

ADJUDICATORY ISSUE INFORMATION

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SECY-10-0003

FOR: The Commissioners

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

SUBJECT: 2009 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 2009.

INTRODUCTION:

The Commission has authority to review decisions of Presiding Officers and the Atomic Safety and Licensing Boards. The Office of Commission Appellate Adjudication (OCAA) assists the Commission in this adjudicatory role by monitoring cases and preparing the Commission's appellate decisions. 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, as 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.

I am providing the Commission this report on agency adjudications for calendar year 2009 (CY 2009) as part of OCAA's monitoring role over adjudicatory matters. This report updates information in OCAA's last Annual Report (SECY-09-0009, January 14, 2009) and includes additional information, in table form, on published Commission decisions (CLIs) issued in CY 2009.

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DISCUSSION:

1. Commission Adjudicatory Decisions in CY 2009

In CY 2009 the Commission issued 23 decisions, somewhat fewer than its average of 30.8 over the five prior calendar years.¹ These decisions spanned a wide variety of proceedings, including:

- seven combined license (COL) applications (*Bellefonte, Calvert Cliffs, Fermi, Shearon Harris, South Texas, Vogtle, William States Lee*)
- four reactor license renewals (*Indian Point, Oyster Creek, Pilgrim, Vermont Yankee*),
- two materials license amendment requests (*Shieldalloy, Crow Butte*),
- two materials license applications (*Shaw Areva MOX Services, Pa'ina*),
- a materials license renewal (*Crow Butte*),
- the construction authorization request for the proposed high-level waste repository (*Yucca Mountain*),
- an enforcement action (*Geisen*),
- a reactor license amendment regarding a power uprate (*Millstone*), and
- issuance of a notice of hearing on a materials license application for a uranium enrichment facility (*Eagle Rock*).

OCAA drafted 21 of last year's 23 Commission decisions.² Of those 21 decisions, 6 upheld or

¹ Twenty-nine decisions in CY 2008, 28 in CY 2007, 29 in CY 2006, 29 in CY 2005, and 39 in CY 2004.

² The Office of the General Counsel (OGC) prepared the two other decisions for the Commission. In the *Fermi* COL proceeding, OGC drafted a decision denying requests to (continued. . .)

denied review of board orders,³ 4 affirmed in part and reversed in part board orders,⁴ and 2 reversed board orders.⁵

The balance of the Commission's decisions addressed other matters, including referred rulings from licensing boards.⁶

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extend the deadline for filing contentions, for compensation of petitioners' experts, to waive the fee for seeking access to certain sensitive documents, and for information concerning redacted portions of the application. The decision granted an extension of the 10-day deadline to request access to the sensitive documents. CLI-09-4. In addition, OGC drafted the notice of hearing and Commission order for the materials license application for the proposed Eagle Rock Enrichment Facility. CLI-09-15.

³ CLI-09-5, -6, -7, -16, -20, -22.

⁴ CLI-09-2, -9, -12, -14.

⁵ CLI-09-3, -8.

⁶ CLI-09-1 (responding to board's memorandum bringing issues to Commission's attention); CLI-09-10 (denying request for Commission action, but advising that Commission will take appropriate action if warranted by pending First Circuit decision); CLI-09-11 (requesting additional briefs with respect to *Pilgrim* petition for review regarding scope of contention and whether intervenor made a sufficient showing to oppose summary disposition of that contention); CLI-09-13 (declining review of referred rulings on the board's denial of two contentions challenging the completeness of an application that references design control document revisions); CLI-09-17 (directing the board to issue a status report outlining the board's general plan and timetable for resolving all pending matters in the proceeding); CLI-09-18 (denying motion to extend the deadline to appeal the board's partial contention admissibility decision, explaining that appeal under section 2.311 does not lie until the board acts on the balance of the pending contentions, and clarifying that the appeal in this case will not lie until the board rules on certain pending newly-proffered contentions); CLI-09-19 (denying motion to transfer case from the board to the Commission); CLI-09-21 (declining review of referred rulings from two boards regarding the boards' denial of substantively identical (continued. . .)

The Commission's decisions continue to interpret and clarify NRC regulations and applicable statutes, including the Atomic Energy Act of 1954, as amended, and the National Environmental Policy Act (NEPA). Significant OCAA work in CY 2009 included decisions:

- Reiterating that contentions failing to meet the admissibility requirements must be dismissed outright, rather than admitting them subject to certain conditions; and reiterating that boards lack the authority to supervise the Staff in its non-adjudicatory activities (*MOX*, CLI-09-2).
- Addressing petition for review of board's merits determination involving complex procedural and technical issues; and confirming that "reasonable assurance" is not quantifiable, rather it is based on sound technical judgment of the particulars of a case and on compliance with Commission regulations (*Oyster Creek*, CLI-09-7).
- Delineating a bright-line rule requiring that affidavits authorizing organizational representation must be filed with specific reference to the proceeding in which standing is sought (*Crow Butte*, CLI-09-9).
- Instructing boards on the scope of their authority to reformulate contentions, specifically, that boards may not add material not raised by a petitioner to render a contention admissible, they should eliminate material that does not meet the contention admissibility standards, and they should explicitly state which bases are admitted in order to clarify the scope of the matters to be litigated (*Crow Butte*, CLI-09-12).
- Confirming that the "proximity presumption" is consistent with contemporaneous judicial concepts of standing, but that, in any event, the Commission is not strictly bound by judicial concepts of standing (*Calvert Cliffs*, CLI-09-20).

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contentions that concern the environmental impacts of greenhouse gas emissions); CLI-09-23 (denying motion to stay the effectiveness of the board's decision setting aside an enforcement order pending Commission action on the petition for review).

- Responding to appeals of the construction authorization boards' First Prehearing Conference Order in the high-level waste proceeding within the 10 C.F.R. Part 2, Appendix D schedule (*Yucca Mountain*, CLI-09-14).

In preparing draft decisions, OCAA provides the Commission with multiple draft decisions (or alternative discussions within a draft) on particularly difficult legal or policy issues which, in CY 2009, included *Yucca Mountain* (CLI-09-14) and *South Texas* (CLI-09-18), and *Pilgrim* (SECY-09-0147). These alternatives are intended to give the Commission options on how to proceed. In addition, our Commission papers routinely point out legal issues, and possible legal and policy implications of particular courses of action, that the Commission might wish to consider. OCAA strives to submit its draft decisions expeditiously, and has nearly always been successful in meeting this goal. Our overall average turnaround time (between receiving the final relevant document and transmitting OCAA's draft decision to the Commission) was 62 days for the 27 draft decisions that OCAA submitted to the Commission in CY 2009. See the attached table, "Commission Adjudicatory Decisions, January – December 2009." Our median turnaround time was 57 days. For CLIs of average complexity, we aim to provide the Commission with a draft order and Commission paper within 60 days (90 days in the most complex of cases) of the filing or issuance of the last document necessary for consideration in drafting the order. Eighteen of our draft decisions met their respective targets in CY 2009.

2. Pending Commission Appeals/Petitions for Review

As of December 31, 2009, 9 draft decisions were before the Commission in the following cases:

- *South Carolina Electric & Gas Co. & South Carolina Public Service Authority (Also Referred to as Santee Cooper) (Summer)* combined license application (appeal of licensing board decision denying intervention petitions)
- *Levy County* combined license application (appeal of licensing board decision granting a hearing to petitioners)
- *Fermi* independent spent fuel storage installation enforcement action (appeal of licensing board decision denying intervention petition)
- *Vogtle* early site permit (petition for review of merits decision rejecting intervenors' contentions)
- *Pilgrim* license renewal application (petition for review of merits decisions, as well as various interlocutory decisions, finding in favor of applicant) (two draft decisions)
- *Bell Bend* combined license application (appeal of licensing board decision denying intervention petition)

- *Shearon Harris* combined license application (appeal of licensing board decision denying intervention petition; request for oral argument; reconsideration of two Commission decisions)
- *Shieldalloy* license amendment request for decommissioning Newfield, New Jersey site (motion to stay transfer of authority over the Newfield site to the State of New Jersey).

3. Anticipated Adjudicatory Matters

OCAA expects that the Commission will face the following significant adjudicatory matters in CY 2010:

- Continued disputes regarding heavily contested license renewal applications, including *Crow Butte*, *Indian Point*, *Pilgrim*, *Prairie Island*, and *Vermont Yankee*.
- Continued disputes regarding multiple COL applications (as of December 31, 2009, intervention petitions have been granted by, or are pending before, licensing boards in the *Bellefonte*, *Calvert Cliffs*, *Comanche Peak*, *Levy County*, *Fermi*, *North Anna*, *South Texas*, and *Vogtle* cases).
- Disputes in the *Yucca Mountain* construction authorization matter, particularly regarding licensing board resolution of legal issue contentions.

4. Commission Adjudicatory Technical Support Program

The Commission Adjudicatory Technical Support (CATS) Program was established as a separate adjudicatory employee (AE) organization to provide technical support to OCAA and the Commission during the licensing period for a high-level waste repository. The Director of OCAA is currently serving as Director of the CATS program. In April 2009, OCAA provided comprehensive training to CATS AEs on the role of the AE for experts assisting on the *Yucca Mountain* adjudicatory proceeding. Seventeen AEs assisted OCAA in preparing for appeals of the First Prehearing Conference Order.

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

Attachment: "Commission Adjudicatory Decisions, January – December 2009"