

ADJUDICATORY ISSUE INFORMATION

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SECY-04-0011

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 from January through December 2003.

1. Introduction:

At the NRC, only the Commission is authorized to review the decisions of Presiding Officers and the Atomic Safety and Licensing Boards. The Office of Commission Appellate Adjudication (OCAA) assists the Commission in its adjudicatory role. The Commission may exercise its appellate authority to review a Presiding Officer or Licensing Board decision 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 authority to offer guidance to the Licensing Board on significant novel questions raised in a proceeding, or to resolve preliminary questions arising before a Licensing Board has been established. In addition, the Commission resolves those legal matters that appropriately should be resolved in the first instance by the Commission. For example, the Commission itself directly handles license transfer adjudications.

As part of OCAA's monitoring role over adjudicatory matters I am providing the Commission this report on agency adjudications for calendar year 2003. This report updates information contained in the last report (SECY-03-0015, Jan. 31, 2003), and is based upon the information in the attached charts. For the calendar year 2003, the attached charts list the Commission decisions (CLIs) issued, the final Licensing Board or Presiding Officer decisions issued, the new proceedings that were established and their current status, and a numerical breakdown of the types of proceedings that were the subject of Commission, Licensing Board, or Presiding Officer decisions during 2003.

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2. General Observations:

In terms of adjudications, the year 2003 was noteworthy in several ways. One, this was an especially busy year for the Atomic Safety and Licensing Board Panel. There were 24 published final decisions issued by Presiding Officers or Boards -- significantly more than the number of decisions issued in each of the past three years (*i.e.*, 13, 15, and 13, respectively). Indeed, this year's total of 24 Licensing Board or Presiding Officer decisions does not even include three major, very lengthy financial qualifications-related decisions issued in the Private Fuel Storage (PFS) case, which were not published due to proprietary information, and also were not ripe for Commission review in 2003 because of a pending motion for reconsideration and clarification before the Licensing Board.¹

The past year also was an unusual year for Commission decisions. Unlikely previous years, a majority of the CLIs issued in 2003 -- 10 out of the 18 issued -- did not involve the review of a Presiding Officer or Licensing Board decision. Instead, these 10 decisions can be sorted into four categories: (1) decisions on questions certified by the Board; (2) license transfer decisions; (3) decisions responding to requests made directly to the Commission (*e.g.*, requests to suspend a proceeding pending consideration of rulemaking petition, or to enjoin construction of a facility pending National Environmental Policy Act (NEPA) review); or (4) decisions initiated by the Commission itself in an effort to expedite long-pending proceedings (Catawba/McGuire and Private Fuel Storage).

OCAA had expected 2003 to be a busier year for adjudications at the Commission level, but instead there were fewer CLIs issued in 2003 than in the past few years -- 18 CLIs in 2003, compared to 29 issued in 2002 and 28 in 2001. There does not appear to be any clear reason behind the lower number of CLIs. In the highly technical *PFS* proceeding, the Licensing Board was immersed in resolving complex contentions. As a result, several issues that OCAA earlier had expected might come before the Commission in 2003 have yet to be resolved at the Board level, or only recently became appealable; this likely played a role in the lower number of Commission decisions. In any event, the lower number appears more of an aberration than a trend, and OCAA fully expects that in 2004 the Commission will have a busy adjudicatory docket.

3. Commission Adjudicatory Decisions in 2003

Commission decisions in 2003 spanned a variety of proceedings. Independent Spent Fuel Storage Installation (ISFSI) cases continue to make up a relatively large portion of Commission decisions. There were 6 ISFSI-related decisions, 3 in PFS and 3 in Diablo Canyon. The year also included 3 license transfer decisions, 3 decisions in materials licensing cases, 2 reactor license renewal decisions, 2 reactor license amendment decisions, 1 decision in an enforcement case, and 1 involving a reactor license termination plan.

¹ Early this month (01/05/04), the Licensing Board ruled on the Private Fuel Storage motion for reconsideration/clarification.

There were no striking changes in the types of proceedings that resulted in Commission adjudication. While there were fewer materials licensing decisions than the Commission typically issues (3 last year compared to 10 the year before), materials licensing proceedings certainly are not decreasing. Since 1999, materials cases have made up the largest single category of new cases referred to the Licensing Board panel. The year 2003 was no exception, with 7 out of 10 of the new proceedings involving materials licensing actions. The other 3 new cases consist of one materials decommissioning, one enforcement, and one reactor license amendment (MOX lead test assemblies). We continue to see relatively few decommissioning cases, and many fewer license transfer proceedings than three or four years ago.

Commission decisions continue to interpret and clarify NRC regulations, the AEA, and NEPA. Significant Commission decisions in 2003 included the following:

- **CLI-03-1, Pacific Gas & Elec. Co. (Diablo Canyon)(ISFSI):**

In this ISFSI proceeding, the Commission reaffirmed principles outlined in four previous terrorism-related decisions in 2002, holding that NEPA does not require a terrorism review.
- **CLI-03-2, Pacific Gas & Elec. Co. (Diablo Canyon)(license transfer):**

In denying requests for hearing in this license transfer proceeding, the Commission ruled on the scope of the NRC's antitrust authority, stating that legal and policy considerations preclude the transfer to a new generating company of antitrust license conditions imposed decades ago.
- **CLI-03-03, Nuclear Fuel Services, Inc. (Erwin, TN)(materials license am.):**

The Commission responded to a request that the licensee be ordered to stop all construction of a facility until the NRC staff completes its environmental review. The Commission emphasized that our regulations discourage construction prior to the NEPA review by raising the possibility that a license ultimately may be denied should an applicant have moved forward precipitously despite open environmental issues. The Commission nonetheless drew a distinction between those licensee actions that we can discourage and those we have the clear authority to prevent outright.
- **CLI-03-05, Private Fuel Storage (ISFSI):**

The Commission declined to immediately review the Licensing Board's air crash probability finding, given that the Board would hold a hearing on air crash consequences, the result of which could render the probability finding insignificant.

- **CLI-03-08, Private Fuel Storage (ISFSI):**

The Commission rejected the State of Utah's petition for review of a Licensing Board decision ruling against the state's seismic-related challenges. The Commission noted that Utah nowhere challenged ultimate bottom-line safety findings. The Commission also found no clear error warranting review in the Board's interpretation of the 5-rem accident dose limit in Part 72, or the Board's approval of the staff decision to exempt PFS from the regulatory requirement of using a deterministic standard in establishing a design basis earthquake. The Commission further clarified that PFS's commitments in its Safety Analysis Report are already part of the licensing basis and therefore would require a license amendment to change.

- **CLI-03-15, Sequoyah Fuels Corp. (Gore, Oklahoma)(MLA-5):**

The Commission held that front-end waste at SFC's site may be considered byproduct material under section 11e.(2) of the AEA.

- **CLI-03-12, Pacific Gas and Elec. Co. (Diablo Canyon)(ISFSI):**

In denying petitions for review, the Commission clarified that while PG&E is in bankruptcy, it is still a rate-regulated utility and entitled to a presumption of financial qualification.

- **CLI-03-7, Connecticut Yankee Atomic Power Co. (Haddam Neck)(LTP):**

The Commission clarified that the appropriate way to request a new regulatory safety standard is to petition for rulemaking, unless special circumstances exist at the site at issue warranting a request for a rule waiver in the particular proceeding.

- **CLI-03-17, Duke Energy Corp. (McGuire/Catawba)(license renewal):**

In denying a petition for review, the Commission stressed that under NEPA mitigation need only be discussed in sufficient detail to ensure that the environmental consequences of the proposed action have been fairly evaluated, and that NEPA does not require a fully developed mitigation plan.

Notably, the Commission in 2003 took effective action to expedite long-pending proceedings:

- **CLI-03-11, Duke Energy Corp. (McGuire/Catawba)(license renewal):**

The Commission directed the Licensing Board to explain why the proceeding was delayed, and to inform the Commission when it

expected to issue a decision on remaining contentions. Within weeks of the Commission's order, the Board resolved the remaining issues and terminated the proceeding.

- **CLI-03-16, Private Fuel Storage (ISFSI):**

The Commission directed all parties to file petitions for review of any interlocutory Licensing Board orders that they wished to challenge. The parties' petitions for review have been filed and are now before the Commission. In addition, the Commission in an earlier decision, CLI-03-05, directed the Board to resolve the air crash consequences issue as promptly as possible.

4. Speed in Resolving Cases:

Both by taking sua sponte action to expedite proceedings (in *Catawba/McGuire and PFS*), and by resolving certified questions and other issues brought before the Commission early on in proceedings, the Commission's actions in 2003 helped to move cases forward. OCAA remains committed to assisting the Commission in monitoring the timeliness of proceedings, and looking for ways to avoid or obviate delay.

As to OCAA's work, we seek to review, research, and resolve the issues before us as quickly as possible, with a goal of providing the Commission with a draft decision within 60 days of the final appellate document. That 60-day goal may not be achievable in some very complex proceedings with an extensive case record, however. In 2003, OCAA submitted draft decisions to the Commission well before our 60-day goal in all proceedings except the *Diablo Canyon* license transfer proceeding. In most proceedings, our turnaround time was under 30 days. Complex proceedings averaged under 45 days for OCAA to complete its review and draft a Memorandum and Order.

5. Future Agency and Commission Caseload:

OCAA expects 2004 to be a busy year for adjudications, with several major proceedings, including *PFS*, *Louisiana Energy Services (LES)*, *Hydro Resources*, and *Nuclear Fuel Services*, as well as proceedings on the first NRC early site permit applications.

Early Site Permit Applications: Requests for hearing already have been filed regarding the *North Anna* and *Clinton* early site permit applications. In a related matter, Dominion has filed a motion before the Commission to have the new Part 2 adjudicatory rules apply in the *North Anna* early site permit proceeding. Another early site permit application that may be challenged is Entergy's application for *Grand Gulf*. In a recent "Nuclear News Flashes" report, the Nuclear Information & Resource Service (NIRS) and Public Citizen indicated an intent to challenge the *Grand Gulf* application.

License Renewal: We can expect new license renewal proceedings this year. Dominion recently submitted a license renewal application for Millstone Units 2 and 3. Licensing actions

involving the *Millstone* facility typically are contentious and result in adjudicatory proceedings. Given other recent license renewal applications, (e.g., *Browns Ferry*) and expected applications (*Point Beach*), we may see an increase in the number of license renewal proceedings in 2004.

New Part 2 Regulations: This year will also prove significant as the first year using the new Part 2 procedures for adjudicatory proceedings, which go into effect on February 13, 2004. The novelty of the Part 2 rules is likely, in the short run, to result in Board-certified questions and other requests for Commission guidance. OCAA expects that one or more Commission decisions in 2004 will involve such requests for clarification of the new rules.

The new Part 2 requires petitioners to submit contentions (not simply areas of concern) in materials licensing cases. Significantly, it will require petitioners to include contentions with the original hearing requests, instead of waiting first for a ruling on standing. These requirements likely will make it easier to dispose of insubstantial cases promptly. In many instances, proceedings have dragged on following an initial finding of standing, only to be dismissed for failure to submit an admissible contention. Elimination of the two-phased hearing request will help to weed out ill-prepared petitioners sooner.

In addition to any early site permit or license renewal proceedings, significant proceedings in 2004 are likely to include:

Private Fuel Storage (ISFSI): Currently before the Commission are the parties' petitions for review of interlocutory Board decisions and of partial initial decisions on financial qualifications and decommissioning.

Later this year the Board will hold a hearing and issue a decision on air crash consequences, a major decision that is likely to be the subject of a petition for review. In addition, depending upon the Board's air crash consequence finding, the Board's earlier decision on air crash probability may return before the Commission on a petition for review.

Louisiana Energy Services (LES)(enrichment facility): The last *LES* proceeding culminated in 1998 after LES withdrew its application for a facility in Louisiana, and was among the lengthiest and most contentious hearings at the NRC. On December 15, 2003, LES filed an application for a centrifuge enrichment facility in Lea County, New Mexico. The Office of General Counsel's proposed notice and order, dated January 8, 2004, sets forth an aggressive two-year schedule for a final agency decision on the LES application. That schedule makes several assumptions, however, including a "quality application," reduced time for LES to respond to requests for additional information, and 15 months for the staff to complete its review. In any event, there will be considerable interest in how smoothly and efficiently the LES proceeding is handled.

Under the procedures set forth in the just-issued notice of hearing, several issues would be decided directly by the Commission, including petitioner standing and the admissibility of any Environmental Justice contentions. The Commission therefore may need to become immersed in fact-specific details of the LES case early on.

In addition, the draft notice and order provides that the Commission “will provide early guidance and direction” on any novel and legal policy questions that may arise. The notice directs the Licensing Board to certify such questions promptly to the Commission.

It still remains to be seen if the LES application in fact will be contested. But if we do see a challenge to the application, the Commission will likely see one or more LES-related issues come before it in 2004.

Hydro Resources, Inc. (HRI)(in situ leach uranium mining):

This complex and highly technical proceeding was held in abeyance from late 2000 until summer 2003 pending settlement discussions. Given the collapse of the settlement talks, remaining issues will now proceed to hearing.

The HRI license, issued in 1998, involves four sites. Issues involving the first site -- termed “Section 8 at Church Rock” -- have been resolved except for one: the adequacy of HRI’s restoration action plan. Once the proceeding actively resumed last summer, the Presiding Officer began work on a decision on the restoration action plan. That decision is expected any day now. This will be a “partial initial decision,” subject to a petition for review. Therefore, the Commission may see this *Hydro* issue come before it in early 2004.

The Presiding Officer is expected imminently to issue an order scheduling the rest of the proceeding on the other three mining sites covered by the license. There are approximately 10 major safety or environmental issues involving the last three sites that have yet to be litigated.

Nuclear Fuel Services, Inc.: NFS seeks three related license amendments. The three amendments are associated with NFS’s plans to downblend and convert high-enriched uranium to low-enriched uranium oxides. After the first license amendment application and related hearing requests, the Presiding Officer granted the petitioners’ request that the proceeding be held in abeyance pending the third license amendment application. The NRC staff issued a hearing notice on the third license amendment application last month, and petitions for hearing on the third application are due by February 2, 2004. The proceeding will then resume and cover all three amendment applications. In the meantime, petitioners are seeking a stay of the NRC staff decision to issue the second license amendment.

ATOMIC SAFETY AND LICENSING BOARD PANEL

- Issued 24 decisions.
- Established 10 new proceedings, 2 of which have terminated.

Cases pending before the Licensing Board Panel:

- *Dominion Nuclear* (North Anna)(early site review)(ASLBP not yet designated as of date of this paper).
- *Duke Energy* (Catawba)(MOX LTA amendment requests)

- *CFC Logistics* (Materials/Part 36 irradiator)
- *Fansteel, Inc.* (MLA-3/decommissioning)
- *Hydro Resources, Inc.* (in situ leachate mining)
- *Savannah River MOX Fuel Fabrication* (Duke, Cogema, Stone & Webster)
- *Nuclear Fuel Services* (BLEU Project)(MLA, MLA-2)(MLA-3 yet to be established)
- *Private Fuel Storage, LLC* (ISFSI)
- *Sequoyah Fuels Corp.* (Gore, OK)(MLA-4/onsite disposal cell)
- *U.S. Dept. of the Army* (Jefferson Proving Ground)(MLA-2)

PENDING COMMISSION APPEALS/PETITIONS FOR REVIEW

OCAA is currently working on appeals or petitions for review in the following proceedings:

- *Private Fuel Storage, LLC*: (ISFSI):

Parties have filed their petitions for review of interlocutory Board decisions and appeals of financial qualifications and decommissioning decisions.
- *Tennessee Valley Authority* (enforcement proceeding):

Appeal of Licensing Board decision sustaining monetary civil penalty but reducing monetary amount of penalty.
- *Maine Yankee Atomic Power Co.* (order modifying license)(interim ISFSI-related security measures):

Appeal of denial of Maine's intervention petition.

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.

