

ADJUDICATORY ISSUE
INFORMATION

January 3, 2014

SECY-14-0001

FOR: The Commissioners

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

SUBJECT: 2013 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 2013.

INTRODUCTION:

The Commission has authority to review decisions of Presiding Officers and the Atomic Safety and Licensing Boards. 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 questions raised in an ongoing proceeding 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.

The Office of Commission Appellate Adjudication (OCAA) assists the Commission in its adjudicatory role by monitoring cases and preparing the Commission's appellate decisions. In preparing draft decisions, OCAA may provide the Commission with multiple drafts (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 novel or complex legal issues and possible legal and policy implications of particular courses of action that the Commission might wish to consider.

As part of OCAA's monitoring role over adjudicatory matters, I am providing the Commission

Contact: Emily Krause
415-7466

this report on agency adjudications for calendar year 2013 (CY 2013). This report updates information in OCAA's last Annual Report (SECY-13-0004, January 9, 2013) and includes additional information, in table form, on the Commission's adjudicatory workload, including Commission decisions (CLIs) issued in CY 2013.

DISCUSSION:

1. Commission Adjudicatory Decisions in CY 2013

In CY 2013 the Commission issued ten decisions, which reflects a drop in adjudicatory activity.¹ These decisions spanned a variety of proceedings:

- Honeywell International, Inc.'s request for an exemption from the NRC's decommissioning financial assurance requirements for its Metropolis Works uranium conversion facility;
- requests for hearing on two enforcement orders that were issued in response to lessons-learned from the March 2011 Fukushima Dai-ichi accident;
- the contested proceeding on the combined license application for Calvert Cliffs Unit 3;
- the *Seabrook* and *Limerick* license renewal applications;
- the confirmatory-action-letter and license-amendment-request proceedings for San Onofre Nuclear Generating Station Units 2 and 3; and
- the U.S. Department of Energy's construction authorization request for the Yucca Mountain high-level waste repository.

OCAA drafted all but two of these CLIs.² Of the remaining eight decisions, four affirmed or

¹ In OCAA's view, this is partially attributable to the ongoing waste confidence rulemaking, and partially attributable to the usual ebb and flow of litigation. See *generally Calvert Cliffs 3 Nuclear Project, LLC and UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC 63 (2012) (suspending final licensing decisions, and holding in abeyance proposed "waste confidence" contentions pending further Commission direction). Over the past five years, the Commission has issued an average of twenty-four decisions per year: twenty-one in CY 2012, fifteen in CY 2011, thirty in CY 2010, twenty-three in CY 2009, and twenty-nine in CY 2008.

² The Office of General Counsel (OGC) prepared the draft decisions in *The Shaw Group Inc.*, CLI-13-5, 77 NRC 223 (2013) (motion to quash subpoena), and *Shieldalloy Metallurgical Corp.* (Decommissioning of the Newfield, New Jersey Site), CLI-13-6, 78 NRC ____ (Aug. 5, 2013) (slip op.) (litigation concerning transfer of regulatory authority to New Jersey).

denied review of board orders,³ two vacated the underlying board decisions for mootness,⁴ one took review of and addressed a referred ruling,⁵ and one set a course of action for the *Yucca Mountain* licensing process, consistent with the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *In re Aiken County*.⁶

The Commission's decisions continue to interpret and clarify NRC regulations and applicable statutes, including the Atomic Energy Act of 1954, as amended (AEA), and the National Environmental Policy Act (NEPA). The following CY 2013 decisions illustrate significant Commission work in this regard:

- *Honeywell* (CLI-13-1): The applicant in this materials license amendment proceeding sought Commission review of the Board's initial decision denying the applicant's 2009 request for an exemption from the "self-guarantee" test for decommissioning financial assurance. The Commission outlined the history and purpose of the decommissioning financial insurance regulations in detail, particularly focusing on the self-guarantee funding option. The Commission also emphasized that exemptions, although authorized in the agency's regulations, are "extraordinary" equitable remedies to be used "sparingly." After reviewing the extensive and complex evidentiary record, the Commission affirmed the Board's ruling.
- *Calvert Cliffs* (CLI-13-4): In this combined license proceeding, the applicants filed a petition for review of the Board's finding that the applicants were ineligible for a license because they are 100% foreign-owned. At bottom, however, the applicants sought reconsideration of agency guidance on the AEA's prohibition on foreign ownership, domination, or control. The Commission declined to address such a broad-reaching issue in the context of an application-specific proceeding, but agreed that a reassessment of agency guidance on foreign ownership would be appropriate outside of the adjudication. The Commission therefore directed the NRC Staff "to review issues relating to foreign ownership and recommend whether the Commission should consider modifications to agency guidance or practice." The Commission also reiterated its disfavor of issuing an advisory opinion, declining to review the Board's ruling given the applicants' plans to revise their application after finding a U.S. partner.

³ See CLI-13-1 (*Honeywell* materials license amendment proceeding); CLI-13-2 (enforcement orders in response to the Fukushima Dai-ichi accident); CLI-13-3 (*Seabrook* license renewal proceeding); CLI-13-4 (*Calvert Cliffs* combined license proceeding).

⁴ See CLI-13-9 (*San Onofre* confirmatory action letter proceeding); CLI-13-10 (*San Onofre* license amendment proceeding).

⁵ See CLI-13-7 (*Limerick* license renewal proceeding).

⁶ See CLI-13-8. See generally *In re Aiken County*, 725 F.3d 255 (D.C. Cir. 2013), *reh'g en banc denied* (Oct. 28, 2013).

- *Shieldalloy* (CLI-13-6): As part of ongoing litigation over the NRC's 2009 transfer of regulatory authority over certain categories of nuclear material (and therefore authority over the Shieldalloy site) to the State of New Jersey, the Commission provided an extensive regulatory analysis of the restricted-release decommissioning provision in 10 C.F.R. § 20.1403(a). On remand from the U.S. Court of Appeals for the District of Columbia Circuit, the Commission explained that the language of section 20.1403(a) is consistent with the NRC's preference for unrestricted-release decommissioning and reasserted its finding that New Jersey's license termination regulations are compatible with the NRC's. The Commission thus reinstated the transfer of regulatory authority over the Shieldalloy site to New Jersey.⁷
- *Limerick* (CLI-13-7): In this license renewal proceeding, the Commission took review of the Board's referred ruling regarding the interplay between the waiver criteria in 10 C.F.R. § 2.335(b) and the severe accident mitigation alternatives (SAMA)-analysis exception in 10 C.F.R. § 51.53(c)(3)(ii)(L). The Commission provided context for the SAMA-analysis exception, describing its purpose as part of the NRC's overall implementation of NEPA in 10 C.F.R. Part 51, and explained that "new and significant information" could require supplementation of the original SAMA analysis. After applying the waiver criteria to the waiver petition at issue, the Commission affirmed the Board's ultimate decision to deny the petition, albeit on a different ground. In addition to addressing the referred ruling, the Commission clarified that the fourth factor of the *Millstone* waiver test,⁸ "significance," should be read to include significant environmental issues, clearing up potential confusion regarding the application of that factor to an environmental contention.⁹

2. Pending Commission Appeals/Motions

As of December 31, 2013, the Commission had before it pending appeals or motions in the following proceedings:

- *Aerotest Operations, Inc.* (Aerotest Radiography and Research Reactor): Aerotest Nuclear Operations, Inc. and Nuclear Labyrinth jointly demand a hearing on the Staff's denial of Aerotest's license renewal application and its application for approval of indirect license transfer to Nuclear Labyrinth, as well as a related enforcement order. The Staff filed a "motion to sever" the license-renewal hearing demand from the license-transfer hearing demand.

⁷ Shieldalloy has appealed this decision. See Petition for Review, *Shieldalloy Metallurgical Corp. v. NRC*, No. 13-1259 (D.C. Cir. Oct. 1, 2013).

⁸ See *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559-60 (2005).

⁹ The petitioner in this case, the Natural Resources Defense Council, has appealed this decision. See Petition for Review, *Natural Resources Defense Council, Inc. v. NRC*, No. 13-1311 (D.C. Cir. Dec. 24, 2013).

- *Crow Butte Resources, Inc.* (Marland Expansion Area): the applicant and the Staff appeal the Board's decision in LBP-13-6, which granted the petitioners' hearing request. The applicant and the Staff argue that the hearing request should have been denied for its failure to demonstrate standing or raise an admissible contention.
- *Exelon Generation Co., LLC* (Byron Nuclear Generating Station, Units 1 and 2, Braidwood Nuclear Generating Station, Units 1 and 2): in response to the Board's denial of the petitioner's hearing request in LBP-13-12, the petitioner requests a "protective stay" of the proceeding to preserve its ability to seek a future stay pursuant to 10 C.F.R. § 2.802(d) when it files a petition for rulemaking. The petitioner requests that no decision be made on the license renewal application until the NRC issues a decision on the petitioner's forthcoming rulemaking petition.
- *Tennessee Valley Authority* (Sequoyah Nuclear Plant, Units 1 and 2): the applicant and the petitioner appeal the Board's decision in LBP-13-8, which found that the petitioner had demonstrated standing. Although the Board found the petitioner's remaining contentions inadmissible, the Board is holding the petitioner's waste confidence contention in abeyance (along with its decision whether to grant or deny the hearing request), in accordance with the Commission's direction in CLI-12-16.¹⁰ The applicant argues that the waste confidence contention should be dismissed because the contention is the subject of the ongoing waste confidence rulemaking. The petitioners argue that the Board should have admitted the contention before holding it in abeyance.
- *U.S. Department of Energy* (High-Level Waste Repository): Nye County, Nevada; the States of South Carolina and Washington; Aiken County, South Carolina; and the National Association of Regulatory Utility Commissioners have filed a motion for reconsideration of the Commission's decision in CLI-13-8, which provided direction on the use of carry-over funding for reviewing the U.S. Department of Energy's construction authorization request for the Yucca Mountain high-level waste repository. The State of Nevada seeks clarification of CLI-13-8 and its companion Staff Requirements Memorandum.

3. Anticipated Adjudicatory Matters

OCAA expects that the Commission will address a number of significant adjudicatory matters in CY 2014, including:

- continued disputes with regard to spent fuel disposal in reactor licensing proceedings, including issues related to waste confidence;
- continued disputes in heavily-contested license renewal proceedings, including *Indian Point* and *Diablo Canyon*;

¹⁰ See *Calvert Cliffs*, CLI-12-16, 76 NRC at 69.

- further litigation in the uranium recovery proceedings; and
- potentially, the mandatory hearing in the *Levy County* combined license proceeding.

Finally, apart from a particular proceeding, OCAA expects the Commission to be engaged in the development of procedures for future hearings on inspections, tests, analyses, and acceptance criteria for new reactors, or “ITAAC,” pursuant to 10 C.F.R. § 52.103.¹¹

4. Commission Adjudicatory Technical Support Program

The Director of OCAA is currently serving as Director of the Commission Adjudicatory Technical Support (CATS) program. The CATS program was originally established as a separate adjudicatory employee organization to provide technical support to OCAA and the Commission during the licensing period for a high-level waste repository.¹² Further, OCAA maintains a comprehensive roster of technical experts to support the Commission in its conduct of mandatory hearings associated with the combined license applications.¹³ Experts assisted the Commission in the *Vogtle* and *Summer* combined license proceedings and have been selected to review staff documents for the *Levy County* combined license application.

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

Enclosure: “Commission Adjudicatory Decisions, January – December 2013”

¹¹ See *generally* Staff Requirements—SECY-13-0033—Allowing Interim Operation Under Title 10 of the Code of Federal Regulations Section 52.103 (July 19, 2013) (ML13200A115) (directing that draft procedures for the conduct of ITAAC hearings be developed within the next twelve to eighteen months).

¹² Although the Commission directed the resumption of certain activities pertaining to the review of the Department of Energy’s construction authorization request, the *Yucca Mountain* adjudicatory proceeding remains suspended. See *U.S. Department of Energy* (High-Level Waste Repository), CLI-13-8, 78 NRC __ (Nov. 18, 2013) (slip op.). Therefore, maintenance of the high-level waste CATS program roster remains suspended.

¹³ This roster was last updated in early 2012, and will be revisited prior to the next mandatory hearing.