

ADJUDICATORY ISSUE INFORMATION

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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 2001.

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 addressed in the first instance directly by the Commission. Moreover, beginning in 1999, the Commission has exercised 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 2001. This report updates information contained in the last report (SECY-00-0002; Jan. 4, 2001), and is based upon the information in the attached charts. Chart 1 presents information regarding the **28** substantive decisions (CLIs) issued by the Commission in 2001, Chart 2 identifies the **15** final decisions issued by presiding officers or Licensing Boards in 2001, and Chart 3 lists and describes the **8** new proceedings that the Commission referred to the Atomic Safety and Licensing Board Panel (ASLBP) in 2001. 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

Because the purpose of this Annual Report is to provide the Commission with numerical measurements of the agency's adjudicatory workload last year and a rough prediction of the workload for the upcoming year, a caveat is required regarding the quantitative nature of the Annual Report. The mere quantity of issued decisions or referred cases does not and cannot reflect the degree of complexity (or simplicity) of the various cases assigned to the Board or in which the Commission or the Board issue their decisions. For instance, some final Board decisions are simple, quickly prepared orders denying poorly drafted petitions to intervene, while other final Board orders include detailed analyses of the merits of numerous legal and technical issues. Similarly, some CLIs may merely refer a proceeding to the Board or address a simple procedural motion, while others may be preceded by lengthy Commission review of multiple alternative draft decisions and may include analyses of complex technical, legal and policy issues -- often of first impression.

GENERAL OBSERVATIONS AND TRENDS

The year 2001 was a very busy year for adjudications at the Commission level. The **28** CLIs issued in 2001 exceeded the prior year's total (25) and nearly equaled the Commission's post-1990 high of 30 CLIs issued in 1999. Gauged simply by the numbers, the Board's **40** LBP issuances in 2001 slightly exceeded those in 2000 and approximated the average for the last decade. The **15** final Board (or Presiding Officer) decisions in 2001 reflect a slight rise from last year's total of 13 and are approximately the same as the decade's average (16), but nonetheless constitute a significant drop from the 4-year period from 1996 through 1999 (21 final decisions in 1999, 20 in 1998, 23 in 1997, and 19 in 1996). The **8** new proceedings referred to the ASLBP this year is significantly fewer than either the number (11) in 2000 or the Board's ten-year average level of roughly a dozen. Overall, the Commission saw **9** new adjudications (**1** was a license transfer case not referred to the Board.) Because the raw number of new adjudications in a particular year has, in the past, provided at least something of an advance indicator of the number of CLIs and final LBPs issued in the following year, we may see in 2002 a decrease in the agency's overall adjudicatory activity.

1. The ASLBP's Caseload

The number of new enforcement cases (**1**) remained at the same low level as in 1999 and 2000. The number of new reactor-related cases (**3** license amendment, license renewal, decommissioning, and operator license proceedings) likewise remained at its post-1998 level of 2-3. This level was also typical for the last decade, except for an aberrational jump to 12 in 1998. The number of materials cases (**4**) dropped from the levels of recent years (6 in 2000, 9 in 1999, 7 in 1998 and 6 in 1997) but nonetheless continued to be the dominant category of new cases. The Board in 2000 processed the majority of its new caseload using Subpart L procedures (**5** cases) rather than Subpart G (**3** cases) or Subpart K (**0** case). These numbers continue the relatively new pattern -- begun only in 1999 -- in which materials license cases under Subpart L outnumber reactor license (and enforcement) cases under Subpart G.

2. The Commission's Caseload

The number of CLIs issued in 2001 (**28**) was in line with the totals for the previous three years (25 in 2000, 30 in 1999, and 25 in 1998). The CLI levels in the underlying categories, however, displayed considerable changes when compared to recent years. The number of CLIs that were issued in reactor license renewal proceedings increased from 1 (in 1999 and 2000) to **3**; the Commission's decisions involving spent fuel storage at reactor sites rose from 2 (in 2000) to **4**; and CLIs involving decommissioning increased from 0 (from 1997 through 2000) to **2**. Other categories remained roughly at their prior levels: **0** for enforcement cases (similar to the previous four years' levels of 0 in 2000 and 1 in 1999), **1** for ordinary reactor license amendments (compared with 0 in 2000 and 3 in 1999), **0** for reactor operator licenses (compared with 1 in 2000 and 0 in 1999), **8** in the category of "other" (compared with 7 in 2000 and 4 in 1999; due principally to an increase in Private Fuel Storage orders this year, from 4 to **7**), and **6** in materials license matters (compared with 6 in 2000 and 10 in 1999). The real surprise in 2001 was the sharp decline in CLIs (and also total cases) addressing license transfer applications. These CLIs numbered 11 in 1999, 8 in 2000, but only **4** in 2001.

Looking at the Commission's CY2001 orders from a procedural perspective, the CLIs addressing appeals or petitions for review of merits orders continued to increase (**7.5** in 2001, compared with 6 in 2000, 4 in 1999 and 2 in 1998), while interlocutory appeals as of right (generally involving denials of petitions to intervene) rose only slightly after its three-year falling trend (**2.5** in 2001, compared with 1 in 2000, 5 in 1999, and 7 in 1998). The Commission continued to issue no CLIs reviewing LBP orders on its own motion (sua sponte actions) (**0** in 2001, compared with 0 in 2000, 1 in 1999 and 2 in 1998). Due in large part to the slump in license transfer adjudications, the number of orders issued under the Commission's original jurisdiction dropped precipitously (from 17 in 1999 and 16 in 2000 down to **10** in 2001). By contrast, the number of CLI's addressing discretionary interlocutory appeals and Board referrals rose significantly (**8** in 2001, compared with 2 in 2000 and 3 in 1999).

3. Speed in Resolving Cases

The Commission and the ASLBP control few 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 quality of advocacy). 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 ASLBP action (or inaction) more closely, and generally to take a more active supervisory role should assist in moving proceedings forward at the ASLBP level. OCAA will continue to monitor the ASLBP'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 within 90 days in complex cases). In 2001, OCAA showed a slight improvement in providing its draft CLIs to the Commission quickly, averaging **50** calendar days after receipt of the last salient document (compared with 53 days in 2000). OCAA submitted **3** of its **24** draft

orders¹ within a week (compared with 6 of 22 in 2000). OCAA averaged a **49**-day turnaround on its regular cases and missed its 60-day target in **4** regular cases (compared with missing it 1 time in 2000).² OCAA averaged a **55**-day turnaround in its complex cases and missed the target in **0** complex cases (compared with missing it 3 times in 2000).

4. Future Agency Caseload

Based on the assumptions that govern the NRC's budget process, we anticipate that the Commission will continue to face adjudications involving reactor license renewals, reactor decommissioning, and reactor license transfers. The age of many currently-operating reactors makes an upswing in the first two categories (particularly the first one) quite likely, and the ongoing restructuring of the electric industry makes a significant number of the third category probable. We also expect a continuation of significant adjudicatory activity in the materials licensing and spent fuel storage areas.

a. Reactor License Renewal or Decommissioning.

In June 2001, the Commission indicated its expectation that about 90 percent of the currently operating nuclear power plants would ultimately seek renewal of their initial 40-year reactor licenses. More recently, the industry has predicted close to a 100-percent renewal application rate. Reactor license renewals have regularly been contested. The NRC has already faced three adjudications involving license renewal applications (Oconee, Calvert Cliffs and Turkey Point) and is currently considering a fourth -- involving McGuire and Catawba. See Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-01-20, 54 NRC 211 (2001). More opportunities for renewal hearings are clearly on the way. For instance, the agency received on December 29, 2001, a license renewal application for the St. Lucie facility and expects to receive an application for Fort Calhoun by January 11, 2002. The NRC's technical staff expects opposition to both applications, especially the one for St. Lucie.

If a plant owner or operator does not choose to seek license renewal, it must decommission the plant at the end of its 40-year license. Although the Commission by rulemaking has removed decommissioning itself from the adjudicatory process, the process of decommissioning nonetheless will likely "spin off" occasional adjudications. See, e.g., Connecticut Yankee Atomic Power Co. (Haddam Neck Plant), CLI-01-25, 54 NRC ____ (Dec. 5, 2001) (license termination plan); Sequoyah Fuels Corp. (Gore, OK), CLI-01-2, 53 NRC 9 (2001) (site decommissioning plan); Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), LBP-98-12, 47 NRC 343, aff'd in part and rev'd in part, CLI-98-21, 48 NRC 85 (1998) (license termination

¹ Of the **28** CLIs issued in 2001, OCAA submitted **24** draft orders in that same year and 1 draft in 2000; OGC submitted drafts for the remaining 3 CLIs that were issued in 2001.

² If OCAA were to exclude from its calculations the two outliers -- Millstone 2&3, CLI-01-24, taking 196 days, and Sequoyah, CLI-01-2, taking 314 days -- the average turnaround times for total cases and regular cases would drop significantly to 31 and 26 days, respectively. OCAA deliberately postponed the Sequoyah case to await full staffing in OCAA and also to complete work on other, more urgent, matters.

plan); Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), LBP-01-28, 54 NRC 221 (2001) (where the Board recently terminated a case involving a challenge to Maine Yankee's license termination plan).

b. Reactor License Transfer.

The ongoing restructuring of the electric industry makes a significant number of license transfer applications probable. (For instance, the Commission currently has pending before it license transfer applications affecting 23 plants.) In the past three years, many of these applications have been challenged in Commission adjudications. The Commission resolved 7 license transfer adjudications in calendar year 1999 (TMI, Pilgrim, Seabrook (twice), Wolf Creek, Beaver Valley, and Millstone) and 5 more in calendar year 2000 (Nine Mile Point, Oyster Creek, Northern States (Monticello & Prairie Island), Vermont Yankee, and Millstone). The Commission in 2001 resolved only 2 license transfer adjudications (Indian Point 3 / FitzPatrick and Indian Point 1&2), but both of these were assigned to a Presiding Officer for hearing, and one went through the entire adjudicatory process.

Despite the drop in license transfer adjudications in 2001, additional license transfer cases are likely. AmerGen Energy Company, Entergy Corp., Dominion Resources Inc., and Constellation Energy Group have shown every indication that they will continue their buying spree of nuclear power plants. For instance, Dominion recently purchased Millstone and is in the process of spinning off Surry 1&2 and North Anna 1&2 to an unregulated subsidiary, and (as discussed below) Entergy recently bought Vermont Yankee. And in October, Constellation purchased all of the Nine Mile Point 1 plant and 82 percent of the Nine Mile Point 2 plant. Each of these sales requires Commission approval through the license transfer process and is therefore susceptible to an adjudicatory challenge by either public interest groups or plant co-owners.

Even after a Commission adjudication resolves a particular dispute regarding a license transfer and the agency approves an application, the plant's transfer may still return to the Commission via a different applicant -- for instance, if the original transfer is derailed by another governmental agency. For instance, earlier this year, both Entergy and Dominion Energy expressed renewed interest in purchasing the Vermont Yankee plant, despite the Commission's prior license-transfer approval of AmerGen's purchase of that facility. Subsequently, the Vermont Department of Public Service withdrew its support of the sale of Vermont Yankee to AmerGen, stating that a previous bid by Entergy was much better for Vermont ratepayers. Vermont Yankee consequently withdrew its license transfer application. Soon thereafter, the Entergy Corporation signed a deal to buy the Vermont Yankee nuclear reactor for \$180 million - a price about 10 times the one quoted when bidding for the plant opened in late 1999. The resulting sale will perforce require Commission approval through the license transfer process (the application was filed with the NRC on October 5, 2001).

Transfers which result from corporate reorganizations may also lead to adjudicatory challenges. The Commission has received inquiries suggesting that at least one entity is seriously considering a challenge to the proposed transfer of Diablo Canyon 1 & 2 to a new entity which is being created as part of Pacific Gas & Electric Company's Chapter 11 reorganization plan.

c. New Plant Construction.

Also important in the reactor arena is the resurgence of interest in new plant construction. Early in 2001, Energy Northwest initiated discussions regarding the potential to resume the construction of Washington Nuclear Project - 1 (in Washington State). Energy Northwest indicated recently that they expect a viability study of this project to be completed in mid 2002. Industry representatives have also expressed the intent to submit the first application for an early site permit (ESP) in early 2003, with two more applications possible later that year.

Pre-application reviews of new reactor designs are currently underway which may ultimately lead to license applications. Pre-application review activity for Westinghouse AP1000 is expected to conclude in 2002, and an application for AP1000 design certification is expected in 2002. The pre-application review of Exelon's Pebble Bed Modular Reactor (PBMR) design is expected to conclude in early 2003. Exelon has indicated they will submit an application for a combined license in late 2003. General Atomics recently requested a pre-application review of their Gas Turbine - Modular Helium Reactor (GT-MHR) design, indicating plans to submit a combined license application in 2004. In the future, both Exelon and General Atomics plan to apply for design certification of their gas-cooled reactor designs.

All of this is consistent with a statement in May by top officials for the nation's nuclear utilities announcing preparations to build at least 50 power plants in the next 20 years. Nuclear power plant construction is on the front burner politically as well, with nuclear energy playing a major role in the President's Energy Plan. We do not yet know whether the events of September 11th will place any of these plans on indefinite hold. In the long run, however, it seems possible that the Commission will face a new generation of reactor licensing cases.

d. Materials License Developments.

In the materials licensing arena, the future Commission appellate caseload is more difficult to predict, as the number of these proceedings and their attendant CLIs have risen and fallen erratically over the years. Much of this rise and fall depends on the level of controversy attendant to particular NRC actions. For instance, Phase I of the Hydro Resources proceeding is still being litigated as to the financial qualifications issue, and the even-more-complex Phase II may also proceed to hearing (although settlement talks are ongoing). Moreover, we are also facing a likely continuation of the large number of CLIs in another highly complex materials license proceeding -- Private Fuel Storage -- a case that yielded 7 different CLIs in 2001 alone. That case is scheduled to come to completion in 2002, and surely will trigger significant adjudicatory actions.

In addition, the Commission has received a construction authorization request for a highly controversial mixed oxide (MOX) fuel fabrication facility. See Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fabrication Facility), CLI-01-13, 53 NRC 478 (2001). (The related application for authority to operate the facility will come somewhat later.) As expected, this application has been challenged and is now pending adjudication. The Board admitted two intervenors who raised several admissible contentions. The resulting complex adjudication will likely demand significant agency attention for several years. Moreover, NRC licensing of a MOX facility would in turn be likely to lead to adjudicatory challenges to any nuclear power plant's attempt to use MOX fuel. Indeed, the first such challenge is already pending before the agency in the Catawba/McGuire license renewal proceeding.

e. Heightened Commission Oversight and Involvement.

Another factor that will determine the level of the Commission's caseload is the extent to which the Commission remains highly involved in adjudications and willing to interject itself into the proceedings both early and often. The Commission's current and recent heightened involvement is reflected in both the Commission's repeated offering of guidance to the Board and its occasional willingness, where appropriate, even to take *sua sponte* review of Board orders (though the Commission took no such review in 2001). Regarding the first of these, see FitzPatrick / Indian Point 3, CLI-01-14, 53 NRC 488 (2001) (offering guidance to Presiding Officers in future License Transfer cases regarding the conduct of hearings); Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fabrication Facility), CLI-01-13, 53 NRC 478 (2001) (offering guidance as to the proper scope of the proceeding); Private Fuel Storage, CLI-00-24, 52 NRC 351 (2000) (clarifying the scope of review of a partial initial decision). The Commission also has shown a willingness to address interlocutory rulings referred by a Board or Presiding Officer. See, e.g., Private Fuel Storage, CLI-01-15, 53 NRC 563 (2001), and CLI-01-22, 54 NRC ____ (Nov. 14, 2001). The Commission has given us every reason to believe that its increased interest and involvement in adjudications will continue. If they do continue, our workload will likewise remain at its current high level -- and may even increase further.

f. Hearing Process Reform.

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 remains unpredictable. A reformed system may succeed over time in reducing threshold procedural disputes and winnowing out insubstantial claims -- thus saving adjudicatory time of the Commission and the Board. 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. Also, 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.

g. Other Factors.

Finally, the Commission's and Board's adjudicatory caseload could rise if any of the following were to occur: enactment of legislation assigning the NRC responsibility for regulating DOE nuclear facilities, adjudications related to licensing of a permanent high-level waste storage facility at Yucca Mountain (an application for which could come as early as 2003), adjudications related to an interim high-level waste storage facility, and further challenges to the ability of operating plants and/or spent fuel storage pools to withstand terrorist actions.³ Conversely, deregulation initiatives by the NRC could decrease the total number of amendment requests and in turn decrease both the trial and appellate caseload, depending on the initiatives.

³ The Commission and its Licensing board have already received terrorism-related challenges in four adjudications -- Private Fuel Storage, Duke Cogema Stone & Webster (MOX), Duke Energy Corp. (McGuire 1&2 and Catawba 1&2), and Dominion Nuclear Connecticut, Inc. (Millstone-3).

SIGNIFICANT DECISIONS IN 2001

In 2001, the Commission issued the following nine CLIs addressing significant issues:

In the materials licensing area:

Hydro Resources, Inc., CLI-01-04, 54 NRC 31 (Jan. 31, 2001) (addressing issues of first impression involving the appropriateness of bifurcating or segmenting proceedings, where various parts of the proceeding would thereby be left indefinitely in abeyance)

Private Fuel Storage (ISFSI), CLI-01-15, 53 NRC 459 (June 27, 2001) (addressing the circumstances under which an exemption request could be the subject of an adjudicatory hearing)

Private Fuel Storage (ISFSI), CLI-01-22, 54 NRC ____ (Nov. 13, 2001) (setting a standard for the "benchmark probability" for a credible accident at an ISFSI)

Private Fuel Storage (ISFSI), CLI-01-26, 54 NRC ____ (Dec. 28, 2001) (addressing motion to hold case in abeyance pending Commission's generic consideration of terrorism-related safety and safeguards issues)

In the reactor license transfer area:

Power Auth'y of the State of NY (James A. FitzPatrick Nuclear Power Plant & Indian Point Nuclear Generating Unit No. 3), CLI-01-14, 53 NRC 488 (June 21, 2001; released to public in redacted form 7/19/01) (first decision addressing the merits in a license transfer proceeding)

Consolidated Edison Co. of NY (Indian Point Nuclear Generating Units Nos. 1 & 2), CLI-01-19, 53 NRC 109 (Aug. 22, 2001) (addressing important procedural and financial issues of first impression in the license transfer arena)

In other reactor matters:

Northeast Nuclear Energy Co. (Millstone 3), CLI-01-10, 53 NRC 353 (May 10, 2001) (addressing the oft-recurring "GDC 62" issue)

Carolina Power & Light Co. (Shearon Harris), CLI-01-11, 53 NRC 370 (May 10, 2001) (addressing appeals of 3 LBPs involving multiple new legal and technical issues involving spent fuel storage)

Florida Power & Light Co. (Turkey Point, Units 3 & 4), CLI01-17, 54 NRC 3 (July 19, 2001) (stressing and clarifying the limited scope of both the safety and environmental reviews associated with license renewal and thereby reinforcing prior Commission rulings as to the narrow scope of issues that can be admitted in license renewal adjudications)

SIGNIFICANT ISSUES CURRENTLY PENDING BEFORE THE COMMISSION

The Commission is currently considering no draft CLI orders from either OCAA or OGC. However, the Commission does have pending a referred terrorism-related issue in Private Fuel Storage. We expect additional terrorism-related issues to arise in pending adjudications. In addition, intervenors have filed an interlocutory appeal in the MOX case, and petitioners have sought reconsideration of a Commission decision in the Millstone license amendment case (CLI-01-24).

SUMMARY OF ACTIVITIES OF THE ATOMIC SAFETY AND LICENSING BOARD PANEL

- The Board Panel issued **15** final decisions.
- The Board Panel established **8** new proceedings, **2** of which have been terminated.
- **11** cases (**3** in abeyance) were pending before the Board Panel as of 12/31/01:

- Connecticut Yankee (Haddam Neck) (license termination)
- Duke Cogema Stone & Webster (MOX fuel fabrication facility) (ML)
- Duke Energy Corp. (McGuire & Catawba) (license renewal)
- Hydro Resources Inc. (ML)
- International Uranium (USA) (MLA-10)
- Northeast Nuclear Energy Corp. (Millstone, Units 3) (OLA, spent fuel)
- Private Fuel Storage, LLC (ML, ISFSI)
- Sequoyah Fuels Corp. (MLA-4) (site decommissioning) (in abeyance)
- Tennessee Valley Auth'y (Watts Bar, etc.) (enforcement) (CivP)
- U.S. Department of the Army (Jefferson) (MLA) (in abeyance)
- 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