

ADJUDICATORY ISSUE INFORMATION

February 17, 2005

SECY-05-0034

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 2004.

INTRODUCTION:

At the NRC, the Commission has the authority 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 through monitoring cases and drafting Commission decisions. 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 may also offer guidance to the Licensing Board on significant novel questions raised in an ongoing proceeding, as when a Board certifies a question or refers its ruling to the Commission. In addition, NRC regulations give the Commission original jurisdiction to resolve particular categories of adjudications, such as reactor license transfer adjudications. The Commission may also resolve preliminary questions arising before a Licensing Board has been established.¹

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¹For example, in three cases seeking early site permits for possible new reactors, the Commission determined that the NRC's new procedural rules should apply prior to referring the intervention petitions to the Board. See Dominion Nuclear North Anna (Early Site Permit for North Anna Site), Exelon Generation Company (Early Site Permit for Clinton Site), System Energy Resources, Inc. (Early Site Permit for Grand Gulf Site), CLI-04-08, 59 NRC 113 (2004).

I am providing the Commission this report on agency adjudications for calendar year 2004 as part of OCAA's monitoring role over adjudicatory matters. This report updates information contained in the last report (SECY-04-0011, Jan. 30, 2004), and is based upon the information in the attached charts. For the calendar year 2004, 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 2004.

COMMISSION ADJUDICATORY ACTIVITIES:

1. Commission Adjudicatory Decisions in 2004

As anticipated, 2004 was a busy year for the Commission in terms of adjudications. The Commission issued 39 CLIs in 2004, compared with 18 in 2003, 29 in 2002 and 28 in 2001. The 39 Commission decisions are the most since OCAA's founding (in 1991), indeed the most in Commission history.²

Commission decisions in 2004 spanned a variety of proceedings. The renewed interest in nuclear power was reflected in three Early Site Permit applications filed in late 2003, all of which generated litigation for the Board. This new interest is also shown by an application to license a new uranium enrichment plant submitted by USEC, joining a similar application filed last year by LES. Several enforcement cases came before the Commission, including the complex Tennessee Valley Authority whistleblower proceeding.³ In that case, the Commission considered issues of first impression concerning how a Board must deal with a licensee accused of taking illegal retaliatory employment actions against an employee who has raised safety issues. Overall, 2004 saw an increase in the number of enforcement proceedings, material license proceedings, and reactor license amendment proceedings requiring Commission review.

Commission decisions continue to interpret and clarify NRC regulations, the AEA, and NEPA. Significant OCAA work in 2004 included the following:

Whistleblower Case: One of the Commission's most significant decisions issued this year was the Tennessee Valley Authority whistleblower decision.⁴ There, the staff had imposed a \$110,000 fine on TVA for taking adverse personnel action against an employee who had engaged in "protected activities." The Board reduced the fine to \$44,000 because TVA had other, performance-based reasons to select another employee for a promotion the whistleblower had sought. TVA acknowledged that the

²Prior to 1991 the now-defunct Atomic Safety Licensing Appeal Board handled appeals in the first instance, thereby reducing the Commission's appealable caseload.

³CLI-04-24, 60 NRC 160 (2004).

⁴TVA (Watts Barr Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 and 2; Browns Ferry Nuclear Plant, Units 1 and 2), CLI-04-24, 60 NRC 160 (2004).

plaintiff had engaged in “protected activities” but denied that those activities were a “contributing factor” for its choosing a different employee for promotion. The Commission formulated a test that strikes a balance between making a whistleblower case impossible to prove and making such a case impossible to defend.

“Need to Know” cases: In *Duke Energy Corporation* (Cawtaba Nuclear Station, Units 1 and 2), Duke is seeking an operating license amendment to use lead test assemblies of mixed oxide fuel in its reactor. In three significant decisions in this case, the Commission interpreted policies and regulations concerning what sensitive information parties intervening in adjudications should be allowed to see. In the first, CLI-04-6,⁵ the Commission took interlocutory review at the staff’s request. The Commission’s decision set a high standard for what constitutes a “need to know” information at the contentions-pleading stage. The second order, CLI-04-21,⁶ also interlocutory review at staff’s request, enunciated a standard for intervenor’s expert witness, whose expertise staff questioned, to be given access to safeguards material. The third order, CLI-04-29,⁷ referred to the Commission by the Board, clarified the need-to-know standard as it applies to discovery.

Financial Qualifications: The Commission issued two orders clarifying NRC’s regulations concerning the financial qualifications of license applicants. In *Hydro Resources, Inc.*,⁸ the Commission reviewed the Board’s highly detailed findings on the reasonableness of the applicant’s decommissioning cost estimates. In *Private Fuel Storage, L.L.C.*,⁹ the Commission found that the applicant’s financial scheme, wherein it would borrow construction costs from potential customers and pass operating costs on to them, met the NRC’s reasonable “financial assurances” requirement.

Bellotti cases: The Commission issued orders in three cases that make it clear that outsiders may not challenge enforcement orders on the grounds that they should be strengthened. Twenty years ago, in *Bellotti v. NRC*,¹⁰ the D.C. Circuit interpreted the AEA’s provision allowing “any person whose interest may be affected”¹¹ to be admitted as a party in a proceeding (among other things) modifying a license as it applied in an enforcement context. There, Circuit Judge Robert Bork, writing for the court, agreed with the NRC that it can limit the “scope of the proceeding” to the issue of whether an enforcement settlement already negotiated between the licensee and the NRC “should

⁵59 NRC 62 (2004).

⁶60 NRC 21 (2004).

⁷60 NRC 417 (2004).

⁸(P.O. Box 15910 Rio Rancho, NM 87174), CLI-04-33, 60 NRC __ (2004).

⁹CLI-04-27 (unpublished due to proprietary content).

¹⁰*Bellotti v. NRC*, 725 F2d 1380 (D.C. Cir. 1983).

¹¹Atomic Energy Act §189(a). CLI-04-6, 59 NRC 52 (2004).

be sustained.” In other words, interested parties could only intervene to argue that the order should be relaxed, when the measures called for in the order would harm public safety, but not that additional measures should be imposed.

In *Maine Yankee Atomic Power Company* (Maine Yankee Atomic Power Station),¹² the Commission rejected the State of Maine’s request for a hearing on an order issued to all ISFSI licensees (including Maine Yankee) that strengthened applicable security requirements following the September 11 attacks. The Commission said the fact that Maine *opposed* the issuance of the order (because it allegedly would impose unfunded burdens on the State) did not matter, because actually Maine wanted additional measures imposed on the licensee, not fewer. In *FirstEnergy Nuclear Operating Company* (Davis-Besse Nuclear Power Station, Unit 1),¹³ the Commission rejected an environmental groups’ request for a hearing on a Confirmatory Order modifying FirstEnergy’s license to require additional safety measures before restarting the Davis-Besse plant. The Commission noted that the petitioners didn’t have standing to protest the order because they would not be harmed by the additional measures imposed by the order. In *State of Alaska Department of Transportation and Public Facilities*¹⁴, the Commission rejected a whistleblower’s attempt to intervene to protest as too weak a Confirmatory Order designed to rectify violations stemming from the licensee’s retaliation against that whistleblower for engaging in protected activities.

State Participation Under New Rules: One of the first Commission cases to interpret the agency’s new Part 2 procedural rules, *Louisiana Energy Services* (National Enrichment Facility)¹⁵ clarified the choice a state has to either participate in an NRC proceeding as an interested state or as a party. Specifically, if a state has entered a proceeding as a party, it may participate at hearing on a contention introduced by another only by first adopting that contention as its own.

CATS: OCAA attorneys also prepared for the upcoming Yucca Mountain License application by participating in the interviews for the Commission Adjudicatory Technical Support (CATS) office. The CATS office identified 33 different technical disciplines that may arise with respect to the Yucca Mountain license application, and interviewed 106 people (three to four candidates for each part-time, temporary position). The CATS office will assign adjudicatory employees to help OCAA attorneys with technical issues in a more formal and efficient manner than the former ad-hoc method of assigning technical adjudicatory employees.

2. Pending Commission Appeals/Petitions for Review

¹²CLI-04-5, 59 NRC 52 (2004).

¹³CLI-04-23, 60 NRC 154 (2004).

¹⁴CLI-04-26, 60 NRC 399 (2004).

¹⁵CLI-04-35, 60 NRC __ (2004).

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

- C *Yankee Atomic Electric Company* (Yankee Nuclear Power Station): Both the NRC staff and the licensee have asked the Commission to review the Board's ruling in LBP-04-27, 60 NRC 539 (2004), which admitted two contentions by Citizens Awareness Network. They claim that neither contention presents a litigible issue.
- C *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation). In the Commission's ruling on what information should be withheld from publication in various Commission and Board orders as proprietary,¹⁶ it directed the parties to submit proposed redactions consistent therewith. After PFS submitted its proposed redactions, Utah filed further objections to PFS's redactions. The Commission needs to rule on whether PFS's proposed redactions are consistent with its order in CLI-05-1.

ATOMIC SAFETY AND LICENSING BOARD PANEL

The Atomic Safety and Licensing Board Panel was also working full tilt this year, releasing 33 published decisions in addition to several that were not published for proprietary or safeguards reasons, and countless unpublished procedural orders. Of the 33 published decisions, 8 represented the Boards' final resolution of the case—three on the merits, three on threshold issues, and two decisions approving settlement agreements.

Several of the Board's published rulings represent the initial rulings on admissibility of contentions, which, in hotly-contested proceedings, is a complex and labor-intensive task. For example, in the Duke Energy Corporation (application to use MOX fuel assemblies) the Board issued a 55-page order ruling on non-security contentions,¹⁷ and a longer order on security contentions.¹⁸ The Board also ruled on contentions in *LES* (National Enrichment Facility),¹⁹ *Dominion Nuclear Connecticut* (Millstone Nuclear Power Station),²⁰ and *Entergy Nuclear Vermont Yankee* (Vermont Yankee Nuclear Power Station)²¹ Under the NRC's new Part 2 rules, the Board has a relatively short period, 45 days after the filing of answers and replies, to rule on contentions, regardless of whether it hears oral argument on admissibility.²² Thus far, various Boards have successfully met this deadline.

¹⁶CLI-05-1, 61 NRC __ (2005).

¹⁷LBP-04-4, 59 NRC 129 (2004).

¹⁸LBP-04-10, 59 NRC 296 (2004) (redacted version).

¹⁹LBP-04-14, 60 NRC 40 (2004).

²⁰LBP-04-15, 60 NRC 81 (2004). _

²¹LBP-04-28, 60 NRC 548 (2004).

²²10 C.F.R. § 2.309(i).

In 2004, 14 new Board proceedings were established.²³

Cases pending before the Licensing Board Panel:

- C *Clinton Early Site Permit* (ESP)
- C *Dominion Nuclear* (North Anna)(early site review)
- C *Duke Energy* (Catawba)(MOX LTA amendment requests)
- C *Entergy Nuclear* (Vermont Yankee)
- C *Hydro Resources, Inc.* (in situ leachate mining)
- C *Louisiana Energy Services* (National Enrichment Facility)
- C *North Anna* ESP
- C *Nuclear Fuel Services* (BLEU Project)(MLA, MLA-2)(MLA-3 yet to be established)
- C *Private Fuel Storage, LLC* (ISFSI)
- C *Safety Light Corporation* (materials license)
- C *Savannah River MOX Fuel Fabrication* (Duke, Cogema, Stone & Webster)
- C *U.S. Dept. of the Army* (Jefferson Proving Ground)(MLA-2)
- C *Yankee Atomic Electric Company* (Yankee Nuclear Power Station)
- C *Yucca Mountain* (pre-license application matters)

FUTURE BOARD AND COMMISSION CASELOAD:

OCAA expects 2005 again to be a busy year for adjudications. Several complex proceedings are either nearing the final resolution by the Board or will potentially require Commission guidance to the Board.

USEC, Inc. (American Centerfuge Plant): In August, 2004, USEC submitted an application for a license to enrich uranium at a plant in Piketon, Ohio. The time for requesting a hearing was extended until February 28, 2005, due to the temporary unavailability of the NRC's ADAMS system. It is expected that this application will generate a great deal of litigation, as the LES has in the last year.

²³See Chart 3, attached.

Private Fuel Storage (ISFSI): This case is reaching a close before the Board; as a result, the Commission may soon face the issue whether to make the Board's approval of the license (if that is the Board's decision) immediately effective.²⁴ The Board is expected to issue a decision on the last substantive issue pending in this case--whether the risk of an F-14 crashing into the site poses an unacceptable risk--by the end of this month.

Louisiana Energy Services (LES)(enrichment facility): LES filed an application for a centrifuge enrichment facility in Lea County, New Mexico in late 2003. The Commission order CLI-04-3²⁵ set forth an aggressive two-and-a-half-year schedule for a final agency decision on the LES application, and required the Board submit a written explanation if any of the prescribed milestones were not met. As anticipated by CLI-04-3, the Commission itself ruled on standing issues in a May, 2004, order²⁶ and referred the contentions to the Board. The Board ruled on contentions, finding 10 admissible.²⁷ The hearing process is moving forward in compliance with the Commission schedule.

Hydro Resources, Inc. (HRI)(in situ leach uranium mining): This complex and highly technical proceeding resumed active litigation in 2003 after settlement negotiations broke down. The HRI license, issued in 1998, involves four sites. Litigation over the first site -- termed "Section 8 at Church Rock" -- was concluded with the issuance of the Commission's order CLI-04-33. The Presiding Officer has scheduled 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 for a facility for downblending high-enriched uranium to low-enriched uranium. The three amendments have been consolidated into a single proceeding. This case, under the "old" subpart L, is now ripe for a merits decision by the Presiding Officer.

Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility): The NRC staff is expected to release the final Environmental Impact Statement and Safety Evaluation Report early in 2005, triggering the final round of proceedings on safety and environmental issues.

Early Site Permit Applications: Hearing requests were granted in two of three early site permit applications, for the *North Anna* and *Clinton* early site permit applications, and proceedings are advancing before the Board. As these applications are the first of their kind, it is likely that interlocutory Board rulings may generate certified questions or requests for interlocutory review by parties.

²⁴See 10 C.F.R. §2.764.

²⁵59 NRC 10 (2004).

²⁶CLI-04-15, 59 NRC 355 (2004).

²⁷LBP-04-14, 60 NRC 40 (2004).

New Part 2 Regulations: The past year was the first for the new Part 2 procedures for adjudicatory proceedings, which apply to all adjudications filed on or after February 13, 2004. The novelty of the Part 2 rules may result in Board-certified questions and other requests for Commission guidance throughout 2005.

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.