

ADJUDICATORY ISSUE INFORMATION

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SECY-12-0016

FOR: The Commissioners

FROM: Brooke D. Poole, Director /RA/
Office of Commission Appellate Adjudication

SUBJECT: 2011 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 2011.

INTRODUCTION:

The Commission has the 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 preparing 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 also may offer guidance to the licensing boards on significant novel legal or policy issues raised in an ongoing proceeding, as when a board certifies a question or refers a ruling to the Commission. In addition, NRC regulations give the Commission original jurisdiction to resolve particular categories of adjudications, such as reactor license transfer cases.

I am providing the Commission this report on agency adjudications for calendar year 2011 (CY 2011) as part of OCAA's monitoring role over adjudicatory matters. This report updates information in OCAA's last Annual Report (SECY-11-0008, January 12, 2011) and includes additional information, in table form, on published the Commission's adjudicatory workload, including Commission decisions (CLIs) issued in CY 2011.

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DISCUSSION:

1. Commission Adjudicatory Decisions in CY 2011

In CY 2011 the Commission issued fifteen decisions, roughly half its average of 29.57 decisions over the seven prior calendar years.¹ These decisions spanned a wide variety of proceedings, including:

- thirteen combined license (COL) applications (*Summer*, *Callaway*, *Calvert Cliffs*, *Fermi*, *Levy County* (two decisions), *Vogtle* (two decisions), *South Texas* (two decisions), *Comanche Peak* (two decisions), *William States Lee*, *Turkey Point*, *Bell Bend*, *Shearon Harris*, *North Anna*),
- one operating license application (*Watts Bar*),
- eight reactor license renewal applications (*Pilgrim*, *Vermont Yankee*, *Indian Point* (two decisions), *Prairie Island*, *Diablo Canyon*, *Columbia Generating Station*, *Davis-Besse*, *Seabrook*),
- one materials license amendment request (*Shieldalloy*),
- two materials license applications (*EnergySolutions*),
- the construction authorization request for the proposed high-level waste repository (*Yucca Mountain*) (three decisions),
- one materials license application for a uranium enrichment facility (*Eagle Rock*).

OCAA drafted twelve of last year's fifteen Commission decisions.² Of those twelve decisions, four upheld or denied review of board orders,³ one affirmed in part and reversed in part a board

¹ Thirty decisions in CY 2010, twenty-three in CY 2009, twenty-nine in CY 2008, twenty-eight in CY 2007, twenty-nine in CY 2006, twenty-nine in CY 2005, and thirty-nine in CY 2004.

² The Office of the General Counsel (OGC) prepared the three other decisions for the Commission. OGC drafted a Commission order denying a request for interim suspension of operating license renewal applications pending resolution of a rulemaking petition seeking that the agency amend 10 C.F.R. § 54.17(c) to allow filing of a license renewal application no sooner than ten years before expiration of the current license. CLI-11-1. In the *EnergySolutions* import/export matter OGC drafted a decision denying a request for hearing, intervention and waiver of our categorical exclusion from NEPA's requirement to prepare an environmental review document for issuance of import licenses involving nuclear materials. CLI-11-3. Finally, OGC drafted a decision reinstating transfer of regulatory jurisdiction over the Shieldalloy Newfield site to the state of New Jersey after the U. S. Court of Appeals for the District of Columbia Circuit vacated the earlier transfer of authority and remanded the case to the agency for proceedings consistent with the opinion. CLI-11-12.

order,⁴ three affirmed board orders,⁵ two granted requested relief in part and denied it in part,⁶ one responded to a certified question,⁷ and one denied a request for Commission action.⁸

The Commission's decisions continue to interpret and clarify NRC regulations and applicable statutes, including the Atomic Energy Act of 1954, as amended, and the National Environmental Policy Act (NEPA). Significant Commission work in CY 2011 included the following:

- In the *Eagle Rock* uranium enrichment facility matter, the Commission took review of a certified question as to the adequacy of the applicant's commitment to provide decommissioning financial insurance with an instrument issued by an institution that is regulated by a federal or state agency, but without reference to other measures that might be employed as benchmarks of the lending institution's fiscal reliability. The Commission ultimately found the commitment sufficient to satisfy the decommissioning funding requirements. (CLI-11-4.)
- The Commission decided a series of petitions, filed in multiple dockets, seeking suspension of adjudicatory, licensing, and rulemaking activities, and requesting additional related relief, in light of the events at the Fukushima Dai-ichi Nuclear Power Station, following the March 11, 2011, earthquake and tsunami. The Commission granted the requests in part, and denied them in part. (CLI-11-5.)
- The Commission denied a petition for review in the *Comanche Peak* COL proceeding pertaining to the admissibility of contentions challenging the applicant's plan to address the loss of large areas of the plant due to explosions or fire. The Commission affirmed the Board's determination that neither our regulations nor the Atomic Energy Act require applicants to include a list of damage states, or a discussion of the number and

³ CLI-11-6, -10, -13, and -15.

⁴ CLI-11-11.

⁵ CLI-11-2, -8, and -9.

⁶ CLI-11-5 and -14.

⁷ CLI-11-4.

⁸ CLI-11-7.

magnitude of fires and explosions, in order demonstrate the effectiveness of the applicant's proposed mitigative strategies. (CLI-11-9.)

- In the *Diablo Canyon* license renewal proceeding, the Commission affirmed in part, and reversed in part, a Board decision granting a hearing. Among other things, the Commission reformulated an admitted contention to reflect that the NRC looks to particular Council on Environmental Quality regulations as guidance (as opposed to requirements). The Commission also rejected as unsupported and outside the scope of the proceeding a contention challenging the applicant's "management competence," observing, among other things, that such claims generally relate to current operations and fall beyond the limited scope of the license renewal review. (CLI-11-11.)
- In the *Indian Point* license renewal case, the Commission denied review of a Board decision granting summary disposition of a contention, finding the Board decision to not be "final" for purposes of appellate review, given (among other things) that the Board's decision neither disposed of a major segment of the case, nor terminated a party's right to participate in the case. The Commission also rejected the suggestion that it should use its supervisory authority to review a decision *sua sponte* at the request of a litigant. (CLI-11-14.)

In preparing draft decisions, OCAA may provide the Commission with multiple draft decisions (or alternative discussions within a draft) on particularly difficult legal or policy issues. These alternatives are intended to give the Commission options on how to proceed. In addition, our Commission papers routinely point out legal issues, and possible legal and policy implications of particular courses of action, that the Commission might wish to consider. OCAA strives to submit its draft decisions expeditiously, and has nearly always been successful in meeting this goal. Our overall average turnaround time (between receiving the final relevant document and transmitting OCAA's draft decision to the Commission) was fifty-six days for the twenty-three draft decisions that OCAA submitted to the Commission in CY 2011. See the attached table, "Commission Adjudicatory Decisions, January – December 2011." Our median turnaround time was forty-eight days. For decisions of average complexity, we aim to provide the Commission with a draft order and Commission paper within sixty days of the filing or issuance of the last document necessary for consideration in drafting the order; we aim for ninety days in the most complex of cases. This year's results are consistent with OCAA's timeliness metric.

2. Pending Commission Appeals/Petitions for Review

As of December 31, 2011, eight draft decisions, in the *Pilgrim*, *Seabrook*, and *Davis-Besse* license renewal cases, in the *Crow Butte* uranium recovery case, and in the *Vogtle* and *Summer* COL proceedings, were before the Commission (appeals of various Board decisions including, but not limited to: granting intervention petitions, contention admissibility, and issuance of a renewed license; and uncontested hearing decisions).

3. Anticipated Adjudicatory Matters

OCAA expects that the Commission will face the following significant adjudicatory matters in CY 2012:

- Continued disputes regarding heavily contested license renewal applications, including *Diablo Canyon*, *Indian Point*, *Seabrook*, *Davis-Besse*, and *Limerick*.
- Recurring issues include challenges to site-specific SAMA analyses and challenges regarding environmental justice, flow-accelerated corrosion, and aging management of *inaccessible* safety-related cables and other components.
- Continued disputes in ongoing proceedings regarding post-Fukushima issues.
- An anticipated “uncontested” hearing in the *Levy County* COL proceeding.

4. Commission Adjudicatory Technical Support Program

The Commission Adjudicatory Technical Support (CATS) program was originally established as a separate adjudicatory employee (AE) organization to provide technical support to OCAA and the Commission during the licensing period for a high-level waste repository. The Director of OCAA is currently serving as Director of the CATS program.

OCAA has maintained a roster of experts to support the high-level waste CATS program; that roster was last updated in December 2008.⁹ Given that the *Yucca Mountain* adjudicatory proceeding is suspended, maintenance of the high-level waste CATS program roster likewise has been suspended. OCAA also maintains a comprehensive roster of technical experts to support the Commission in its conduct of mandatory hearings associated with combined license applications.¹⁰

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

Attachment: “Commission Adjudicatory Decisions, January – December 2011”

⁹ See “Identification of Adjudicatory Employees to Support the Commission and the Office of Commission Appellate Adjudication in the Adjudication of a Yucca Mountain Application,” Commission Paper SECY-08-0194 (Dec. 19, 2008).

¹⁰ See “Updated Staffing Plan and Identification of Adjudicatory Employees to Support the Commission’s Mandatory Hearing Process for Combined License Application Proceedings Under 10 C.F.R. Part 52,” Commission Paper SECY-10-0127 (Sept. 30, 2010).