

# ADJUDICATORY ISSUE INFORMATION

January 13, 2011

SECY-11-0008

**FOR:** The Commissioners

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

**SUBJECT:** 2010 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 2010.

## **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 2010 (CY 2010) as part of OCAA's monitoring role over adjudicatory matters. This report updates information in OCAA's last Annual Report (SECY-10-0003, January 12, 2010) and includes additional information, in table form, on published Commission decisions (CLIs) issued in CY 2010.

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**DISCUSSION:**

**1. Commission Adjudicatory Decisions in CY 2010**

In CY 2010 the Commission issued thirty decisions, roughly equivalent to its average of 29.5 over the six prior calendar years.<sup>1</sup> These decisions spanned a wide variety of proceedings, including:

- seven combined license (COL) applications (*Summer* (two decisions), *Levy County*, *Vogle*, *Bell Bend*, *Shearon Harris*, *South Texas* (two decisions), *Comanche Peak*),
- one construction permit (*Bellefonte* (two decisions)),
- one operating license (*Watts Bar* (two decisions)),
- four reactor license renewals (*Pilgrim* (five decisions), *Vermont Yankee*, *Indian Point* (two decisions), *Prairie Island*),
- one materials license amendment request (*Shieldalloy*),
- two materials license applications (*Pa'ina*, *U.S. Army Installation Command*),
- the construction authorization request for the proposed high-level waste repository (*Yucca Mountain*) (two decisions),
- two enforcement actions (*Fermi*, *Geisen*), and
- one materials license application for a uranium enrichment facility (*GE-Hitachi*).

OCAA drafted twenty-eight of last year's thirty Commission decisions.<sup>2</sup> Of those twenty-eight

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<sup>1</sup> Twenty-three decisions in CY 2009, twenty-nine in CY 2008, twenty-eight in CY 2007, twenty-nine in CY 2006, twenty-nine in CY 2005, and thirty-nine in CY 2004.

<sup>2</sup> The Office of the General Counsel (OGC) prepared the two other decisions for the Commission. OGC drafted a notice of hearing and Commission order associated with the materials license application for the proposed GE-Hitachi Global laser enrichment facility. CLI-10-4. In the *Bellefonte* matter, OGC drafted a decision denying contentions on the

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decisions, fourteen upheld or denied review of board orders,<sup>3</sup> five affirmed in part and reversed in part board orders,<sup>4</sup> four reversed board orders,<sup>5</sup> one denied a stay application,<sup>6</sup> one denied a motion for reconsideration of a Commission decision,<sup>7</sup> one responded to a certified question,<sup>8</sup> one affirmed a licensing board judge's decision on a recusal motion,<sup>9</sup> and one denied a request for Commission action.<sup>10</sup> OCAA also prepared alternative draft decisions addressing appeals of the construction authorization board's decision on the issue of the Department of Energy's (DOE's) motion to withdraw its application to construct a geologic repository at Yucca Mountain, Nevada.<sup>11</sup>

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 2010 included:

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threshold issue of whether the NRC has the authority to reinstate terminated construction permits, and referring the balance of the intervention petition to the licensing board. CLI-10-6. In addition, OGC drafted a decision on a request for suspension of license renewal reviews pending the disposition of a petition for rulemaking to amend 10 C.F.R. § 54.17(c). This matter remained pending before the Commission as of December 31, 2010.

<sup>3</sup> CLI-10-3, -5, -7, -9, -10, -12, -14, -16, -20, -21, -23, -26, -29, and -30.

<sup>4</sup> CLI-10-1, -2, -11, -17, and -18.

<sup>5</sup> CLI-10-13, -24, -25, -27.

<sup>6</sup> CLI-10-8.

<sup>7</sup> CLI-10-15.

<sup>8</sup> CLI-10-19.

<sup>9</sup> CLI-10-22.

<sup>10</sup> CLI-10-28.

<sup>11</sup> See SECY-10-0102 (Aug. 10, 2010); this matter remained pending before the Commission as of December 31, 2010.

- In the *Summer* COL proceeding, the Commission reiterated that NRC regulations allow an applicant to submit a combined license application that does not reference a certified design. Such a submission is at the applicant's own risk. The decision confirmed that a contention relating to design certification must be found admissible before it can be referred to the Staff and held in abeyance. The Commission also clarified that NEPA's rule of reason would not exclude consideration of demand-side management as part of an alternatives analysis in connection with an application to produce baseload power for a defined service area. (CLI-10-1.)
- The Commission confirmed that a board may reframe contentions to "eliminate extraneous issues or to consolidate issues for a more efficient proceeding." (*Levy County*, CLI-10-2.)
- In the *Vogtle* COL proceeding, the Commission explained that there is a difference between the issues an agency must examine to evaluate cumulative impacts under NEPA and the scope of a particular cumulative impacts contention. Specifically, a particular contention might call out only a subset of the total array of cumulative impacts that the NRC must examine under NEPA. (CLI-10-5.)
- The Commission explained, in the complicated *Pilgrim* license renewal proceeding, that the generic environmental impact statement for license renewal addresses the environmental impacts of severe accidents generically in bounding fashion, and that severe accident mitigation alternatives analysis is a site-specific mitigation analysis that has as its goal the determination of the safety enhancements that it would be cost-effective to implement. Additionally, NEPA allows agencies to select their own scientific methodology for NEPA analysis, as long as that methodology is reasonable. (CLI-10-11.)
- Also in the *Pilgrim* license renewal proceeding, the Commission described the concepts of "current licensing basis" and aging management review, provided details on the appropriate scope of review in license renewal proceedings, and applied these concepts to proffered technical contentions. The Commission also analyzed the board's case-specific application of the "reasonable assurance" standard. (CLI-10-14.)
- In the heavily contested *Geisen* enforcement proceeding, the Commission considered an extensive factual record and ultimately upheld several challenged factual findings. In addition, a majority of the Commission held that the Board did not err in declining to apply the doctrine of collateral estoppel with respect to one of the communications that formed the basis of both Mr. Geisen's criminal conviction and the NRC's enforcement order. (CLI-10-23.)
- The Commission addressed, for the first time, an appeal as of right by the Staff on the question of whether a request for access to sensitive unclassified non-

safeguards information should have been denied in whole or in part. (*South Texas*, CLI-10-24.)

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 2010, included the *Yucca Mountain* and *Pa'ina* cases. 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 sixty-seven days for the twenty-nine draft decisions that OCAA submitted to the Commission in CY 2010. See the attached table, "Commission Adjudicatory Decisions, January – December 2010." Our median turnaround time was fifty-eight days. For CLIs of average complexity, we aim to provide the Commission with a draft order and Commission paper within sixty days of the filing or issuance of the last document necessary for consideration in drafting the order; we aim for ninety days in the most complex of cases. This year's results are generally consistent with OCAA's timeliness metric.

## **2. Pending Commission Appeals/Petitions for Review**

As of December 31, 2010, one draft decision, in the *Yucca Mountain* proceeding, was before the Commission (appeals of construction authorization board decision denying DOE's motion to withdraw its license application).

## **3. Anticipated Adjudicatory Matters**

OCAA expects that the Commission will face the following significant adjudicatory matters in CY 2011:

- Continued disputes regarding heavily contested license renewal applications, including *Pilgrim*, *Diablo Canyon*, *Indian Point*, *Seabrook*, and *Davis-Besse*. Recurring issues include challenges to site-specific SAMA analyses and challenges regarding aging management programs associated with inaccessible safety-related cables.
- Continued disputes in several ongoing COL proceedings (as of December 31, 2010, intervention petitions have been granted by, or are pending before, licensing boards in the *Calvert Cliffs*, *North Anna*, *Comanche Peak*, *Fermi*, *Levy County*, *South Texas*, and *Turkey Point* cases).
- The first of the anticipated "uncontested" mandatory hearings, in the *Vogtle* and *Summer* COL proceedings.

**4. Commission Adjudicatory Technical Support Program**

The Commission Adjudicatory Technical Support (CATS) program was originally 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.

OCAA maintains a roster of experts to support the high-level waste CATS program; that roster was last updated in December 2008. See SECY-08-0194, "Identification of Adjudicatory Employees to Support the Commission and the Office of Commission Appellate Adjudication in the Adjudication of a Yucca Mountain Application" (Dec. 19, 2008). We have not undertaken a further update at this time, given the uncertainties surrounding the repository license application.

We have, however, undertaken expansion of the program to identify a comprehensive roster of experts to support the Commission in its conduct of mandatory hearings on combined license applications. OCAA provided to the Commission an "Updated Staffing Plan and Identification of Adjudicatory Employees to Support the Commission's Mandatory Hearing Process for Combined License Application Proceedings Under 10 C.F.R. Part 52" (SECY-10-0127) (Sept. 30, 2010). This document provided a status update of the CATS program, a roster of available technical specialists, and a revised staffing plan for the CATS program, all for the purpose of supporting the mandatory hearing effort.

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 2010"