

ADJUDICATORY ISSUE INFORMATION

January 4, 2001

SECY-01-0002

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 2000.

INTRODUCTION

At the NRC, the Commission alone is authorized to review the decisions of presiding officers and Atomic Safety and Licensing Boards in agency adjudications. The Office of Commission Appellate Adjudication (OCAA) assists the Commission in this role. The Commission may exercise its appellate authority to review these trial-level decisions either when a dissatisfied party to an NRC adjudicatory proceeding seeks review, or when the Commission, on its own initiative, determines that review is warranted. The Commission also has original jurisdiction to offer the Licensing Board guidance on significant novel questions raised in a proceeding and to resolve those occasional legal matters that appropriately should be resolved in the first instance directly by the Commission. Moreover, beginning in 1999, the Commission has taken on original jurisdiction over all reactor license transfer proceedings -- an area in which OCAA takes the lead in assisting the Commission.

As part of OCAA's monitoring role over adjudicatory matters, I am providing the Commission this annual report on agency adjudications for calendar year 2000. This report updates information contained in the last report (SECY-00-0005; Jan. 5, 2000), and is based upon the information in the attached charts. Chart 1 presents information regarding the **25** substantive decisions (CLIs) issued by the Commission in 2000, Chart 2 identifies the **13** final decisions issued by presiding officers or Licensing Boards in 2000, and Chart 3 lists and describes the **11** new proceedings that the Commission referred to the Atomic Safety and Licensing Board Panel (ASLBP) in 2000. Chart 4 provides a numerical breakdown of the proceedings referred to the ASLBP since OCAA's inception in July 1991 -- divided into substantive and procedural categories. Finally, Chart 5 provides a breakdown of Commission decisions issued during that same period, divided into substantive and jurisdictional categories.

CONTACT: Roland Frye, OCAA
415-3505

GENERAL OBSERVATIONS AND TRENDS

The year 2000 was a busy year for adjudications at the Commission level, but marked a slowdown from the blistering rate of adjudication in 1999. The number of CLIs issued in 2000 (**25**) fell back from the peak level of 30 CLIs issued in 1999, but the CLI output in 2000 was still the third-highest of the Commission's last decade. Gauging by the numbers, the year 2000 also saw somewhat fewer adjudications at the Licensing Board level. The ASLBP's **35** LBPs (including non-final orders) in 2000 marked a return to a more typical level (about average for the last decade) after a one-year increase to 46 LBPs in 1999. The **13** final Board (or presiding officer) decisions in 2000 fell below the decade's average (16) and, indeed, was the lowest since 1993, reflecting a 50-percent decline from the levels of the previous four years (21 in 1999, 20 in 1998, 23 in 1997, and 19 in 1996). The number of new proceedings referred to the ASLBP (**11**) remained at its ten-year average level of roughly a dozen. However, this number of referrals is deceptive because it does not include requests for hearing in **5** reactor or materials license transfer applications -- a category of proceeding over which the Commission itself exercises direct jurisdiction. In all, then, the year 2000 saw the initiation of **16** new adjudications (compared with 19 in 1999). Given that the number of new adjudications in a particular year has proven to be a relatively good advance indicator of the number of CLIs and final LBPs issued in the following year, we may see in 2001 another small drop in the agency's overall adjudicatory activity.

1. The ASLBP's Caseload

The number of new enforcement cases remained low, increasing (insignificantly) from 1 to **2**. This continues the trend of the last several years, perhaps reflecting a decreased NRC emphasis on formal enforcement orders. The new reactor-related cases (license amendment, license renewal, decommissioning, and operator license proceedings) went up slightly in 2000, from 2 to **3** -- about typical for the last decade, except for an aberrational jump to 12 in 1998. Materials cases continued to dominate the categories of new cases, with **6** such new proceedings climb (compared with 9 in 1999, 7 in 1998 and 6 in 1997). For the second year running (and also for only the second time since the inception in 1989 of the informal Subpart L rules), the Board in 2000 processed the bulk of its new caseload using those procedures (**6** cases) rather than Subpart G (**4** cases) or Subpart K (**1** case).

2. The Commission's Caseload

The number of CLIs issued in 2000 was 5 less than in 1999. This decrease is essentially attributable to two developments. First, the reactor transfer proceedings yielded **8** in 2000, compared with 11 CLIs in 1999. Second, the complex Hydro Resources materials licensing case generated **3** CLIs in 2000, compared with 6 CLIs in 1999. Due in large part to the decline in the number of Hydro Resources decisions, the number of materials license CLIs declined from 10 to **6**. The number of reactor license amendment decisions declined from 3 to **0**, well below its average level of 3 since 1995. The enforcement CLIs dropped from 1 to **0** -- the lowest figure since OCAA began keeping records in 1991. The number of reactor license renewal CLIs in 2000 remained at **1** -- the same as in 1999. The Commission also issued **4** CLIs in the Private Fuel Storage ISFSI proceeding, **1** involving an export license application, **1** involving an exemption request, and **1** regarding a materials license transfer application.

Looking at the Commission's CY2000 orders from a procedural perspective, the CLIs are dominated by those **16** that were issued under the Commission's original jurisdiction (down slightly from 17 in 1999, but still up significantly from the 10, 2, 2, and 5 such CLIs issued in '98, '97, '96, and '95, respectively). The Commission issued **9** of these 16 CLIs in the new Subpart M license transfer proceedings. The relative dominance of the Commission's original docket over its appellate docket derives from the Subpart M innovation and from the Commission's continuing effort to manage its adjudicatory caseload aggressively.

Interlocutory appeals as of right under section 2.714a continued to decline from prior years -- numbering only **1** in 2000 as compared to 5 in 1999 and 7 in 1998. This marks a return to the levels of the three preceding years: 2, 1 and 1 during '97, '96 and '95, respectively. The Commission ruled on **2** discretionary appeals -- about the average since 1995 (2.3) -- and **0** suu sponte matters (compared with 1, 2, 0, 1 and 1 in '99, '98, '97, '96 and '95, respectively). The Commission issued 6 final "merits" decisions -- about average when compared with 4, 2, 11, 9 and 5 in '99, '98, '97, '96 and '95, respectively.

3. Speed in Resolving Cases

Neither the Commission nor the Boards can control many of the factors that govern the speed at which cases are resolved (e.g., the number and complexity of the issues, the willingness of parties to settle, the pace with which the Department of Justice pursues parallel criminal actions). Nevertheless, speed in reaching decisions will be viewed by some outside the Commission as a reflection of its level of emphasis on both the importance of adjudications and the need for their expeditious resolution. The Commission's continued willingness to become involved in cases earlier, to set proposed schedules for adjudications, to monitor Board action (or inaction) more closely, and generally to take a more active supervisory role should assist in moving proceedings forward at the Board level. OCAA will continue to monitor the Board's adjudicatory caseload and be on the lookout for opportunities where the Commission may appropriately exercise its supervisory role.

The ASLBP has committed itself to issuing decisions within 60 days after the parties file their closing pleading. Similarly, OCAA has undertaken to complete its drafts of Commission decisions in all but the most complex cases within 60 days of receipt of the final appellate document (and 90 days in cases of particular complexity). In 2000, OCAA has been less successful than previously in getting its draft CLIs to the Commission quickly, averaging 53 calendar days after receipt of the last salient document (compared with 20 days 1999), with **6** of the **22** orders¹ submitted in less than a week. OCAA missed its targets in **1** order in a regular case and **3** orders in complex cases.

OCAA's increased turnaround time is dually attributable to a commensurate increase in complex orders (**5** in 2000 as compared with 3 in 1999) and OCAA being seriously understaffed from January until October. The return of our new third attorney from maternity leave in October and the arrival (also in October) of a much-needed fourth attorney should place OCAA in a better position to promptly provide the Commission with draft orders. However, Subpart M

¹ Of the 25 CLIs issued in 2000, OCAA drafted 22 in that same year and 1 in 1999; OGC drafted the remaining two CLIs that were issued in 2000.

applications could still strain the recently-enhanced resources of OCAA when these proceedings actually go to hearing, as has already happened in the FitzPatrick / Indian Point 3 proceeding. This is because Subpart M contemplates that the Commission itself (rather than the Board) will in the first instance resolve contested applications on the merits, after a hearing, with OCAA ordinarily providing drafting assistance to the Commission.

4. Future Agency Caseload

As OCAA noted in both its 1998 and 1999 Annual Reports, we anticipate that the Commission will continue to face adjudications involving reactor relicensing, reactor decommissioning,² and reactor license transfers. The age of many currently-operating reactors makes an upswing in the first two categories quite likely, and the ongoing restructuring of the electric industry makes a significant number of the third category probable. In the materials licensing area, the Hydro Resources and Private Fuel Storage cases likely will continue to generate adjudicatory controversies for the next year or more. Also, the Commission can expect a continued minimal enforcement caseload.

As we noted in our 1999 Annual Report, another factor that could affect the Commission's future caseload is the still-anticipated reform of the NRC's hearing process. The potential impact here is unpredictable. A reformed system may succeed over time in reducing threshold procedural disputes and winnowing out insubstantial claims -- thus saving adjudicatory time by the Commission and its staff. On the other hand, the Commission's current interest in moving toward more informal proceedings could generate additional proceedings and an increased workload, as members of the public become aware that participation in the NRC process need not be overly costly or complex. Moreover, significant changes in the NRC's existing procedural rules may trigger a concomitant increase in procedural disputes in adjudications, at least in the short term. Finally, in the near future, the Commission caseload could become dominated by the Yucca Mountain licensing proceeding, assuming that the site survives threshold scrutiny by DOE, the President and the Congress.

SIGNIFICANT DECISIONS IN 2000

In 2000, the Commission issued the following six CLIs addressing significant issues:

In the materials licensing area:

Hydro Resources Inc., CLI-00-8, 51 NRC 227 (5/25/00) (Commission ruled that the NRC staff's review and approval of the financial assurance plan and its cost estimate should logically come prior to, or be a part of, the issuance of the materials license; imposed a condition to remedy the staff's failure to do so).

² Although the Commission by rulemaking has removed decommissioning itself from the adjudicatory process, the process of decommissioning nonetheless will likely "spin off" occasional adjudications. E.g., Yankee Atomic Elec. Co., LBP-98-12, 47 NRC 343, aff'd in part and rev'd in part, CLI-98-21, 48 NRC 85 (1998). The Board is currently considering a challenge to Maine Yankee's license termination plan (a decommissioning document).

In the developing area of license transfers:

GPU Nuclear, Inc. (Oyster Creek), CLI-00-6, 51 NRC 193 (5/3/00).
Moab Mill Reclamation Trust, CLI-00-7, 51 NRC 216 (5/3/00) (first Commission order on a materials license transfer).
Northern States Power Co. (Monticello & Prairie Island), CLI-00-14, 52 NRC 37 (8/1/00).
Vermont Yankee Nuclear Power Corp. (Vt. Yankee), CLI-00-20, 52 NRC 151 (10/6/00).
Power Auth'y of the State of NY (FitzPatrick & IP3), CLI-00-22, 52 NRC ____ (11/27/00).

SIGNIFICANT ISSUES CURRENTLY PENDING BEFORE THE COMMISSION

A draft order is currently pending before the Commission that would resolve all remaining NEPA issues and also would reverse the Presiding Officer's decision (LBP-99-40) that placed on hold three-quarters of the Hydro Resources, Inc. proceeding. Another pending draft order would allow the Sequoyah Fuels decommissioning case to proceed.

SUMMARY OF ACTIVITIES OF THE ATOMIC SAFETY AND LICENSING BOARD PANEL

- The Board Panel issued **13** final decisions.
- The Board Panel established **11** new proceedings, **2** of which have been terminated.
- **17** cases were pending before the Board Panel as of 12/31/00:

Atlas Corp. (MLA-4 & 5)
Carolina Power & Light Co. (Shearon Harris) (OLA, spent fuel)
Fansteel, Inc. (MLA)
First Energy Operating Co. (Perry) (CivP)
Florida Power & Light Co (Turkey Point) (License Renewal)
GrayStar, Inc. (ML)
Hydro Resources Inc. (ML)
International Uranium (USA) (MLA-8)
Maine Yankee Atomic Power Co. (Maine Yankee)(OLA, license termination plan)
Molycorp., Inc. (MLA)
Northeast Nuclear Energy Corp. (Millstone, Units 2 & 3) (OLA)
Northeast Nuclear Energy Corp. (Millstone, Units 3) (OLA, spent fuel)
Private Fuel Storage, LLC (ML)
Sequoyah Fuels Corp. (MLA-4)
U.S. Department of the Army (ML)
U.S. Department of the Army (Jefferson) (MLA)
[Big Rock Point 1 -- on indefinite hold]

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

Enclosures: Charts 1-5