

ADJUDICATORY ISSUE INFORMATION

February 28, 2006

SECY-06-0042

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 2005.

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 drafting 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 may also offer guidance to the licensing boards on significant novel questions raised in an ongoing proceeding, as when a board certifies a question or refers its ruling to the Commission. In addition, NRC regulations give the Commission original jurisdiction to resolve particular categories of adjudications, such as reactor license transfer adjudications. To ensure our continued effectiveness in providing these services to the Commission, we hired a new administrative person and a new lawyer in 2005, to replace two other long-time employees who retired earlier that year.

I am providing the Commission this report on agency adjudications for calendar year 2005 as part of OCAA's monitoring role over adjudicatory matters. This report updates information in OCAA's last Annual Report (SECY-05-0034, February 17, 2005) and includes additional information, in chart form, on the CLIs which the Commission issued in 2005.

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COMMISSION ADJUDICATORY ACTIVITIES:

1. Commission Adjudicatory Decisions in CY2005

CY2005 was a typical adjudicatory year for the Commission. The Commission issued 29 CLIs, compared with an average of 28½ over the preceding four calendar years.¹ These decisions spanned a wide variety of proceedings: e.g., reactor license amendments, early site permits, combined operating licenses for two different fuel fabrication plants, materials licenses, an off-site ISFSI, a license termination plan, a reactor license renewal, and two license transfers. In the 27 CLIs which OCAA drafted,² the Commission upheld board orders in 10 CLIs,³ partially or wholly overturned (reversed, vacated, remanded) board orders in 6,⁴ and did not address challenges to board orders in the remaining 11.⁵

The Commission's decisions continue to interpret and clarify NRC regulations, the AEA and NEPA. Significant OCAA work in CY2005 included the following:

- *Exelon Generation Co., et al.*, CLI-05-17, 62 NRC 5 (2005), (i) addressing mandatory hearings involving uranium enrichment facilities, as well as early site permits and combined operating licenses under Part 52 of the Commission's regulations, and (ii) offering guidance to current and future boards on the conduct of mandatory hearings.
- *Louisiana Energy Serv. (National Enrichment Center)*, CLI-05-05, 61 NRC 22 (2005), concluding that (i) depleted uranium is properly categorized as a low-level radioactive waste, and that (ii) accordingly, pursuant to the USEC Privatization Act, disposal of LES's depleted uranium tails at a Department of Energy facility represents a "plausible strategy" for waste disposal.
- *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551 (2005), (i) denying petitioners request for a waiver of the controlling NRC regulation, (ii) finding that petitioner had not justified the tardiness of its filing, and (iii) finding that its emergency-planning contentions fell outside the scope of a license renewal proceeding.

¹ Thirty-nine in 2004, 18 in 2003, 29 in 2002, and 28 in 2001.

² OCAA acted as a consultant in the remaining two CLIs (CLI-05-3 and -6), but OGC drafted them because they fell outside OCAA's ordinary jurisdiction.

³ CLI-05-2, -4, -12, -15, -19, -21, -23, -27, -28, and -29.

⁴ CLI-05-1, -5, -14, -16, -20, and -22 (vacated as moot).

⁵ CLI-05-7, -8, -9, -10, -11, -13, -17, -18, -24, -25, and -26. These include license transfer decisions, *sua sponte* Commission orders providing guidance or direction, Commission decisions on certified questions, and initial Commission decisions on standing in uranium enrichment cases.

- *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-05-14, 61 NRC 359 (2005), (i) taking *sua sponte* review of an unchallenged Board order imposing security conditions and (ii) disapproving four Board-imposed conditions.
- *Private Fuel Storage* (ISFSI), CLI-05-19, 62 NRC 403 (2005), (i) denying review of the Board's ruling on the risks posed to the facility by a potential F-16 aircraft crash, (ii) concluding that the Board's findings and methods of addressing this issue did not constitute "clear error," and (iii) declining to reconsider its ruling that "one in a million" is the appropriate "threshold probability" for a design basis event at an independent spent fuel storage installation.
- *Exelon Generation Co.* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801 (2005), (i) declining to review a NEPA ruling on Exelon's pending early site permit application for its Clinton facility, (ii) agreeing with the Board that "energy efficiency" did not have to be considered as an "alternative," (iii) likewise agreeing with the Board that an economic cost comparison among the various technologies considered did not raise a material issue in an early site permit hearing, and (iv) concluding that there was no clear error in the Board's various fact-specific findings.

OCAA regularly provides the Commission with options on particularly difficult cases which, in 2005, included *PFS* (CLI-05-1, regarding proprietary information) and *Millstone* (CLI-05-24, regarding late-filed contention).

OCAA strives to submit all its draft orders expeditiously, and has been successful overall in meeting this goal. For instance in 2005 our overall average turnaround time (between receiving the final relevant document and filing OCAA's draft order with SECY) was 34 days.⁶

2. Pending Commission Appeals/Petitions for Review

As of the date of this Annual Report, OCAA is working on appeals or petitions for review in the following proceedings:

- *Andrew Siemaszko* (an enforcement order concerning petitions to intervene in an enforcement hearing).
- *Hydro Resources, Inc.* (a materials licensing order addressing cultural issues and also environmental issues regarding air emissions).
- *USEC* (a Board order finding no admissible contentions).

⁶ In CY2005, we submitted 16 of our 19 ordinary draft orders within the 60-day target period for such orders, with an average turnaround time of 26 days. And we submitted 8 of our 9 draft orders on complex matters within the 90-day target period for complex orders, with an average turnaround time of 53½ days. See attached Chart.

3. Anticipated Adjudicatory Matters

OCAA expects that the Commission will face the following important adjudicatory matters in CY2006:

- The Board in *Louisiana Energy Serv.* is expected in early 2006 to rule on contentions relating to decommissioning costs, the costs of managing and disposing of depleted uranium hexafluoride, and the environmental impacts of depleted uranium disposal. A mandatory hearing on uncontested matters is scheduled for March 2006. The Board's decisions on these matters and the Board's final decision on the license application are likely to come before the Commission.
- The fourth and last partial initial decision in Phase II of the *Hydro Resources* materials license proceeding is expected in March 2006. OCAA expects this long-pending proceeding to conclude by July 2006.
- Important decisions and appeals are expected in the *Vermont Yankee* power uprate request.
- Ongoing license renewal disputes such as the pending ones in *Oyster Creek* and *Palisades*, plus expected ones for Pilgrim and Vermont Yankee, likely will lead to appeals on significant issues.
- More disputes over PAPO rulings in *Yucca Mountain* may arise.

4. OCAA Involvement in Yucca Mountain Pre-Adjudicatory Activities

In 2004, OCAA helped establish the "Commission Adjudicatory Technical Support" (CATS) office, to provide technical advice to Commission in the anticipated *Yucca Mountain* proceeding. In 2005, OCAA began to establish a working relationship with CATS, e.g., by using CATS to find technical advisors in *Catawba*, *PFS*, and *Hydro*, and by consulting on CATS's office protocols. OCAA attorneys also participated in the interviews of about 100 prospective adjudicatory employees for the *Yucca Mountain* proceeding.

OCAA has also sent some of its attorneys to key meetings on LSN and electronic courtroom projects for *Yucca Mountain*.

In anticipation of DOE's *Yucca Mountain* application, OCAA has reserved in its budget one FTE for the high-level waste repository proceeding. (OCAA also plans to request additional FTE to address new reactor licensing proceedings, e.g., early site permits and, more significantly, combined operating licenses.)

ATOMIC SAFETY AND LICENSING BOARD PANEL:

In 2005, the Board opened 10 new proceedings, managed 19, closed 18, and also issued 33 LBPs. The following 15 cases were pending before the Board at the end of 2005:

- Andrew Siemaszko, enforcement
- Big Rock Point 1 (indefinitely suspended as a result of GESMO decision) (old Pt. 2)
- Clinton, ESP
- Davis H. Hawes, reactor operator license
- Entergy Nuclear Vermont Yankee, uprate
- Grand Gulf, ESP
- Yucca Mountain, pre-application matters
- Hydro Resources, materials license for in situ leach uranium mining (old Pt. 2)
- LES, fuel fabrication facility
- North Anna, ESP
- Oyster Creek, license renewal
- Pa'ina Hawaii, materials license
- Palisades, license renewal
- U.S. Army, decommissioning of Jefferson Proving Grounds
- USEC, fuel fabrication facility

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

Attachment: Chart 1

COMMISSION ADJUDICATORY DECISIONS, JANUARY - DECEMBER 2005

Decision Number/Cite Date/Attorney	Case Name	Type of Proceeding	Decision Being Challenged	Relief Sought	Commission Action	SECY Paper Number/Date	Last Salient Document Date	Turnaround Time	Complexity Level
CLI-05-01, 61 NRC 160 (1/5/05) (RF)	PFS L.L.C.	ISFSI License	March 31, 2004 Board Order	redaction of proprietary information in Board Order	affirmed in part & reversed in part the Board's redactions	04-0184, (10/12/04)	7/16/04	88	C
CLI-05-02, 61 NRC 1 (1/5/05) (RF)	Duke Energy Corp. (Catawba)	Reactor Operating License Amendment	Dec. 17, 2004 Board Order	interlocutory review	denied interlocutory review	04-0234, (12/27/04)	12/22/04	5 (2w/d)	R
CLI-05-03, 61 NRC 8 (1/5/05) (OGC)	Rene Chun	Investigation/ Subpoena	N/A	clarification of CLI-04-34	denied clarification, but noted that Mr. Chun had complied with the Commission's requirements set forth in CLI-04-34				
CLI-05-04, 61 NRC 10 (1/18/05) (SS)	System Energy Resources, Inc. (Grand Gulf ESP)	Early Site Permit	LBP-04-19, 60 NRC 277 (2004)	review dismissal of environmental justice claim	affirmed Board decision	05-0004, (1/7/05)	9/08/04	121	C
CLI-05-05, 61 NRC 22 (1/18/05) (CC)	LES, L.P.	Materials License/ Uranium Enrichment	None	Board certified question	concluded that depleted uranium is a low-level radioactive waste	05-0011, (1/12/05)	12/15/05	28	C

Decision Number/Cite Date/Attorney	Case Name	Type of Proceeding	Decision Being Challenged	Relief Sought	Commission Action	SECY Paper Number/Date	Last Salient Document Date	Turnaround Time	Complexity Level
CLI-05-06, 61 NRC 37 (1/19/05) (OGC)	All Power Reactor Licensees & Research Reactor Licenses Who Transport Spent Nuclear Fuel	Security Orders	No Board order challenged; security order, 69 Fed. Reg. 42,071 (July 13, 2004)	challenge to NRC security order as being unlawfully promulgated regulations	rejected the challenge				
CLI-05-07, 61 NRC 69 (2/22/05) (SS)	Safety Light Corp.	Enforcement	LBP-05-2, 61 NRC 53 (2005)	<u>Sua sponte</u> action	Lifted immediate effectiveness of license suspension order	None	2/18/05	0	R
CLI-05-08, 61 NRC 129 (3/16/05) (RF)	PFS, L.L.C. (Proprietary)	ISFSI License	N/A	redaction of proprietary information from three Commission Orders	accepted PFS's proposed redactions & rejected State of Utah's challenges to four redactions	05-0036, (2/22/05)	2/08/05	14	R
CLI-05-09, 61 NRC 235 (4/20/05) (RF)	Exelon Generation Co., L.L.C. Dominion Nuclear North Anna, L.L.C. System Energy Resources, Inc. LES, L.P. USEC, Inc.	Applications for Early Site Permits or Combined Licenses	Order at issue is LBP-05-7, 61 NRC 188, but order was not challenged	The Board certified six questions to the Commission	granted certification	05-0053, (3/30/05)	3/28/05	2	R
CLI-05-10, 61 NRC 238 (4/21/05) (JS)	Duke Energy Corp. (Catawba)	Reactor Operating License Amendment	LBP-05-10, 61 NRC 241	no appeal	sought briefs on one issue on which Commission took sua sponte review	05-0059, (4/12/05)	4/08/05	4	R

Decision Number/Cite Date/Attorney	Case Name	Type of Proceeding	Decision Being Challenged	Relief Sought	Commission Action	SECY Paper Number/Date	Last Salient Document Date	Turnaround Time	Complexity Level
CLI-05-11, 61 NRC 309 (5/12/05) (CC)	USEC, Inc.	Materials License/ Uranium Enrichment	None	Commission decision on threshold standing	found that both petitioners have standing to intervene, & referred their contentions to the Board	05-0066, (4/21/05)	4/18/05	4	R
CLI-05-12, 61 NRC 345 (6/20/05) (SS)	PFS, L.L.C.	ISFSI License	LBP-05-5, 61 NRC 108 (2005)	review Board's refusal to reopen record to consider "Yucca incompatibility" claim	denied review	05-0076, (5/03/05)	3/28/05	36	R
CLI-05-13, 61 NRC 356 (6/20/05) (SS)	U.S. Army (Jefferson Proving Ground)	License Amendment/Site Decommissioning	response to Board status report, LBP-05-9, 61 NRC 218 (2005)	Board advised Commission of stalled adjudication	ordered licensee to report directly concerning status/steps taken to resolve impasse	05-0079, (5/06/05)	3/31/05	36	R
CLI-05-14, 61 NRC 359 (6/20/05) (JS)	Duke Energy Corp.	Reactor Operating License Amendment	March 10, 2005 Board order	N/A, no appeal	took <u>sua sponte</u> review & reversed as to Board- imposed conditions	05-0088, (5/19/05)	5/09/05	10	R
CLI-05-15, 61 NRC 365 (6/29/05) (RF)	Yankee Atomic Electric Co.	Reactor Operating License Amendment involving licensee's "license termination plan"	LBP-04-27, 60 NRC 539	reversal of the Board's grant of a hearing & intervention	affirmed the Board's grant of a hearing & intervention	05-0038, (2/25/05)	12/13/04	74	C
CLI-05-16, 61 NRC 1 (7/22/05) (RF)	PFS, L.L.C.	ISFSI License	April 25, 2005 Board order	reversal of certain of the Board's redactions	affirmed in part & reversed in part the Board's redactions	05-0115, (7/01/05)	5/23/05	38	R

Decision Number/Cite Date/Attorney	Case Name	Type of Proceeding	Decision Being Challenged	Relief Sought	Commission Action	SECY Paper Number/Date	Last Salient Document Date	Turnaround Time	Complexity Level
CLI-05-17, 62 NRC 5 (7/28/05) (RF)	Exelon Generation Co., L.L.C. Dominion Nuclear North Anna, L.L.C. System Energy Resources, Inc. LES, L.P. USEC, Inc.	Applications for Early Site Permits or Combined Licenses	Order at issue is LBP-05-7, 61 NRC 188, but order was not challenged	answer certified questions	answered certified questions & offered guidance on the conduct of mandatory ESP & COL hearings	05-0109, (6/21/05)	5/25/05	27	C
CLI-05-18, 62 NRC 185 (8/4/05) (RF)	Dominion Nuclear Connecticut, Inc.	Reactor License Renewal	N/A	acceptance of certified questions	accepted certified questions & established briefing schedule	COMSECY-05-0027, (7/22/05)	7/21/05	1	R
CLI-05-19, 62 NRC 403 (9/9/05) (SS)	PFS, L.L.C.	ISFSI License	LBP-05-12, 61 NRC 319, & Memorandum & Order (Feb 24, 2005)	review of aircraft crash consequences rulings	denied review	05-0157, (8/30/05)	7/08/05	53	C
CLI-05-20, 62 NRC 523 (10/19/05) (CC)	LES, L.P.	Materials License/ Uranium Enrichment	LBP-05-13, 61 NRC 385 (2005)	petition for review of decision on environmental contentions	Remanded one contention on depleted uranium disposal impacts	05-0140, (8/04/05)	7/11/05	24	C
CLI-05-21, 62 NRC 538 (10/19/05) (CC)	LES, L.P.	Materials License/ Uranium Enrichment	None	Board referral of its Aug. 4, 2005 decision on late-filed contentions	Declined review of decision	05-0173, (9/28/05)	8/04/05	55	R

Decision Number/Cite Date/Attorney	Case Name	Type of Proceeding	Decision Being Challenged	Relief Sought	Commission Action	SECY Paper Number/Date	Last Salient Document Date	Turnaround Time	Complexity Level
CLI-05-22, 62 NRC 542 (10/19/05) (SS)	PFS, L.L.C.	ISFSI License	Sept. 15, 2005 Board order	Motion to stay Board order	Dismissed motion as moot, vacated Board order	05-0184, (10/12/05)	9/28/05	14	R
CLI-05-23, 62 NRC 546 (10/26/05) (SS)	U.S. Army (Jefferson Proving Ground)	Site Decommissioning	LBP-05-25, 62 NRC 435 (2005)	Referred ruling	Affirmed with instructions to use revised Part 2 rules of procedure.	05-0168, (9/19/05)	9/12/05	7	R
CLI-05-24, 62 NRC 551 (10/26/05) (RF)	Dominion Nuclear Connecticut, Inc.	Reactor License Renewal (Pt. 50)	LBP-05-16, 62 NRC 56 (2005)	exemption from rule	denied exemption, reviewed <u>sua sponte</u> the remainder of LBP-05-16, & offered guidance on various issues	05-0169, (10/26/05)	8/28/05	22	C
CLI-05-25, 62 NRC 572 (10/26/05) (RF)	Amergen Energy Co., L.L.C.	Reactor License Transfer	N/A (Commission has original jurisdiction)	issuance of a Notice of Opportunity for Hearing; grant of petition to intervene & request for hearing	denied all relief	05-0175, (9/30/05)	8/23/05	37	R
CLI-05-26, 62 NRC 577 (10/26/05) (RF)	Exelon Generation Co., L.L.C. & PSEG Nuclear, L.L.C.	Reactor License Transfer	N/A (Commission has original jurisdiction)	intervention & hearing	denied intervention & hearing	05-0176, (9/30/05)	9/15/05	15	R
CLI-05-27, 62 NRC 715 (11/21/05) (SS)	U.S. Dept. of Energy	PAPO for Geologic Repository	LBP-05-27, 62 NRC 478 (2005)	Motion for Stay pending appeal	denied stay	05-0205, (11/04/05)	10/13/05	21	R

Decision Number/Cite Date/Attorney	Case Name	Type of Proceeding	Decision Being Challenged	Relief Sought	Commission Action	SECY Paper Number/Date	Last Salient Document Date	Turnaround Time	Complexity Level
CLI-05-28, 62 NRC 721 (11/21/05) (CC)	LES, L.P.	Materials License/ Uranium Enrichment	LBP-05-13, 61 NRC 385 (2005)	Intervenors petition for review of decision on environmental contentions	denied review	05-0206, (11/03/05)	8/29/05	66	R
CLI-05-29, 62 NRC ____ (12/12/05) (SS)	Exelon Generation Co., L.L.C.	Early Site Permit	LBP-05-19, 62 NRC 134 (2005)	review Board order granting summary disposition on alternative energy sources	denied review	05-0177, (9/30/05)	8/29/05	32	R
CLI-06-01 62 NRC ____ (1/11/06) (CC)	Hydro	Materials License	LBP-05-17, 62 NRC 77 (2005)	review of partial final decision regarding groundwater protection, restoration & safety estimates	denied review	05-0220, 12/02/05	8/24/05	100	R
CLI-06-02 62 NRC ____ (1/31/06) (RF)	FirstEnergy	Reactor License Transfer	N/A (Commission has original jurisdiction)	intervention & hearing	denied intervention & hearing	05-0230, 12/21/05	9/12/05	101	C
CLI-06-05 62 NRC ____ (2/02/06) (BA)	U.S. Dept. of Energy	PAPO for Geologic Repository	LBP-05-27, 62 NRC 478 (2005)	review of Board order requiring DOE to release draft application	granted review & reversed the Board's decision	05-0231, 12/23/05	11/21/05	32	C