

**ADJUDICATORY ISSUE**  
**(Information)**

January 5, 2015

SECY-15-0001

**FOR:** The Commissioners

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

**SUBJECT:** 2014 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 2014.

**INTRODUCTION:**

The Commission has authority to review decisions of Presiding Officers and the Atomic Safety and Licensing Boards. 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 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 license transfer cases.

The Office of Commission Appellate Adjudication (OCAA) assists the Commission in its adjudicatory role by monitoring cases and preparing the Commission's appellate decisions. In preparing draft decisions, OCAA may provide the Commission with multiple drafts (or alternative discussions within a draft) on particularly difficult legal or policy issues. These alternatives are intended to give the Commission options on how to proceed. In addition, our Commission papers routinely point out novel or complex legal issues and possible legal and policy implications of particular courses of action that the Commission might wish to consider.

As part of OCAA's monitoring role over adjudicatory matters, I am providing the Commission this report on agency adjudications for calendar year 2014 (CY 2014). This report updates

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information in OCAA's last Annual Report (SECY-14-0001, January 3, 2014) and includes additional information, in table form, on the Commission's adjudicatory workload, including Commission decisions (CLIs) issued in CY 2014.

## **DISCUSSION:**

### 1. Commission Adjudicatory Decisions in CY 2014

In CY 2014 the Commission issued eleven decisions, one more than last year.<sup>1</sup> These decisions involved a variety of matters:

- decisions lifting a prior suspension of final licensing decisions, and addressing a new suspension request in response to publication of the continued storage rule and companion generic environmental impact statement in multiple proceedings (CLI-14-8, CLI-14-9);
- an appeal of a Board decision granting a hearing associated with a license amendment request for Crow Butte Resources' proposed materials license for the Marsland Expansion Area (CLI-14-2);
- petitions related to license renewal applications for Tennessee Valley Authority's Sequoyah Nuclear Plant, Units 1 and 2, and Exelon's Byron and Braidwood reactors (CLI-14-3, CLI-14-6);
- stay and hearing requests related to St. Lucie Unit 2 (CLI-14-4, CLI-14-11);
- hearing requests on the denials of a license transfer and license renewal application, and a related enforcement order, for the Aerotest Radiography and Research Reactor (CLI-14-5);
- a petition for review related to the licensing board's resolution of a contention in favor of the Fermi combined license applicant (CLI-14-10);

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<sup>1</sup> CY 2013 and 2014 saw drops in adjudicatory activity as compared to previous years. In OCAA's view, this is partially attributable to suspension of final reactor licensing decisions resulting from the court of appeals' decision in *New York v. NRC*, and partially attributable to the usual ebb and flow of litigation. See generally *Calvert Cliffs 3 Nuclear Project, LLC and UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC 63 (2012) (suspending final licensing decisions dependent upon the waste confidence decision and the temporary storage rule, and holding in abeyance proposed "waste confidence" contentions pending further Commission direction); *Calvert Cliffs 3 Nuclear Project, LLC and UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-14-8, 80 NRC \_\_\_ (Aug. 26, 2014) (slip op.) (lifting the suspension imposed in CLI-12-16, as of October 20, 2014, the effective date of the continued storage rule). In the five years prior to CY 2014, the Commission has issued an average of twenty decisions per year: ten in CY 2013, twenty-one in CY 2012, fifteen in CY 2011, thirty in CY 2010, and twenty-three in CY 2009.

- environmental organizations' joint petition for suspension of final reactor licensing decisions in combined license, license renewal, and operating license cases pending the resolution of their petition for rulemaking related to the NRC staff's consideration of the expedited transfer of spent fuel from pools to casks (CLI-14-7).

OCAA drafted all but two of these decisions.<sup>2</sup> Of the remaining nine decisions, one affirmed a board order,<sup>3</sup> one denied a petition for review,<sup>4</sup> one denied requests for reconsideration and clarification of issues in a previous Commission decision,<sup>5</sup> one dismissed appeals as premature,<sup>6</sup> one denied requests for suspension of final licensing decisions,<sup>7</sup> one lifted the suspension on final licensing decisions imposed in CLI-12-16,<sup>8</sup> one consolidated petitions filed in several proceedings before the Boards and the Commission and set a briefing schedule,<sup>9</sup> one denied a request for a "protective stay,"<sup>10</sup> and one addressed hearing requests and procedural matters in the *Aerotest* matter.<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 (AEA), and the National Environmental Policy Act (NEPA). The following CY 2014 decisions illustrate the Commission's discussion of its regulations and procedures:

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<sup>2</sup> The Office of General Counsel (OGC) prepared the draft decisions in *Florida Power & Light Co.* (St. Lucie Plant, Unit 2), CLI-14-4, 79 NRC 249 (2014) (denying stay of plant restart) and in *Florida Power & Light Co.* (St. Lucie Plant, Unit 2), CLI-14-11, 80 NRC \_\_ (Dec. 19, 2014) (slip op.) (denying hearing request on asserted *de facto* license amendment related to installation of replacement steam generators).

<sup>3</sup> See CLI-14-2 (*Crow Butte* materials license amendment proceeding).

<sup>4</sup> See CLI-14-10 (*Fermi* combined license proceeding).

<sup>5</sup> See CLI-14-1 (*Yucca Mountain* proceeding).

<sup>6</sup> See CLI-14-3 (*Sequoyah* license renewal proceeding).

<sup>7</sup> See CLI-14-7 (joint petition filed in multiple dockets for suspension of final reactor licensing decisions pending the resolution of petition for rulemaking related to the NRC staff's consideration of the expedited transfer of spent fuel from pools to casks).

<sup>8</sup> See CLI-14-8 (multiple dockets).

<sup>9</sup> See CLI-14-9 (multiple dockets).

<sup>10</sup> See CLI-14-6 (*Byron* and *Braidwood* license renewal).

<sup>11</sup> See CLI-14-5 (granting hearing request with respect to license transfer and deferring hearing requests with respect to denial of license renewal application and related enforcement order).

- *High-Level Waste Repository* (CLI-14-1): The State of Nevada requested that the Commission clarify certain aspects of CLI-13-8 and the companion Staff Requirements Memorandum, in which the Commission, in response to a writ of mandamus issued by the U.S. Court of Appeals for the District of Columbia Circuit, set forth the course of action selected to continue the licensing process for the Yucca Mountain repository. In denying the request, the Commission noted that external entities are not entitled to seek revisions to Commission direction to the NRC staff contained in Staff Requirements Memoranda.
- *Crow Butte Marsland* (CLI-14-2): In affirming the Board's decision granting the Oglala Sioux Tribe's hearing request, the Commission addressed a number of issues related to intervention petitions. The Commission noted that failure to pursue a contention could result in, among other things, dismissal of the contention. The Commission also discussed standing and concluded that the Oglala Sioux Tribe's interest in cultural resources found within its aboriginal territory, coupled with a plausible potential injury to that interest, provided a sufficient basis for standing.
- *Sequoyah* (CLI-14-3): Both the applicant and petitioner appealed a Board order that concluded the petitioner had standing, found seven contentions inadmissible, and held one "waste confidence" contention in abeyance. In dismissing the appeals as premature because the Board properly held the contention in abeyance and neither granted nor denied the hearing request, the Commission addressed several procedural matters. The Commission reiterated that it permits filings not otherwise authorized by its rules of practice only where "necessity or fairness dictates," and found that the applicant did not meet that standard. The Commission also discussed 10 C.F.R. § 2.311 and clarified that appeals as of right from a licensing board's ruling on an initial intervention petition are permitted once the Board has fully ruled on that petition.
- *Aerotest* (CLI-14-5): The licensee and proposed license transferee sought a hearing on the NRC staff's denials of a license transfer application and license renewal application and issuance of a related enforcement order. The licensee and proposed transferee sought a consolidated hearing under Part 2, Subpart L on the three matters, while the Staff requested that the license transfer hearing proceed under Part 2, Subpart M and that the license renewal hearing be conducted separately under Subpart L. The Commission discussed the history of Subpart M and concluded it applies equally to license transfer hearings requested by applicants and those requested by intervenors. Concluding that the matters were appropriately considered in sequence (with the transfer hearing proceeding first and the other two matters held in abeyance), the Commission also discussed factors weighing for and against consolidation of proceedings and emphasized that consolidation is the exception rather than the rule.
- *Byron/Braidwood* (CLI-14-6): The Board denied the petitioner's request for a hearing, and the petitioner appealed to request a "protective stay" to protect its right to intervene while it filed a related petition for rulemaking. In denying the request (and noting that no rulemaking petition had been filed), the Commission re-confirmed its

reluctance to hold proceedings in abeyance pending the outcomes of other Commission actions or to grant indefinite or lengthy stays based on the possibility of future change.

- *St. Lucie* (CLI-14-11): the Commission denied a request for a hearing challenging the NRC Staff's asserted grant of a *de facto* license amendment relating to the licensee's installation of replacement steam generators in 2007. In denying the request, the Commission clarified that NRC oversight activities gathering information about and evaluating plant performance do not alter the conditions of a license and, therefore, cannot form the basis for the right to request a hearing. The Commission also discussed good cause for untimely filings.

## 2. Pending Commission Matters

As of December 31, 2014, the Commission had before it pending matters in the following proceedings:

- *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3): the State of New York, Hudson River Sloop Clearwater, Inc., Entergy, and the NRC staff have filed petitions for review of the Board's partial initial decision, LBP-13-13, which resolved the nine "Track 1" contentions. New York also has filed a petition for review of a Board order denying reconsideration of LBP-13-13, and Entergy and the NRC staff also have challenged LBP-11-17, the Board's decision granting the State of New York's summary disposition on one contention, and LBP-10-13, the Board's decision admitting that contention. Several related interlocutory Board decisions also have been appealed.
- *Shaw AREVA MOX Services, LLC* (Mixed Oxide Fuel Fabrication Facility Possession and Use License): in response to LBP-14-1, which resolved three material control and accounting contentions in favor of the applicant, the intervenors have petitioned for review.
- *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3): in LBP-14-9, the Board requested Commission approval to undertake *sua sponte* review of an issue raised in a contention that the Board found to be non-timely. Relatedly, the intervenors have petitioned for review of the Board's dismissal of this contention. Both requests concern the environmental impacts of developing new transmission lines for Fermi Unit 3.
- *Nuclear Innovation North America, LLC* (South Texas Project, Units 3 and 4): the intervenors seek reversal of the Board's decision in LBP-14-3, which resolved Contention FC-1 in favor of the applicant and found the applicant was not subject to impermissible foreign ownership.
- *Omaha Public Power District* (Fort Calhoun Station, Unit 1): the Sierra Club has requested a hearing on plant modifications associated with the NRC staff's issuance of Confirmatory Action Letters and initiation of enhanced plant oversight. The Sierra

Club asserts that license amendments on modifications that have been, or should have been, made are required and carry with them hearing rights.

- *Exelon Generation Co., LLC* (Dresden Nuclear Power Station): the NRC staff issued a confirmatory order modifying Exelon's license with respect to its Behavioral Observation Program, and the labor union representing Dresden employees filed a hearing request and petition to intervene. In LBP-14-4, the Board found that the union neither established standing to intervene nor proffered an admissible contention. The union's appeal raises the issue whether it must meet the 10 C.F.R. § 2.309(d) and (f) standing and contention admissibility requirements or whether it can "demand" a hearing as of right pursuant to 10 C.F.R. § 2.202(a)(3).
- *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2): Friends of the Earth has requested a hearing challenging the continued operation of Diablo Canyon based on new seismic information.
- *Aerotest Operations, Inc.* (Aerotest Radiography and Research Reactor): following an evidentiary hearing under 10 C.F.R. Part 2, Subpart M, the presiding officer has certified the hearing record to the Commission for its consideration in this license transfer proceeding.
- *PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 and 2): an individual has submitted a request for hearing and petition to intervene on an indirect license transfer application.

### 3. Anticipated Adjudicatory Matters

OCAA expects that the Commission will address a number of significant adjudicatory matters in CY 2015, including:

- continued disputes with regard to spent fuel disposal and post-licensed-life storage in reactor licensing proceedings, including issues related to continued storage;
- continued disputes in the *Indian Point* and *Diablo Canyon* license renewal proceedings;
- further litigation in several uranium recovery proceedings;
- mandatory hearings in the *Fermi* and *Levy County* combined license proceedings; and
- the choice of presiding officer for the Part 50 mandatory hearing associated with SHINE Medical Technologies' application for permit to construct a medical isotope facility.

Finally, apart from a particular proceeding, OCAA expects the Commission to be engaged in the development of procedures for future hearings on inspections, tests, analyses, and acceptance

criteria for new reactors, or “ITAAC,” that may be held pursuant to 10 C.F.R. § 52.103.<sup>12</sup>

4. Commission Adjudicatory Technical Support Program

The Director of OCAA is currently serving as Director of the Commission Adjudicatory Technical Support (CATS) program. The CATS program was originally established as a separate adjudicatory employee organization to provide technical support to OCAA and the Commission during the licensing period for a high-level waste repository.<sup>13</sup> Further, OCAA has a comprehensive roster of technical experts to support the Commission in its conduct of mandatory hearings associated with the combined license applications.<sup>14</sup> OCAA works with the Office of the Executive Director of Operations to identify adjudicatory employees as needs arise. In 2014, experts assisted the Commission in the *Indian Point* and *MOX* proceedings.<sup>15</sup>

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

Enclosure: “Commission Adjudicatory Decisions, January – December 2014”

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<sup>12</sup> See *generally* Staff Requirements—SECY-13-0033—Allowing Interim Operation Under Title 10 of the Code of Federal Regulations Section 52.103 (July 19, 2013) (ML13200A115) (directing that draft procedures for the conduct of ITAAC hearings be developed within the next twelve to eighteen months); Proposed Procedures for Conducting Hearings on Whether Acceptance Criteria in Combined Licenses Are Met, 79 Fed. Reg. 21,958 (Apr. 18, 2014) (publishing proposed procedures for public comment).

<sup>13</sup> Although the Commission directed the resumption of certain activities pertaining to the review of the Department of Energy’s construction authorization request, the *Yucca Mountain* adjudicatory proceeding remains suspended. See *U.S. Department of Energy* (High-Level Waste Repository), CLI-13-8, 78 NRC 219 (2013), *reconsideration denied*, CLI-14-1, 79 NRC 1 (2014). Therefore, maintenance of the high-level waste CATS program roster remains suspended.

<sup>14</sup> This roster was last updated in early 2012.

<sup>15</sup> See Notice of Appointment of Adjudicatory Employees; In the Matter of Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), 79 Fed. Reg. 19,396 (Apr. 8, 2014); In the Matter of Shaw Areva Mox Services, LLC (Mixed Oxide Fuel Fabrication Facility); Notice of Appointment of Adjudicatory Employees, 79 Fed. Reg. 38,573 (July 8, 2014).