ADJUDICATORY ISSUE
INFORMATION

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For: The Commissioners

From: John F. Cordes, Director ***/RA/***
Office of Commission Appellate Adjudication

Subject: 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 2002.

INTRODUCTION

At the NRC, the Commission alone is authorized to review the decisions of presiding officers and Atomic Safety and Licensing Boards in agency adjudications. The Office of Commission Appellate Adjudication (OCAA) assists the Commission in this role. The Commission may exercise its appellate authority to review these trial-level decisions either when a dissatisfied party to an NRC adjudicatory proceeding seeks review, or when the Commission, on its own initiative, determines that review is warranted. The Commission also has original jurisdiction to offer the Licensing Board guidance on significant novel questions raised in a proceeding and to resolve those occasional legal matters that appropriately should be addressed in the first instance directly by the Commission. Moreover, since 1999, the Commission has exercised original jurisdiction over all reactor license transfer proceedings -- an area in which OCAA takes the lead in assisting the Commission.

As part of OCAA's monitoring role over adjudicatory matters, I am providing the Commission this Annual Report on agency adjudications for calendar year 2002. This report updates information contained in the last report (SECY-02-0003; Jan. 7, 2002), and is based upon the information in the attached charts. Chart 1 presents information regarding the **29** substantive decisions (CLIs) issued by the Commission in 2002, Chart 2 identifies the **13** final decisions issued by presiding officers or Licensing Boards in 2002, and Chart 3 lists and describes the **14** new proceedings that the Commission referred to the Atomic Safety and Licensing Board Panel (ASLBP) in 2002. Chart 4 provides a numerical breakdown of the proceedings referred to the ASLBP since OCAA's inception in July 1992 -- divided into substantive and procedural categories. Finally, Chart 5 provides a breakdown of Commission decisions issued during that same period, divided into substantive and jurisdictional categories.

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GENERAL OBSERVATIONS AND TRENDS

The year 2002 was a busy year for adjudications at the Commission level. The **29** CLIs issued in 2002 exceeded the totals for the prior two years (28 in 2001, 25 in 2000) and nearly equaled the Commission's post-1990 high of 30 CLIs issued in 1999. Gauged simply by the numbers, the Board's **26** LBP issuances in 2002 fell significantly below the previous year's total of 40, and likewise was well below the average for the last decade. The **13** final Board (or Presiding Officer) decisions in 2002 reflect a slight fall from 2001's total of 15, are equal the 2000 total of 13, and are below the average number of orders (**15.6**) since OCAA's creation in July 1991, and constitute a significant drop from the 4-year period from 1996 through 1999 (21 final decisions in 1999, 20 in 1998, 23 in 1997, and 19 in 1996). The **14** new proceedings referred to the ASLBP in 2002 was more than the 8 referrals in 2001, but in line with the Board's ten-year average level of roughly a dozen. Overall, the Commission saw **15** new adjudications (**1** was the Diablo Canyon license transfer case which is being adjudicated by the Commission itself rather than by the Board).

1. The ASLBP's Caseload

The number of new enforcement cases (**3**) marked a significant increase over previous years' levels (about 1 per year from 1999-2001). The **4** new reactor-related cases (license amendment, license renewal, decommissioning, and operator license proceedings) slightly exceeded its post-1998 level of 2-3. This level of **4** was also typical for the last decade, except for an aberrational jump to 12 in 1998. The number of materials cases (**6**) retained its recent position as the dominant category of new cases (4 in 2001, 6 in 2000, 9 in 1999).

The Board in 2002 processed the majority of its cases (**7**) using Subpart G procedures, marking the end of a three-year period in which Subpart L cases outnumbered Subpart G cases. Subpart L proceedings totaled **5** and Subpart K cases totaled **1**.

2. The Commission's Caseload

The number of CLIs issued in 2002 (**29**) was roughly in line with the totals for the previous four years (28 in 2001, 25 in 2000, 30 in 1999, and 25 in 1998). The number of CLIs increased in two substantive categories. Reactor license renewal proceedings increased to **5** from 3 (in 2001) and 1 (in both 1999 and 2000). The catch-all category ("Other") increased to **13**, compared with 9 in 2001, 8 in 2000, and 4 in 1999. (The bulk of these "Other" CLIs for those four years has been issuances in Private Fuel Storage -- almost a category in itself -- with **7**, 7, 4 and 1 CLIs in those years, respectively.)

Two substantive categories contained fewer CLIs than in recent years. The Commission continued to experience a significant decline in CLIs addressing license transfer applications: the number of CLIs in 2002 was only **3**, compared with 4 in 2001, 8 in 2000, and 11 in 1999. CLIs involving decommissioning reverted to the usual level of **0** after an aberrational increase to 2 in 2001. Other substantive categories (e.g., traditional materials license amendments, traditional reactor license amendments, onsite spent fuel license applications, and enforcement proceedings) remained stable at low levels.

This year's Commission decisions resolved significant issues in several arenas – including, for example, the appropriateness of addressing in NEPA reviews the potential environmental effects of terrorist attacks, NRC authority to license offsite ISFSIs, the scope of license renewal hearings, and the proper format for MOX facility hearings.[1]

3. Speed in Resolving Cases

The Commission and the ASLBP do not control all of the factors that govern the speed at which cases are resolved (e.g., the number and complexity of the issues, the willingness of parties to settle, the quality of advocacy). But OCAA continues t look for ways (e.g., scheduling orders) to introduce as much efficiency as possible into the system. For the most part, adjudications in recent years have moved forward expeditiously.

For its own work, OCAA has undertaken to complete drafts of Commission decisions in all but the most complex cases within 60 days of receipt of the final appellate document (and within 90 days in complex cases). In 2002, OCAA showed a notable improvement in providing its draft CLIs to the Commission quickly, averaging **37** calendar days after receipt of the last salient document (compared with 50 days in 2001). OCAA averaged a **22**-day turnaround on its **23** regular cases in 2002 (compared with 49 in 2001) and missed its 60-day target in only **2** regular cases (compared with missing it 4 times in 2001). OCAA averaged a **97**-day turnaround in its **6** complex cases (compared with 55 days in 2001) and missed its 90-day target in **5** complex cases (compared with missing it 0 times in 2001). (Four of those five complex cases, however, required the preparation of multiple draft orders on terrorism-related issues of first impression.) Finally, OCAA submitted **10** of its **29** draft orders within a week (compared with 3 in 2001).

4. Future Agency Caseload

We anticipate that the Commission will continue to face adjudications involving (i) reactor license renewals and (ii) reactor decommissioning, and perhaps also involving (iii) reactor license transfers. The age of many currently operating reactors makes an upswing in the first two categories (and particularly the first one) quite likely, and the ongoing restructuring of the electric industry makes a significant number of the third category possible. We also expect a continuation of significant adjudicatory activity in the materials licensing and spent fuel

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[1] Regarding terrorism and NEPA, see Private Fuel Storage (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC __ (Dec. 18, 2002); Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-26, 56 NRC __ (Dec. 18, 2002); Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3), CLI-02-27, 56 NRC __ (Dec. 18, 2002); and Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-24, 56 NRC ___ (Dec. 18, 2002). Regarding offsite ISFSIs, see Private Fuel Storage (Independent Spent Fuel Storage Installation), CLI-02-29, 56 NRC __ (Dec. 18, 2002). Regarding license renewal hearings, see Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-14, 55 NRC 278 (2002); and Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-17, 56 NRC ___ (July 23, 2002). Regarding format for MOX facility hearings, see Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-19, 56 NRC ___ (Sept. 4, 2002).

storage areas. Finally, we predict that petitioners to intervene will continue to raise terrorism-related issues in proceedings involving all stages of the fuel cycle.

a. Reactor License Renewal or Decommissioning.

In June 2001, the Commission had indicated its expectation that about 90 percent of the currently operating nuclear power plants would ultimately seek renewal of their initial 40-year reactor licenses. More recently, the industry has predicted close to a 100-percent renewal application rate. Licensees for 25 units have formally indicated their intent to submit renewal applications in the next three years, and roughly half of the operating nuclear units in this country are currently involved at some stage in the license renewal process. Reactor license renewals have regularly been contested. The NRC has already decided three adjudications involving license renewal applications (Oconee, Calvert Cliffs and Turkey Point) and is currently considering a fourth -- involving the four units at the McGuire and Catawba facilities.[2] More opportunities for renewal hearings are on the horizon. Hearing requests are possible regarding three of the license renewal applications currently pending before the Commission (the Ginna, Summer and Robinson facilities). Also, the NRC staff expects at least **7** more applications for **14** units to be filed in CY2003 alone (Dresden-2 and -3, Quad Cities-1 and -2, Farley-1 and -2, Arkansas Nuclear One-2, Nine Mile Point-1 and -2, D.C. Cook-1 and -2, and Browns Ferry-1, -2 and -3).

If a plant owner or operator does not choose to seek license renewal, it must decommission the plant at the end of its 40-year license. Although the Commission by rulemaking has removed decommissioning itself from the scope of the adjudicatory process, the decommissioning process nonetheless will often "spin off" occasional adjudications.[3]

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[2] See Baltimore Gas & Elec. Co. (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-14, 48 NRC 39 (1998), CLI-98-15, 48 NRC 45 (1998), CLI-98-19, 49 NRC 132 (1998), & CLI-98-25, 48 NRC 325 (1998); Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-98-17, 48 NRC 123 (1998), & CLI-99-11, 49 NRC 328 (1999); Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327 (2000), & CLI-01-17, 54 NRC 3 (2001); Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2, and Catawba Nuclear Station, Units 1 and 2), CLI-01-20, 54 NRC 211 (2001), CLI-01-27, 54 NRC 385 (2001), CLI-02-06, 55 NRC 164 (2002), CLI-02-14, 55 NRC 278 (2002), CLI-02-17, 56 NRC ___ (July 23, 2002), CLI-02-26, 56 NRC ___ (Dec. 18, 2002), & CLI-02-28, 56 NRC ___ (Dec. 18, 2002).

[3] See, e.g., Connecticut Yankee Atomic Power Co. (Haddam Neck Plant), CLI-01-25, 54 NRC 219 (2001) (license termination plan); Sequoyah Fuels Corp. (Gore, OK), CLI-01-2, 53 NRC 9 (2001) (site decommissioning plan); Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), LBP-98-12, 47 NRC 343, aff'd in part and rev'd in part, CLI-98-21, 48 NRC 85 (1998) (license termination plan); Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), LBP-01-28, 54 NRC 221 (2001) (license termination plan).

b. Power Reactor License Transfer.

Logically, the ongoing restructuring of the electric industry should result in a significant number of license transfer applications. But that restructuring, at least in the nuclear sector, appears to have slowed in the past year. At the end of May 2002, the Commission was reviewing 20 license transfer applications. This number, however, had declined to a mere **3** by the end of CY2002, with no specific applications anticipated in the immediate future. The technical staff posits several possible explanations for this drop. They suggest that a possible cause is the specter of terrorism. The staff says that there may be some uncertainty on the part of industry as to the future cost of security upgrades which could be required in response to terrorist threats. This uncertainly may be keeping some companies on the sidelines until those costs are better defined. Finally, most state public utility commissions ("PUCs") are currently insisting that plants not be sold at "bargain basement" prices (e.g., the New York PUC voided the Amergen purchase of Nine Mile Point for this reason). So the need to pay a more realistic price for nuclear plants may also be playing a part in the slowdown in transfers.

In any event, a once-booming are of adjudication -- license transfer -- has declined to nearly nothing. The Commission currently has only **1** pending transfer adjudication proceeding, involving the effects of bankruptcy law on the proposed transfer of Pacific Gas & Electric Company's Diablo Canyon facilities to a newly-created successor company. That compares, for example, with the 7 such cases in the Commission docket in 1999.

c. New Plant Construction.

Also important in the reactor arena is seemingly growing interest in new plant construction.

Pre-application reviews of new reactor designs are currently underway which may ultimately lead to license applications. Most immediately, the NRC staff's pre-application review activity for the Westinghouse AP1000 passive light water reactor concluded in March 2002, and the Commission received an application for the AP1000 design certification the same month. The NRC staff is currently reviewing the design of the AP1000 and plans to complete the final safety evaluation in September 2004, the final design approval in October 2004, and the entire design certification rulemaking in December 2005. Although Exelon is no longer pursuing its proposed Pebble Bed Modular Reactor (PBMR) design, other companies have expressed an interest in this design. Still other companies have notified the Commission that they may seek pre-application review in 2004 and beyond. NRC is currently conducting pre-application review of five reactor designs (the General Electric European Simplified Boiling Water Reactor, Atomic Energy of Canada Ltd.'s ACR-700, the General Atomics GT-MHR, Westinghouse's IRIS, and Framatome's SWR-1000).

Exelon has expressed an intent to submit applications for early site permits for Clinton in June 2003. Dominion Resources has announced plans to file an early site permit application for its North Anna site in September 2003. And Entergy is expected to submit an application in June 2003 for an early site permit to build another nuclear power plant at its Grand Gulf nuclear power facility in Port Gibson, Mississippi. Entergy has indicated, however, that it will take at least three years to decide whether to build the facility. The early site permit applications will generate mandatory Board hearings. See 10 C.F.R. § 52.21.

All of this is consistent with a statement in May of 2001 by top officials for the nation's nuclear utilities announcing preparations to build at least 50 power plants in the next 20 years. Nuclear power plant construction remains on the front burner politically as well, with nuclear energy playing a major role in the President's Energy Plan. In the long run, it seems possible that the Commission will face a new generation of reactor licensing cases.

d. Materials License Developments.

In the materials licensing arena, the future Commission appellate caseload is more difficult to predict, given that the number of these proceedings and their attendant CLIs have risen and fallen erratically over the years. Much of this rise and fall depends on the level of controversy attendant to particular NRC actions. One pending materials case will almost certainly come before the Commission in CY2003 -- Private Fuel Storage, a case that yielded **7** Commission orders in CY2002 alone. That case is scheduled to come to completion in the first quarter of CY2003, and the Final Initial Decision of the Licensing Board will surely trigger significant appellate adjudicatory actions.

In addition, the agency is currently conducting an adjudication regarding a construction authorization request for a controversial mixed oxide (MOX) fuel fabrication facility. The case generated **6** Commission orders in CY2002.[4] This complex adjudication will likely demand significant agency attention for several years. Moreover, an NRC licensing of a MOX facility may lead to adjudicatory challenges to any nuclear power plant's attempt to use MOX fuel. Indeed, intervenors have already previewed such a challenge in the Catawba/McGuire license renewal proceeding (the Commission rejected the challenge as premature).

Louisiana Energy Services (LES) is expected to submit a license application to construct a gas centrifuge uranium enrichment facility in March of 2003. The previous LES application generated fierce litigation before this agency. The U.S. Enrichment Corporation intends to submit an application for a similar facility within the next three months.

Finally, a consortium of European and U.S. nuclear companies announced in July 2002 that it would apply soon for a license with the NRC to build a $1.1 billion plant for processing reactor fuel.

e. Heightened Commission Oversight and Involvement.

Another factor that will determine the level of the Commission's caseload is the extent to which the Commission remains highly involved in adjudications and willing to interject itself into the proceedings both early and often. The Commission has shown an increasing willingness to

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[4] See Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fabrication Facility), CLI-02-02, 55 NRC 5 (2002); CLI-02-04, 55 NRC 158 (2002); CLI-02-07, 55 NRC 205 (2002); CLI-02-09, 55 NRC 245 (2002); CLI-02-19, 56 NRC ___ (Sept. 4, 2002); and CLI-02-24, 56 NRC ___ (Dec. 18, 2002).

provide guidance[5] and to address interlocutory rulings referred or certified by a Board or Presiding Officer.[6] On rare occasions, the Commission has even been willing to grant a party's motion for discretionary interlocutory review of an issue of particular significance, such as terrorism or the validity of the very structure of the Commission's two-step licensing process (i.e., construction permit and operating license).[7]

f. Hearing Process Reform.

Another factor that could affect the Commission's future caseload is the still-pending proposed reform of the NRC's hearing process. The potential impact here remains unpredictable. A reformed system (along the lines of the currently-pending OGC proposal) may succeed over time in reducing threshold procedural disputes and winnowing out insubstantial claims -- thus saving adjudicatory time of the Commission and the Board. On the other hand, the Commission's current interest in moving toward more informal proceedings could generate additional proceedings and an increased workload, as members of the public become aware that participation in the NRC process need not be overly costly or complex. Also, significant changes in the NRC's existing procedural rules may trigger a concomitant increase in procedural disputes in adjudications, at least in the short term.

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[5] See, e.g., Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC ___ (Dec. 18, 2002) (addressing certified question seeking guidance); Dominion Nuclear Conn. (Millstone Nuclear Power Station, Unit No. 3; Facility Operating License NPF-49), CLI-02-22, 56 NRC ___ (Nov. 21, 2002) (clarifying parties' roles in a Subpart K proceeding); International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-02-21, 56 NRC ___ (Oct. 1, 2002) (advising presiding officers in future proceedings not to assume that previously-suffered harm necessarily precludes standing based on fresh harm of the same type).

[6] See, e.g., Private Fuel Storage, CLI-02-03, 55 NRC 155 (2002); Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Unit No. 3), CLI-02-05, 55 NRC 161 (2002); Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2, and Catawba Nuclear Station, Units 1 & 2), CLI-02-06, 55 NRC 164 (2002); Private Fuel Storage, CLI-02-25, 56 NRC ___ (Dec. 18, 2002) (addressing referred issue regarding terrorism); Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-26, 56 NRC ___ (Dec. 18, 2002) (addressing certified issue regarding terrorism); Dominion Nuclear Conn. (Millstone Nuclear Power Station, Unit No. 3), CLI-02-27, 56 NRC ___ (Dec. 18, 2002) (addressing referred issue regarding terrorism); Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC ___ (Dec. 18, 2002) (addressing certified question seeking guidance).

[7] See Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-04, 55 NRC 158 (2002) & CLI-02-07, 55 NRC 205 (2002), respectively; Private Fuel Storage, CLI-02-08, 55 NRC 222 (2002) (granting interlocutory review where a Licensing Board proceeding could itself cause irreparable harm to an adjudicatory participant); Cf. Pacific Gas & Elec. Co. (Diablo Canyon Power Plant ISFSI), CLI-02-23, 56 NRC ___ (Nov. 21, 2002) (ruling on a motion to suspend, filed directly with the Commission rather than with the Board).

g. Other Factors.

Finally, the Commission's and Board's adjudicatory caseload could rise if any of the following were to occur: enactment of legislation assigning the NRC responsibility for regulating DOE nuclear facilities, adjudications related to licensing of a permanent high-level waste storage facility at Yucca Mountain (an application for which is now expected in December 2004), adjudications related to an interim high-level waste storage facility, and further challenges to the ability of operating plants and/or spent fuel storage pools to withstand terrorist actions.[8] Conversely, deregulation initiatives by the NRC could decrease the total number of amendment requests and in turn decrease both the trial and appellate caseload, depending on the initiatives.

SIGNIFICANT DECISIONS IN 2002

In 2002, the Commission's Memoranda and Orders included the following **7** CLIs addressing significant issues:

Duke Cogema Stone & Webster, CLI-02-7 (addressing whether the two-step licensing procedure is incompatible with Part 70 of the Commission's regulations)

Pacific Gas & Elec. Co., CLI-02-16 (ruling on numerous procedural, standing and admissibility issues)

Duke Energy Corp., CLI-02-17 & CLI-02-28 (ruling on SAMA issues)

Private Fuel Storage, CLI-02-20 (ruling on environmental justice issues)

Private Fuel Storage, CLI-02-25 (ruling on admissibility of terrorism-related issues)

Private Fuel Storage, CLI-02-29 (ruling on Commission's jurisdiction under the Nuclear Waste Policy Act)

SIGNIFICANT ISSUES CURRENTLY PENDING BEFORE THE COMMISSION

The Commission is currently considering only **1** draft CLI order from OCAA. That order addresses antitrust, technical qualifications and financial qualifications issues in the Diablo Canyon license transfer proceeding.

[8] The Commission and its Licensing Board have already received terrorism-related contentions in **8** adjudications -- Private Fuel Storage, Duke Cogema Stone & Webster (MOX), Duke Energy Corp. (McGuire 1&2 and Catawba 1&2), Dominion Nuclear Connecticut, Inc. (Millstone-3), Tennessee Valley Authority (Watts Bar), Pacific Gas & Electric Co. (Diablo Canyon), Nuclear Fuel Services, and Dominion Nuclear Conn. (Millstone-2).

SUMMARY OF ACTIVITIES OF THE ATOMIC SAFETY AND LICENSING BOARD PANEL

- The Board Panel issued **13** final decisions.

- The Board Panel established **14** new proceedings, **6** of which have been terminated.

- **16** cases (**3** in abeyance) were pending before the Board Panel as of 12/31/02:

Arizona Pub. Serv. Co. (Palo Verde)
Connecticut Yankee (Haddam Neck)
Dominion Nuclear Conn. (Millstone-2)
Duke Cogema Stone & Webster (Savannah River MOX fuel fabrication facility)
Duke Energy Corp. (McGuire & Catawba) (license renewal)
Earthline Technologies (CivP)
High Mountain Inspection Service (CivP)
Hydro Resources Inc. (ML)
Maine Yankee Atomic Power Co. (Maine Yankee)
Nuclear Fuels Serv.
Pacific Gas & Elec. Co. (ISFSI)
Private Fuel Storage, LLC (ML, ISFSI)
Sequoyah Fuels Corp. (MLA-4) (site decommissioning) (in abeyance)
Tennessee Valley Auth'y (Watts Bar, etc.) (CivP)
U.S. Department of the Army (Jefferson) (MLA) (in abeyance)
Big Rock Point 1 (on indefinite hold)

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

Enclosures: Charts 1-5