

ADJUDICATORY ISSUE INFORMATION

January 12, 2010

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 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 (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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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 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 (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).
- 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).

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order pending Commission action on the petition for review).

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"

2/17/2010

COMMISSION ADJUDICATORY DECISIONS, JANUARY - DECEMBER 2009

Decision Number/Date/Attorney	Case Name	Type of Proceeding	Decision Being Challenged	Relief Sought	Commission Action	SECY Number/Date [2008 in highlight]	Last Salient Document Date	Turn-around Time	Complexity Level
CLI-09-1 1/27/09 (CC)	Shieldalloy Metallurgical Corp. (License Amendment Request for Decommissioning of the Newfield, New Jersey Site)	Materials License Amendment	N/A	N/A	Response to Board Memorandum bringing issues to Commission's attention (LBP-08-8)	08-0160 (10/24/08)	10/10/08	14	Average
CLI-09-2 2/4/09 (RF)	Shaw Areva MOX Services (Mixed Oxide Fuel Fabrication Facility)	Materials License	LBP-08-11	Staff request for interlocutory review	Request for interlocutory review granted; affirmed dismissal of Contention 7; reversed Board decision imposing conditions and potential sanction	08-0123 (8/29/08)	7/21/08	39	Average
CLI-09-3 2/17/09 (RF)	Tennessee Valley Authority (Bellefonte Nuclear Power Plant, Units 3 and 4)	Combined License	LBP-08-16	N/A (contention admissibility rulings referred to Commission, with suggestion to initiate rulemaking)	Reversed Board decision to admit contentions; declined to initiate rulemaking	08-0199 (12/31/08)	9/12/08	109	Average

Decision Number/Date/ Attorney	Case Name	Type of Proceeding	Decision Being Challenged	Relief Sought	Commission Action	SECY Number/ Date [2008 in highlight]	Last Salient Document Date	Turn-around Time	Complexity Level
CLI-09-4 2/17/09 (OGC)	Detroit Edison Co. (Fermi Unit 3)	Combined License	N/A	Five requests associated with filing of initial intervention petitions	Four requests denied; request for 10-day extension to deadline for filing requests for access to SGI and SUNSI granted	09-0024 (2/10/09)			
CLI-09-5 3/5/09 (SS)	Dominion Nuclear Connecticut, Inc. (Millstone Power Station, Unit 3)	License Amendment	Unpublished decision (10/27/08) rejecting new contention	Reverse Board decision, restart proceeding and admit contention	Board decision affirmed	09-0008 (1/13/09)	11/17/08	58	Average
CLI-09-6 3/5/09 (RF)	Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3)	License Renewal	Unpublished decision (12/18/08) denying reconsid'n of LBP-08-13	Reversal of Board decision admitting contention	Request for interlocutory review denied	09-0027 (2/17/09)	1/26/09	22	Average
CLI-09-7 4/1/09 (BA)	AmerGen Energy Co., LLC (License Renewal for Oyster Creek Nuclear Generating Station)	License Renewal	LBP-07-17; other interlocutory decisions	Denial of license renewal application	Petition for review granted in part; Board decisions affirmed; proceeding terminated	08-0192 (12/18/08)	10/29/08 (Board Advisory Memorandum)	50	High

Decision Number/Date/Attorney	Case Name	Type of Proceeding	Decision Being Challenged	Relief Sought	Commission Action	SECY Number/Date [2008 in highlight]	Last Salient Document Date	Turn-around Time	Complexity Level
CLI-09-8 5/18/09 (BCA)	Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 and 3)	Combined License	LBP-08-21	Reversal of decision to grant a hearing; granting of a motion to hold the proceeding in abeyance	Remanded to Board for reassessment of admissibility decision; denied motion to hold proceeding in abeyance	09-0046 (3/27/09)	11/29/08	118	Average
CLI-09-9 5/18/09 (SS)	Crow Butte Resources, Inc. (License Renewal for <i>In Situ</i> Leach Facility, Crawford, Nebraska)	License Renewal	LBP-08-24, LBP-08-27	Reversal of decision to grant a hearing; reversal of decision denying a group party status	LBP-08-24 affirmed in part, and reversed in part; LBP-08-27 reversed	09-0058 (4/9/09)	1/2/09	97	High
CLI-09-10 6/4/09 (CC)	Entergy Nuclear Generation Co., and Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (Pilgrim and Vermont Yankee Nuclear Power Station)	License Renewal	LBP-08-22; LBP-08-25	Deferral of final decision in license renewal actions pending judicial appeal of denial of rulemaking petitions; or expressly condition licenses to comply with court ruling	Commission commitment to meaningfully effectuate the court's conclusion on rulemaking petition denial	09-0025 (2/12/09)	12/23/08	49	Average

Decision Number/Date/ Attorney	Case Name	Type of Proceeding	Decision Being Challenged	Relief Sought	Commission Action	SECY Number/ Date [2008 in highlight]	Last Salient Document Date	Turn-around Time	Complexity Level
CLI-09-11 6/4/09 (CC)	Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station)	License Renewal	LBP-07-13; LBP-08-22; LBP-06-23; LBP-07-12; and various unpublished orders.	Review and reversal of Board decisions, including decisions on scope of safety contention, merits decision on contention, dismissal of environmental contention	Requested additional briefing on specific issues regarding dismissed environmental contention	09-0040 (3/16/09)	12/22/08	84	High
CLI-09-12 6/25/09 (SS)	Crow Butte Resources, Inc. (North Trend Expansion Area)	Materials License Amendment	LBP-08-6, LBP-09-1	Reverse Board, deny hearing	LBP-08-6 affirmed in part and reversed in part, LBP-09-1 reversed	09-0063 (4/17/09)	2/17/09	60	High
CLI-09-13 6/25/09 (CCC)	Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4)	Combined License	LBP-09-3	N/A (Consideration of referred rulings on contention admissibility)	Declined to consider referred rulings	09-0084 (6/4/09)	3/5/09	112	Average

Decision Number/Date/Attorney	Case Name	Type of Proceeding	Decision Being Challenged	Relief Sought	Commission Action	SECY Number/Date [2008 in highlight]	Last Salient Document Date	Turn-around Time	Complexity Level
CLI-09-14 6/30/09 (OCAA)	U.S. Department of Energy (High Level Waste Repository)	Request for Construction Authorization	LBP-09-6	Appeal of admitted and rejected contentions	Board decisions on appealed issues affirmed in part and reversed in part	09-0089 (6/12/09)	6/1/09	11	Average
CLI-09-15 7/23/09 (OGC)	Areva Enrichment Services, LLC (Eagle Rock Enrichment Facility)	Materials License	N/A	N/A	Issuance of Notice of Hearing and Commission Order	09-0081 (5/29/09)			
CLI-09-16 7/31/09 (CCC)	Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4)	Combined License	LBP-09-3	Appeal of sole admitted contention	Board decision affirmed	09-0076 (5/22/09)	3/24/09	129	Average
CLI-09-17 8/13/09 (CC)	Pa'ina Hawaii, LLC (Materials License Application)	Materials License	N/A	Request to transfer case from Licensing Board to Commission	Board directed to provide status report	09-0107 (7/30/09)	7/24/09	6	Low

Decision Number/Date/ Attorney	Case Name	Type of Proceeding	Decision Being Challenged	Relief Sought	Commission Action	SECY Number/ Date [2008 in highlight]	Last Salient Document Date	Turn-around Time	Complexity Level
CLI-09-18 9/23/09 (BDP)	South Texas Project Nuclear Operating Co. (South Texas Project Units 3 and 4)	Combined License	N/A	Request for extension of time to file appeal of LBP-09-21	Request denied; LBP-09-21 not yet ripe for appeal	09-0125 (9/10/09)	9/4/09	6	Low
CLI-09-19 9/23/09 (CC)	Pa'ina Hawaii, LLC (Materials License Application)	Materials License	N/A	Transfer of case from Licensing Board to Commission	Request to transfer the case denied	09-0127 (9/14/09)	8/27/09	16	Low
CLI-09-20 10/13/09 (BCA)	Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC (Combined License Application for Calvert Cliffs, Unit 3)	Combined License	LBP-09-4	Appeal of admitted contentions	Board decision affirmed	09-0111 (8/7/09)	4/17/09	112	Average
CLI-09-21 11/3/09 (SS)	Duke Energy Carolinas, LLC (William States Lee III Nuclear Station, Units 1 and 2); Tennessee Valley Authority (Bellefonte Nuclear Power Plant, Units 3 and 4)	Combined License	N/A	N/A (Consideration of referred rulings on contention admissibility (LBP-08-16, LBP-08-17))	Declined to review referred rulings	09-0033 (2/27/09)	2/24/09 (SRM)	3	Low

Decision Number/Date/Attorney	Case Name	Type of Proceeding	Decision Being Challenged	Relief Sought	Commission Action	SECY Number/Date [2008 in highlight]	Last Salient Document Date	Turn-around Time	Complexity Level
CLI-09-22 11/17/09 (EIK)	Detroit Edison Co. (Fermi Nuclear Power Plant, Unit 3)	Combined License	LBP-09-16	Reversal of Board decision granting request for hearing/intervention petition	Board decision affirmed	09-0149 (10/16/09)	10/13/09 (CLI-09-20)	3	Low
CLI-09-23 11/17/09 (SS)	David Geisen	Enforcement Action	LBP-09-24	Stay of effectiveness of initial decision	Stay application denied	09-0154 (10/22/09)	10/6/09	16	Average
CLI-10-XX (CCC)	South Carolina Electric & Gas Co. & South Carolina Public Service Authority (Also Referred to as Santee Cooper) (Virgil C. Summer Nuclear Station, Units 2 and 3)	Combined License	LBP-09-2	Appeal of rejected intervention petitions		09-0117 (8/26/09)	3/13/09	196	Average
No CLI issued (EIK)	AmerenUE (Callaway Plant Unit 2)	Combined License	N/A	N/A	None	09-0134 (9/22/09)	8/28/09	25	Average

Decision Number/Date/Attorney	Case Name	Type of Proceeding	Decision Being Challenged	Relief Sought	Commission Action	SECY Number/Date [2008 in highlight]	Last Salient Document Date	Turn-around Time	Complexity Level
CLI-10-XX (SS)	Progress Energy Florida, Inc. (Levy County Nuclear Station Units 1 and 2)	Combined License	LBP-09-10	Reversal of Board decision to admit three contentions		09-0135 (9/22/09)	7/30/09	54	Average
CLI-10-XX (RF)	Detroit Edison Co. (Fermi Power Plant Independent Spent Fuel Storage Installation)	Enforcement Action	LBP-09-20	Reversal of Board decision denying a hearing request		09-0139 (10/1/09)	9/10/09	21	Average
CLI-10-XX (BCA)	Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4)	Combined License	LBP-09-7	Reversal of Board decision on the merits of Contentions EC 2.1 and EC 6.0		09-0142 (10/2/09)	8/3/09	60	High
CLI-10-XX (CC)	Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station)	License Renewal	LBP-07-13	Reversal of Board decision to dismiss Contention 3		09-0147 (10/9/09)	7/07/09	92	High

Decision Number/Date/Attorney	Case Name	Type of Proceeding	Decision Being Challenged	Relief Sought	Commission Action	SECY Number/Date [2008 in highlight]	Last Salient Document Date	Turn-around Time	Complexity Level
CLI-10-XX (SS)	PPL Bell Bend, LLC (Combined License Application for Bell Bend Nuclear Power Plant)	Combined License	LBP-09-18	Reversal of Board decision denying intervention petition		09-0158 (10/27/09)	8/31/09	57	Average
CLI-10-XX (EIK)	Progress Energy Carolinas, Inc. (Shearon Harris Power Plant, Units 2 and 3)	Combined License	CLI-08-15; CLI-09-8; LBP-08-21; LBP-09-8; and one unpublished order (12/23/08)	Reversal of Board decision to reject eleven proposed contentions; request for oral argument; reconsideration of two prior Commission decisions		09-0160 (10/29/09)	8/3/09	87	Average
CLI-10-XX (EIK)	Shieldalloy Metallurgical Corp. (License Amendment Request for Decommissioning the Newfield Site)	Materials License	N/A	Stay of effectiveness of transfer of regulatory authority over Newfield site pending judicial review		09-0171 (11/25/09)	10/23/09	33	Average
CLI-10-XX (CC)	Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station)	License Renewal	LBP-08-22; LBP-06-23; LBP-07-12; and four unpublished Board orders	Reversal of Board decisions on scope and merits of safety contention		09-0175 (12/4/09)	7/7/09	146	High