

February 02, 2010

MEMORANDUM TO: Summer A. Lingard, Senior Analyst  
U.S. Government Accountability Office

FROM: Darani M. Reddick, Legal Counsel */RA/*  
Office of Commissioner Kristine L. Svinicki

SUBJECT: RESPONSE TO JANUARY 26, 2010 REQUEST FOR  
INFORMATION – JOB CODE 361118

This memorandum responds to your request, transmitted via electronic mail to Kimberly Sargent dated January 26, 2010, for responses to two additional questions, discussed in turn below.

The Office of Commission Appellate Adjudication compiled the list of Commission decisions in response to Question 1, as well as the table of Commission decisions in response to Question 2.

**Please identify:**

- 1. (Part 1) Any certified questions from the ASLBP to the Commission that have been issued or are pending Commission decision.**

Certified Questions and Referred Rulings

Although you requested information only regarding “certified rulings”, we provide below a list of issued Commission decisions addressing both “certified questions” and “referred rulings” in the following new reactor licensing proceedings.<sup>1</sup>

1. *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site) (Early Site Permit Application)
  - CLI-05-9, 61 NRC 235 (April 20, 2005); ADAMS accession number ML051100427 (setting a briefing schedule for questions regarding mandatory hearing requirements, certified in LBP-05-7, 61 NRC 188 (March 18, 2005); ADAMS accession number ML050800315).<sup>2</sup>

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<sup>1</sup> There are currently no certified questions or referred rulings pending before the Commission. There have been no certified questions or referred rulings in the *Fermi*, *Shearon Harris*, *South Texas*, *Bell Bend*, *Calvert Cliffs*, *Virgil C. Summer*, *Comanche Peak*, *Callaway*, or *Levy County* combined license (COL) cases.

<sup>2</sup> As the Office of Commission Appellate Adjudication (OCAA) explained in its response to GAO dated January 22, 2010, CLI-05-9 was the result of questions certified to the Commission by the Chief Administrative Judge of the ASLBP, and also provided guidance in the *Clinton*, *North Anna*, and *Grand Gulf* early site permit cases, as well as the *USEC* uranium enrichment case.

- CLI-05-17, 62 NRC 5 (July 28, 2005); ADAMS accession number ML052090391 (addressing questions regarding mandatory hearings, certified in LBP-05-7, 61 NRC 188 (March 18, 2005); ADAMS accession number ML050800315).<sup>3</sup>
2. *System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site) (Early Site Permit Application)
    - CLI-05-9, 61 NRC 235 (April 20, 2005); ADAMS accession number ML051100427 (setting a briefing schedule for questions regarding mandatory hearing requirements, certified in LBP-05-7, 61 NRC 188 (March 18, 2005); ADAMS accession number ML050800315).
    - CLI-05-17, 62 NRC 5 (July 28, 2005); ADAMS accession number ML052090391 (addressing questions regarding mandatory hearings, certified in LBP-05-7, 61 NRC 188 (March 18, 2005); ADAMS accession number ML050800315).
  3. *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site) (Early Site Permit Application)
    - CLI-05-9, 61 NRC 235 (April 20, 2005); ADAMS accession number ML051100427 (setting a briefing schedule for questions regarding mandatory hearing requirements, certified in LBP-05-7, 61 NRC 188 (March 18, 2005); ADAMS accession number ML050800315).
    - CLI-05-17, 62 NRC 5 (July 28, 2005); ADAMS accession number ML052090391 (addressing questions regarding mandatory hearings, certified in LBP-05-7, 61 NRC 188 (March 18, 2005); ADAMS accession number ML050800315).
  4. *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site) (Early Site Permit Application)
    - CLI-07-17, 65 NRC 392 (April 17, 2007); ADAMS accession number ML071090195 (addressing question as to whether the Board may go forward with merits litigation based on the draft environmental impact statement, certified in LBP-07-3, 65 NRC 237 (March 12, 2007); ADAMS accession number ML070710443).
    - CLI-07-24, 66 NRC 38 (August 30, 2007); ADAMS accession number ML072420166 (addressing question as to whether the Commission wished the Board to conduct the mandatory hearing, certified in Memorandum (Certifying Question Regarding Conduct of Mandatory Hearing) (July 12, 2007) at 3 (unpublished); ADAMS accession number ML071930224).

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<sup>3</sup> Like CLI-05-9, CLI-05-17 is a memorandum and order addressing certified questions arising out of three then-pending ESP cases (*North Anna, Clinton, and Grand Gulf*), and one uranium enrichment facility proceeding (*Louisiana Energy Services*). While no questions were certified in the USEC uranium enrichment facility proceeding (which began later in time), USEC filed a motion for leave to submit its views on the certified questions, and the Commission ultimately provided guidance also applicable to the *USEC* proceeding.

5. *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4)  
(Combined License Application)
  - CLI-09-3, 69 NRC 68 (February 17, 2009); ADAMS accession number ML090480541 (addressing rulings as to admissibility of low-level waste storage contention, referred in LBP-08-16, 68 NRC 361 (September 12, 2008); ADAMS accession number ML082560826).
  - CLI-09-21, 70 NRC \_\_ (November 3, 2009); ADAMS accession number ML093070690 (addressing ruling relating to admissibility of contention concerning the consideration in COL applications of certain environmental impacts relating to greenhouse gas emissions, referred in LBP-08-16, 68 NRC 361 (September 12, 2008); ADAMS accession number ML082560826).<sup>4</sup>
  
6. *Duke Energy Carolinas, LLC* (Combined License Application for William States Lee III Nuclear Station, Units 1 and 2) (Combined License Application)
  - CLI-09-21, 70 NRC \_\_ (November 3, 2009); ADAMS accession number ML093070690 (addressing ruling relating to admissibility of contention concerning the consideration in COL applications of certain environmental impacts relating to greenhouse gas emissions, referred in LBP-08-17, 68 NRC 431 (September 22, 2008); ADAMS accession number ML082660504).
  
7. *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4)  
Combined License Application)
  - CLI-09-13, 69 NRC \_\_ (June 25, 2009); ADAMS accession number ML093000088 (addressing rulings relating to admissibility of contentions challenging the completeness of a COL application that references design certification documents still under review by the agency, referred in LBP-09-3, 69 NRC 139 (March 5, 2009); ADAMS accession number ML090640918).

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<sup>4</sup> CLI-09-21 is a decision issued in both the *Bellefonte* and *Lee* COL proceedings.

**1. (Part 2) Additionally, what are other types of Commission decisions that have been issued or are pending (besides appeals)?**

Commission decisions addressing certified questions or referred rulings are listed above. The list below provides issued Commission decisions in new reactor licensing proceedings that did not address certified questions, referred rulings, or appeals.<sup>5</sup> A brief description of the decision is included.

1. *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site) (Early Site Permit Application)
  - CLI-04-8, 59 NRC 113 (March 2, 2004); ADAMS accession number ML040620405 (addressing the applicant's motion to apply the 2004 version of the NRC's procedural rules).<sup>6</sup>
  - CLI-07-4, 65 NRC 24 (January 22, 2007); ADAMS accession number ML070220415 (requesting briefing from the NRC Staff and the applicant on issues raised in the Board's initial decision on uncontested issues).
  - CLI-07-12, 65 NRC 203 (March 8, 2007); ADAMS accession number ML070670147 (addressing Board's initial decision on uncontested issues pursuant to 10 C.F.R. § 2.340(f) (2007); approving issuance of an early site permit).
  
2. *System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site) (Early Site Permit Application)
  - CLI-04-8, 59 NRC 113 (March 2, 2004); ADAMS accession number ML040620405 (addressing the applicant's motion to apply the 2004 version of the NRC's procedural rules).
  - CLI-06-28, 64 NRC 404 (November 9, 2006); ADAMS accession number ML063130176 (taking up issue before the Board (admissibility of late-filed contention raising NEPA terrorism issue) on Commission's own motion).
  - CLI-07-7, 65 NRC 122 (February 15, 2007); ADAMS accession number ML070460124 (requesting briefing from the NRC Staff and the applicant on issues raised in the Board's initial decision on uncontested issues).

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<sup>5</sup> There have been no Commission decisions issued in the *Vogtle* ESP proceeding and the *Bellefonte*, *William States Lee*, *Vogtle*, *Bell Bend*, *Calvert Cliffs*, *Virgil C. Summer*, *Comanche Peak*, *Callaway*, and *Levy County* COL proceedings besides decisions addressing certified questions, referred rulings, and/or appeals. There are no Commission decisions (other than one appeal in the *Shearon Harris* COL case) currently pending.

<sup>6</sup> In CLI-04-8, the Commission provided direction for the *North Anna*, *Clinton*, and *Grand Gulf* ESP proceedings.

- CLI-07-10, 65 NRC 144 (February 26, 2007); ADAMS accession number ML070570536 (addressing issue that Commission took up on its own motion (admissibility of late-filed NEPA terrorism contention)).
  - CLI-07-14, 65 NRC 216 (March 27, 2007); ADAMS accession number ML070860864 (addressing Board's initial decision on uncontested issues pursuant to 10 C.F.R. § 2.340(f) (2007); approving issuance of an early site permit).
3. *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site) (Early Site Permit Application)
- CLI-04-8, 59 NRC 113 (March 2, 2004); ADAMS accession number ML040620405 (addressing the applicant's motion to apply the 2004 version of the NRC's procedural rules).
  - CLI-07-23, 66 NRC 35 (August 2, 2007); ADAMS accession number ML072140614 (requesting briefing from the NRC Staff and the applicant on issues raised in the Board's initial decision on uncontested issues).
  - CLI-07-27, 66 NRC 215 (November 20, 2007); ADAMS accession number ML073240391 (addressing Board's initial decision on uncontested issues pursuant to 10 C.F.R. § 2.340(f) (2007); approving issuance of an early site permit).
4. *Detroit Edison Co.* (Fermi, Unit 3) (Combined License Application)
- CLI-09-4, 69 NRC 80 (February 17, 2009); ADAMS accession number ML090480542 (addressing requests by prospective petitioners regarding notice of opportunity for hearing).
5. *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3) (Combined License Application)
- CLI-08-15, 68 NRC 1 (July 23, 2008); ADAMS accession number ML082050541 (addressing motion to suspend hearing notice).
6. *South Texas Project Nuclear Operating Co.* (South Texas Project, Units 3 and 4) (Combined License Application)
- CLI-09-18, 70 NRC \_\_ (September 23, 2009); ADAMS accession number ML092660253 (addressing request for an extension of time to appeal Board's ruling).
2. **For each issued or pending Commission decision related to new reactors (appeals, certified questions from ASLBP, and other decisions), please provide the timeframes for the Commission to provide a response, the reason for those timeframes, and the name of the case.**

**a. For example, on February 27, 2009 an appeal was filed for the Summer COL. The Commission issued an appellate decision on January 7, 2010. Why did this decision take over 10 months to issue?**

As an initial matter, the agency's procedural rules set time limits for Commission action or response in one circumstance: a forty-day time limit for the Commission to take review, on its own motion, with respect to partial or final initial decisions issued pursuant to 10 C.F.R. § 2.341(a)(2). That regulation provides:

within forty (40) days after the date of a decision or action by a presiding officer, or within forty (40) days after a petition for review of the decision or action has been served . . . , whichever is greater, the Commission may review the decision or action on its own motion, unless the Commission, in its discretion, extends the time for its review.<sup>7</sup>

As a practical matter, it is difficult to prescribe a single time frame for the Commission's consideration of adjudicatory matters. The time needed for the consideration and resolution of an adjudicatory matter will be informed by a number of factors, including the nature of the legal and/or factual issues that must be decided. These issues may vary widely not only in number, but also in legal and technical complexity, the procedural posture of the case, and the scope of the underlying adjudicatory record to be considered. Further, these matters must be prioritized, taking into account not only other pending adjudications, but also the balance of the Commission's considerable workload – the adjudication of legal matters is only one of the Commission's many responsibilities. With this in mind, the Commission's rules of procedure provide broad latitude for the Commission to take action in individual proceedings to ensure prompt and effective resolution of matters set for adjudication.

When prioritizing its adjudicatory workload, the Commission is cognizant of and takes into consideration the potential impact of the timing of its action on an overall COL schedule. The Commission's issuance of the *Summer* decision referenced in Question 2a is a case in point. There was no impact on the progress of the *Summer* proceeding, since the decision on threshold standing and contention admissibility issues had no effect on the overall schedule of that proceeding. This kind of prioritization exemplifies the necessary balancing of adjudicatory resources.

The following table represents the time elapsed between the relevant Board issuance and the Commission decision addressing certified questions, referred rulings, appeals, or petitions for review, as applicable.<sup>8</sup>

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<sup>7</sup> Parties seeking to file a petition for review of a Board's partial or final initial decision must do so within 15 days of that decision. Answers to the petition for review must be filed within 10 days thereafter. Only after receiving the parties' filings does the Commission have the necessary briefing to decide the petition for review.

<sup>8</sup> In a January 27, 2010 telephone conference between Summer Lingard, Senior Analyst, GAO, and Brooke Poole, Director, OCAA, a clarification was provided with respect to Question 2. In particular, Ms. Lingard clarified that, as part of this response, GAO sought information specifically regarding the amount of time that elapsed between issuance of the Licensing Board decision, and issuance of the related Commission decision.

<u>Name of Proceeding</u>	<u>Description of Commission Decision</u>	<u>Relevant Board Issuance</u>	<u>Time Elapsed Between Board Decision and Commission Decision (days)</u>
1. <i>Clinton</i> (ESP)	CLI-04-31, 60 NRC 461 (November 10, 2004); ADAMS accession number ML043150424 (addressing intervenors' petition for interlocutory review of Board decision granting request for hearing)	LBP-04-17, 60 NRC 229 (August 6, 2004); ADAMS accession number ML042260071	96
	CLI-05-9, 61 NRC 235 (April 20, 2005); ADAMS accession number ML051100427 (addressing certified questions)	LBP-05-7, 61 NRC 188 (March 18, 2005); ADAMS accession number ML050800315	33
	CLI-05-17, 62 NRC 5 (July 28, 2005); ADAMS accession number ML052090391 (addressing certified questions)	LBP-05-7, 61 NRC 188 (March 18, 2005); ADAMS accession number ML050800315	132
	CLI-05-29, 62 NRC 801 (December 12, 2005); ADAMS accession number ML053460102 (addressing intervenors' petition for review of Board decision granting summary disposition)	LBP-05-19, 62 NRC 134 (July 28, 2005); ADAMS accession number ML052090265	137

<u>Name of Proceeding</u>	<u>Description of Commission Decision</u>	<u>Relevant Board Issuance</u>	<u>Time Elapsed Between Board Decision and Commission Decision (days)</u>
	CLI-06-20, 64 NRC 15 (July 26, 2006); ADAMS accession number ML062070667 (addressing NRC Staff's petitions for interlocutory review of Board decisions requesting documents for mandatory hearing)	Order (May 3, 2006) (unpublished); ADAMS accession number ML061230413	84 <sup>9</sup>
2. <i>Grand Gulf</i> (ESP)	CLI-05-4, 61 NRC 10 (January 18, 2005); ADAMS accession number ML050180273 (addressing petitioners' appeal of Board decision denying request for hearing)	LBP-04-19, 60 NRC 277 (August 6, 2004); ADAMS accession number ML042300040	165
	CLI-05-9, 61 NRC 235 (April 20, 2005); ADAMS accession number ML051100427 (addressing certified questions)	LBP-05-7, 61 NRC 188 (March 18, 2005); ADAMS accession number ML050800315	33
	CLI-05-17, 62 NRC 5 (July 28, 2005); ADAMS accession number ML052090391 (addressing certified questions)	LBP-05-7, 61 NRC 188 (March 18, 2005); ADAMS accession number ML050800315	132

<sup>9</sup> This order also addressed an NRC Staff petition for interlocutory review of an unpublished Board decision in the *Grand Gulf* ESP proceeding dated May 31, 2006.



<u>Name of Proceeding</u>	<u>Description of Commission Decision</u>	<u>Relevant Board Issuance</u>	<u>Time Elapsed Between Board Decision and Commission Decision (days)</u>
	CLI-06-20, 64 NRC 15 (July 26, 2006); ADAMS accession number ML062070667 (addressing NRC Staff's petitions for interlocutory review of Board decisions requesting documents for mandatory hearing)	Order (May 31, 2006) (unpublished); ADAMS accession number ML061510434	56
3. <i>North Anna</i> (ESP)	CLI-05-9, 61 NRC 235 (April 20, 2005); ADAMS accession number ML051100427 (addressing certified questions)	LBP-05-7, 61 NRC 188 (March 18, 2005); ADAMS accession number ML050800315	33
	CLI-05-17, 62 NRC 5 (July 28, 2005); ADAMS accession number ML052090391 (addressing certified questions)	LBP-05-7, 61 NRC 188 (March 18, 2005); ADAMS accession number ML050800315	132
4. <i>Vogtle</i> (ESP)	CLI-07-17, 65 NRC 392 (April 17, 2007); ADAMS accession number ML071090195 (addressing certified question)	LBP-07-3, 65 NRC 237 (March 12, 2007); ADAMS accession number ML070710443	36
	CLI-07-24, 66 NRC 38 (August 30, 2007); ADAMS accession number ML072420166 (addressing certified question)	Memorandum (Certifying Question Regarding Conduct of Mandatory Hearing) (July 12, 2007) at 3 (unpublished); ADAMS accession number ML071930224	49

<u>Name of Proceeding</u>	<u>Description of Commission Decision</u>	<u>Relevant Board Issuance</u>	<u>Time Elapsed Between Board Decision and Commission Decision (days)</u>
	CLI-10-5, 71 NRC __ (January 7, 2010); ADAMS accession number ML100070365 (addressing intervenors' petition for review of Board initial decision in contested proceeding)	LBP-09-7, 69 NRC __ (June 22, 2009); ADAMS accession number ML091730471	199
5. <i>Bellefonte</i> (COL)	CLI-09-3, 69 NRC 68 (February 17, 2009); ADAMS accession number ML090480541 (addressing referred rulings)	LBP-08-16, 68 NRC 361 (September 12, 2008); ADAMS accession number ML082560826	158
	CLI-09-21, 70 NRC __ (November 3, 2009); ADAMS accession number ML093070690 (addressing referred ruling)	LBP-08-16, 68 NRC 361 (September 12, 2008); ADAMS accession number ML082560826	417 <sup>10</sup>
6. <i>Fermi</i> (COL)	CLI-09-22, 70 NRC __ (November 17, 2009); ADAMS accession number ML093210153 (addressing applicant's appeal of Board decision granting request for hearing)	LBP-09-16, 70 NRC __ (July 31, 2009) (slip op.); ADAMS accession number ML092120531	109
7. <i>Shearon Harris</i> (COL)	CLI-09-8, 69 NRC 317 (May 18, 2009); ADAMS accession number ML091380148 (addressing applicant and NRC Staff's appeals of Board decision granting request for hearing)	LBP-08-21, 68 NRC 554 (October 30, 2008); ADAMS accession number ML083040610	200

<sup>10</sup> This order also addressed a referred ruling in the *William States Lee* (COL) proceeding dated September 22, 2008.

<u>Name of Proceeding</u>	<u>Description of Commission Decision</u>	<u>Relevant Board Issuance</u>	<u>Time Elapsed Between Board Decision and Commission Decision (days)</u>
	<p>Decision pending on petitioner’s appeal of three Board decisions and two Commission decisions regarding request for hearing</p> <p>(Notice of Appeal, Request for Oral Argument and Brief Supporting Notice of Appeal by NC Warn (July 22, 2009); ADAMS accession number ML092030462)</p>	<p>LBP-08-21, 68 NRC 554 (October 30, 2008); ADAMS accession number ML083040610</p> <p>Licensing Board Memorandum and Order (Ruling on Request to Admit New Contention) (Dec. 23, 2008) (unpublished); ADAMS accession number ML083590139</p> <p>LBP-09-8, 69 NRC __ (June 30, 2009) (slip op.); ADAMS accession number ML091811084</p>	<p>Pending</p>
<p>8. <i>William States Lee</i> (COL)</p>	<p>CLI-09-21, 70 NRC __ (November 3, 2009); ADAMS accession number ML093070690 (addressing referred ruling)</p>	<p>LBP-08-17, 68 NRC 431 (September 22, 2008); ADAMS accession number ML082660504</p>	<p>407</p>
<p>9. <i>Vogle</i> (COL)</p>	<p>CLI-09-13, 69 NRC __ (June 25, 2009); ADAMS accession number ML093000088 (addressing referred rulings)</p>	<p>LBP-09-3, 69 NRC 139 (March 5, 2009); ADAMS accession number ML090640918</p>	<p>112</p>

<u>Name of Proceeding</u>	<u>Description of Commission Decision</u>	<u>Relevant Board Issuance</u>	<u>Time Elapsed Between Board Decision and Commission Decision (days)</u>
	CLI-09-16, 70 NRC __ (July 31, 2009); ADAMS accession number ML092120239 (addressing NRC Staff and applicant's appeals of Board decision granting request for hearing)	LBP-09-3, 69 NRC 139 (March 5, 2009); ADAMS accession number ML090640918	148
10. <i>Bell Bend</i> (COL)	CLI-10-7, 71 NRC __ (January 7, 2010); ADAMS accession number ML100070368 (addressing petitioner's appeal of Board decision denying request for hearing)	LBP-09-18, 70 NRC __ (August 10, 2009) (slip op.); ADAMS accession number ML092220570	150
11. <i>Calvert Cliffs</i> (COL)	CLI-09-20, 70 NRC __ (October 13, 2009); ADAMS accession number ML092860071 (addressing applicants' appeal of Board decision granting request for hearing)	LBP-09-4, 69 NRC 170 (March 24, 2009); ADAMS accession number ML090830626  Order (Correcting Errors in March 24, 2009 Order) (April 14, 2009) (unpublished); ADAMS accession number ML091040681	182
12. <i>Virgil C. Sumner</i> (COL)	CLI-10-1, 71 NRC __ (January 7, 2010); ADAMS accession number ML100070351 (addressing petitioners' appeals of Board decision denying request for hearing)	LBP-09-2, 69 NRC 87 (February 18, 2009); ADAMS accession number ML090490756	323

<u>Name of Proceeding</u>	<u>Description of Commission Decision</u>	<u>Relevant Board Issuance</u>	<u>Time Elapsed Between Board Decision and Commission Decision (days)</u>
13. <i>Levy County</i> (COL)	CLI-10-2, 71 NRC __ (January 7, 2010); ADAMS accession number ML100070354 (addressing applicant appeal of Board decision granting request for hearing)	See LBP-09-10, 70 NRC __ (July 8, 2009) (slip op.); ADAMS accession number ML091890822  Notice of Correction (July 10, 2009) (unpublished); ADAMS accession number ML091910532	181