

ADJUDICATORY ISSUE INFORMATION

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SECY-08-0009

FOR: The Commissioners

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SUBJECT: 2007 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 2007.

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 cases.

I am providing the Commission this report on agency adjudications for calendar year 2007 (CY2007) as part of OCAA's monitoring role over adjudicatory matters. This report updates information in OCAA's last Annual Report (SECY-07-0013, January 22, 2007) and includes additional information, in table form, on published Commission decisions (CLIs) issued in CY2007.

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COMMISSION ADJUDICATORY ACTIVITIES

1) Commission Adjudicatory Decisions in CY2007

CY2007 was a typical adjudicatory year for the Commission. The Commission issued 28 decisions, essentially the same as its average of 28.8 over the five prior calendar years.¹ These decisions spanned a wide variety of proceedings:

- five reactor license renewals (Palisades, Oyster Creek, Pilgrim, Vermont Yankee, and Indian Point),
- four early site permits (ESP) (including orders authorizing issuance of ESPs for the North Anna, Grand Gulf and Clinton ESP sites, as well as orders in the ongoing Vogtle proceeding),
- a materials license for possession and use of materials in an industrial irradiator (Pa'ina),
- a license for a uranium enrichment facility (USEC),
- two license transfers (Big Rock Point independent spent fuel storage installation (ISFSI) and Palisades),
- one reactor license amendment regarding an extended power uprate (Susquehanna),
- a materials license for an on-site ISFSI (Diablo Canyon),
- two materials license amendments pertaining to site decommissioning (Waltz Mill, Shieldalloy), and
- one ongoing individual enforcement matter (Geisen).

OCAA drafted 27 of last year's 28 Commission decisions.² Of those 28 decisions, 6 upheld or denied review of board orders,³ 2 partially or wholly overturned (reversed, vacated, or

¹ Twenty-nine in CY2006, 29 in CY2005, 39 in CY2004, 18 in CY2003, and 29 in CY2002.

² OCAA served as a consultant on one Commission decision, involving a request for hearing on a Staff decision not to docket a request for a declaratory order in a decommissioning matter involving cleanup standards at the Westinghouse Waltz Mill site. OGC drafted that decision because the case fell outside OCAA's area of responsibility. CLI-07-15.

³ CLI-07-2, -3, -8, -20, -25, -28.

remanded) board orders,⁴ and 3 denied reconsideration of prior Commission orders.⁵ Six decisions pertained to the Commission's mandatory review of initial decisions authorizing early site permits (ESPs).⁶ The Commission issued 3 decisions in multiple dockets related to the ongoing *Diablo Canyon* case, following remand of the case from the U.S. Court of Appeals for the Ninth Circuit.⁷ The remaining 8 decisions addressed other matters, including license transfer matters of original Commission jurisdiction.⁸

The Commission's decisions continue to interpret and clarify NRC regulations, the AEA and NEPA. Significant OCAA work in CY2007 included decisions:

- setting bounds on the scope of uncontested "mandatory hearings" on ESP applications, including the scope and nature of consideration of the Staff's safety and environmental reviews (*Grand Gulf*, CLI-07-14; *North Anna*, CLI-07-27).
- Establishing the appropriate timing of a merits hearing on environmental issues in an ESP proceeding (*Vogtle*, CLI-07-17).
- Confirming the Commission's limited scope of inquiry into Clean Water Act determinations (*Vermont Yankee* license renewal, CLI-07-16).

OCAA provides the Commission with multiple draft decisions on particularly difficult cases which, in CY2007, included *North Anna* (CLI-07-27). Such multiple drafts are intended to give the Commission options on how to proceed. In addition, our SECY Papers regularly 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,

⁴ CLI-07-6, -16.

⁵ CLI-07-13, -21, -22.

⁶ CLI-07-4, -7, -12, -14, -23, -27.

⁷ CLI-07-9 (in the *Palisades* license renewal matter, denying a request to redraft the supplemental environmental impact statement (SEIS) and allow contentions on the environmental impacts of terrorist attacks on the plant during the license renewal period), CLI-07-10 (denying a similar request for a late-filed contention in the *Grand Gulf* ESP matter), CLI-07-11 (establishing a procedural schedule in the *Diablo Canyon* case following the Ninth Circuit remand).

⁸ CLI-07-1 (requesting briefs on an interlocutory appeal of contention admission); CLI-07-5 (ordering Board to revise the mandatory hearing schedule in the *USEC* enrichment facility proceeding); CLI-07-15 (holding in abeyance an application for a declaratory order to relax standards at the Waltz Mill site); CLI-07-17 (declining to authorize or require a merits hearing prior to issuance of the Final EIS in the *Vogtle* ESP proceeding); CLI-07-18 (finding standing for certain intervenors in a reactor license transfer proceeding, and granting them access to proprietary information); CLI-07-19 (denying petition to intervene in Big Rock Point ISFSI license transfer matter); CLI-07-24 (affirming delegation to the Board to conduct *Vogtle* ESP mandatory hearing); CLI-07-26 (requesting briefs on certified questions in *Pa'ina* materials license proceeding).

and has nearly always been successful in meeting this goal. Our overall average turnaround time (between receiving the final relevant document and filing OCAA's draft decision with SECY) was 23 days for the 32 draft decisions that OCAA submitted in CY2007. See Chart 1, "Commission Adjudicatory Decisions, January-December 2007." Our median turnaround time was likewise 23 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. All of our average and complex draft orders met their respective targets in CY2007.

2. Pending Commission Appeals/Petitions for Review

As of December 31, 2007, draft decisions were before the Commission in the following cases:⁹

- *Diablo Canyon* ISFSI (initial determination on contention admissibility following Ninth Circuit remand on NEPA terrorism issue)
- *Pilgrim* license renewal (interlocutory review of Board decision granting summary disposition of contention)
- *Pa'ina Hawaii* (certified questions interpreting Parts 30 and 36 as they relate to pool-type industrial irradiators).

3. Anticipated Adjudicatory Matters

OCAA expects that the Commission will face the following important adjudicatory matters in CY2008:

- Continued disputes over PAPO rulings in the Yucca Mountain LSN matter.
- Disputes on the heavily contested *Indian Point* license renewal application. The Commission may also see disputes regarding the recently-docketed *Three Mile Island* license renewal matter, which is also expected to be heavily contested.
- Additional issues regarding the *Vogtle* ESP application.
- Appeal of the Board's ruling dismissing the single admitted contention on the *Oyster Creek* license renewal case.
- Resolution of a petition to suspend the *Oyster Creek*, *Indian Point*, *Vermont Yankee*, and *Pilgrim* license renewal proceedings pending Staff action on the license renewal process.
- Additional challenges based on the NEPA terrorism issue in multiple dockets.
- Potential disputes over the first combined license (COL) applications (for example, as of December 31, 2007, COL applications have been docketed Bellefonte Units 3 and 4, Calvert Cliffs Unit 3, South Texas Project Units 3 and 4, and William States Lee III Units 1 and 2).

⁹ Decisions in the *Diablo Canyon* and *Pilgrim* matters were ultimately issued in January 2008. See CLI-08-1 and CLI-08-2, respectively.

COMMISSION ADJUDICATORY TECHNICAL SUPPORT PROGRAM

The Commission Adjudicatory Technical Support (CATS) program was 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. In light of schedule uncertainties and changes resulting from delays in the Department of Energy's submission of a repository license application, the CATS program has been in a minimalist, maintenance mode since April 2006.

In a June 28, 2007 Staff Requirements Memorandum (COMDEK-07-0003/COMDEK-07-0003A), the Commission approved the transfer of CATS from OGC to OCAA, with the position of Director of the program to report to the OCAA Director. The transfer went into effect in September 2007. Until the need arises for the appointment of a full-time CATS director, the Director of OCAA is serving as Director of the CATS program.

If the Commissioners would like 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 2007