hawes, reactor operator license
- Entergy Nuclear Vermont Yankee, uprate
- Grand Gulf, ESP
- Yucca Mountain, pre-application matters
- Hydro Resources, materials license for in situ leach uranium mining (old Pt. 2)
- LES, fuel fabrication facility
- North Anna, ESP
- Oyster Creek, license renewal
- Pa'ina Hawaii, materials license
- Palisades, license renewal
- U.S. Army, decommissioning of Jefferson Proving Grounds
- USEC, fuel fabrication facility

If the Commissioners would like any additional information on this Annual Report or any adjudicatory proceeding, I would be happy to provide it.

Attachment: Chart 1