

ADJUDICATORY ISSUE INFORMATION

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SECY-13-0004

FOR: The Commissioners

FROM: Brooke D. Poole, Director
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SUBJECT: 2012 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 2012.

INTRODUCTION:

The Office of Commission Appellate Adjudication (OCAA) assists the Commission in all aspects of the Commission's adjudicatory role. OCAA's primary duty is to support the Commission in the exercise of its appellate authority over decisions of 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 legal or policy issues raised in an ongoing proceeding, as when a board refers a ruling or certifies a question to the Commission. In this role, OCAA monitors ongoing cases and prepares the Commission's appellate decisions. In proceedings where the Commission has original jurisdiction to conduct proceedings, OCAA assists the Commission throughout the proceeding in case management activities, and drafts the final Commission decision. Proceedings where the Commission has original jurisdiction include the uncontested portions of combined license proceedings, and certain types of contested adjudications, such as reactor license transfer cases.

I am providing the Commission this report on agency adjudications for calendar year 2012 (CY 2012) as part of OCAA's monitoring role over adjudicatory matters. This report updates information from OCAA's last Annual Report (SECY-12-0016, January 30, 2012) and includes additional information, in table form, on the Commission's adjudicatory workload, including Commission decisions (CLIs) issued in CY 2012.

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DISCUSSION:

1. Commission Adjudicatory Decisions in CY 2012

In CY 2012 the Commission issued twenty-one decisions, which is slightly fewer than average when compared to recent years, although an increase over CY 2011.¹ These decisions spanned a variety of proceedings, including:

- authorization of two combined licenses, for Vogtle Electric Generating Plant, Units 3 and 4, and Virgil C. Summer Nuclear Station, Units 2 and 3;
- multiple filings in various reactor cases requesting, among other things, suspension of final licensing decisions and admission of contentions relating to spent fuel disposal issues following the D.C. Circuit's decision remanding the NRC's "Waste Confidence Rule;"²
- contested proceedings on combined license applications for the proposed Comanche Peak Nuclear Power Plant, Units 3 and 4; and North Anna Power Station, Unit 3;
- reactor license renewal applications for the Davis-Besse, Diablo Canyon, Pilgrim, Limerick and Seabrook facilities; and
- two materials license proceedings.

¹ In the past five years, the Commission has issued an average of twenty-five CLIs per year: Fifteen decisions in CY 2011, thirty decisions in CY 2010, twenty-three in CY 2009, twenty-nine in CY 2008, and twenty-eight in CY 2007.

² See *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012). See *generally* Final Rule, Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 75 Fed. Reg. 81,032 (Dec. 23, 2010); Waste Confidence Decision Update, 75 Fed. Reg. 81,037 (Dec. 23, 2010).

OCAA drafted all but one of these Commission decisions.³ Of the remaining twenty decisions, ten affirmed or denied review of board orders,⁴ two affirmed in part and reversed in part board orders,⁵ two reversed the board decision below,⁶ two authorized issuance of combined licenses,⁷ one responded to a Board memorandum to the Commission,⁸ one responded to multiple requests to admit new or amended contentions (and in some cases, to reopen closed

³ The Office of the General Counsel (OGC) prepared the draft decision in *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-12-20, 76 NRC ____ (Nov. 8, 2012) (slip op.).

⁴ See CLI-12-1, CLI-12-3, CLI-12-6, CLI-12-10, CLI-12-15, and CLI-12-21 (all in the *Pilgrim* license renewal proceeding), CLI-12-7 (*Comanche Peak* combined license proceeding), CLI-12-12 (*Ross In Situ* Uranium Recovery Project materials license proceeding), CLI-12-13 (*Diablo Canyon* license renewal proceeding), and CLI-12-18 (*Indian Point* license renewal proceeding).

⁵ See CLI-12-5 (*Seabrook* license renewal proceeding), CLI-12-8 (*Davis-Besse* license renewal proceeding).

⁶ See CLI-12-14 (*North Anna* combined license proceeding), CLI-12-19 (*Limerick* license renewal proceeding).

⁷ See CLI-12-3 (*Vogtle* combined license proceeding), CLI-12-9 (*Summer* combined license proceeding).

⁸ See CLI-12-4 (*Crow Butte* materials license renewal).

proceedings),⁹ one denied reconsideration of a Commission decision,¹⁰ and one denied a request to stay the effectiveness of the *Vogtle* combined license.¹¹

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 Commission work in CY 2012 included the following:

- *Pilgrim* (CLI-12-1): The Commission denied intervenor Pilgrim Watch's petition for review of the Board's merits ruling (LBP-11-20) on the adequacy of the NEPA "severe accident mitigation alternatives" (SAMA) analysis for Pilgrim Nuclear Power Station. The decision explains the nature of the air dispersion computer modeling done for the SAMA analysis.
- *Vogtle*, Units 3 and 4 (CLI-12-3) and *Summer*, Units 2 and 3 (CLI-12-9): Following evidentiary hearings in each case, the Commission authorized the issuance of the first combined licenses for construction and operation of four new reactors.
- *Diablo Canyon* (CLI-12-13): The Commission declined to review a referred ruling, which raised the issue whether a license applicant has a duty to update its environmental report to reflect significant new information. Apart from the adjudication, the Commission directed the Staff to review the issue generically. The Licensing Board had referred the issue to the Commission after rejecting a proposed Fukushima-related contention, partly on the ground that the license applicant has no apparent duty to amend its environmental report to include new and significant information.

⁹ See CLI-12-16 (requests on multiple dockets for suspension of final licensing decisions and admission of new contentions, some of which involved motions to reopen).

¹⁰ See CLI-12-17 (denying reconsideration of CLI-12-14).

¹¹ See CLI-12-11.

- *Limerick* (CLI-12-19): In *Limerick*, the Commission addressed for the first time the question whether a rule waiver is required to litigate, at the license renewal application stage, purported new and significant information relevant to the SAMA analysis when a “severe accident mitigation design alternatives” analysis had already been conducted as part of the plant’s original operating license application. The Board had admitted portions of the contention without a waiver petition. The Commission found, based on the regulatory history of 10 C.F.R. Part 51 and case law, that a waiver is required. The Commission therefore reversed the Board’s admission of the narrowed contention, and remanded the case to provide the petitioner with an opportunity to address the waiver criteria.
- *Pilgrim* (CLI-12-21): In an otherwise straightforward petition for review of the Board’s application of the reopening and contention admissibility standards to a new NEPA contention, the Commission rejected the Board’s conclusion that the reopening rule’s “exceptionally grave” provision applies only to safety issues. The Commission held that an environmental issue could be considered exceptionally grave “depending on the circumstances of the case and the facts presented.” The Commission ultimately denied the petition for review, finding no substantial question regarding the Board’s rejection of the new contention as impermissibly late.

In preparing draft decisions, OCAA may provide the Commission with multiple draft decisions (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.

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 fifty-five days for the sixteen draft decisions that OCAA submitted to the Commission in CY 2012. (See the attached table, “Commission Adjudicatory Decisions, January – December 2012”). For decisions 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 consistent with OCAA’s timeliness metric.

2. Pending Commission Appeals/Petitions for Review

- *Seabrook* license renewal proceeding (appeal from a November 8, 2012 board order (unpublished) denying admission of late contention). The intervenors appeal the Board’s rejection of a proposed new contention concerning aging management issues. The Intervenor based their contention on matters raised during an Advisory Committee on Reactor Safeguards meeting concerning the licensee’s program for alkali-silica reaction monitoring. The Board rejected the contention because the information on which the contention was based was not “new.”
- *Honeywell*. As of December 31, 2012, the Commission had before it a petition for review from the Board’s decision (LBP-12-6) upholding the Staff’s denial of

Honeywell's request for an exemption from decommissioning financial assurance requirements with respect to its Metropolis Works uranium conversion facility. The Board concluded, among other things, that Honeywell had not satisfied the requirements of 10 C.F.R. § 40.14 regarding exemptions.

- *Calvert Cliffs*. OCAA recently provided the Commission with recommendations for resolving this petition for review of the Board's decision (LBP-12-19) with respect to foreign ownership. Granting summary disposition in favor of the intervenor, the Board agreed with the Staff's assessment that the applicant is ineligible to receive a combined license for its proposed new reactor because the applicant is, indirectly, wholly owned by a French company. The applicant seeks Commission reconsideration of the agency's foreign ownership guidance and further direction on this issue.
- *Enforcement Orders Directed to All Power Reactors*. The Commission has before it an appeal by Pilgrim Watch of a Board decision (LBP-12-14) denying its hearing request relating to two orders issued under the authority of 10 C.F.R. § 2.202. The Board rejected the hearing request because it raised matters outside the scope of the proceeding on the orders; that is, the petitioners sought to litigate the appropriateness of safety measures additional to those included in the § 2.202 orders.

3. Anticipated Adjudicatory Matters

OCAA expects that the Commission will address a number of significant adjudicatory matters in CY 2013, including:

- continued disputes in heavily contested license renewal proceedings, including *Indian Point*, *Diablo Canyon*, *Limerick*, and *Davis-Besse*;
- continued disputes with regard to spent fuel disposal in reactor licensing proceedings;
- continued disputes over foreign ownership and control;
- further litigation in the *Prairie Island* independent spent fuel storage installation matter,
- a variety of issues in the uranium recovery races, including Historic Preservation Act and Native American issues, and
- potentially, the mandatory hearing in the *Levy County* combined license proceeding.

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.¹² Currently, OCAA maintains a comprehensive roster of technical experts to support the Commission in its conduct of mandatory hearings associated with combined license applications.¹³ The experts on this list were used in the *Vogtle* and *Summer* combined license proceedings, and have been engaged in reviewing the staff documents for the *Levy County* combined license application in preparation for the mandatory hearing.

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 2012”

¹² Given that the *Yucca Mountain* adjudicatory proceeding is suspended, maintenance of the high-level waste CATS program roster likewise has been suspended.

¹³ See “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,” Commission Paper SECY-12-0036 (Mar. 7, 2012) (ML12068A117) (non-public).