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Attention: Rulemaking and Adjudications Staff

Your ref:
Our ref: DCP/NRC1743

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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

SUBJECT: Comments of Westinghouse Electric Company LLC re: NRC Proposed Rule: Licenses, Certifications, and Approvals for Nuclear Power Plants, 71 Fed. Reg. 12782 (March 13, 2006)

Dear Ms. Vietti-Cook:

Westinghouse Electric Company LLC ("Westinghouse") submits the following comments in response to the invitation for comments on rules proposed in the above-captioned Federal Register Notice of Proposed Rule ("Proposed Rule") that would amend current NRC regulations relating to standard design certifications (DC), early site permits (ESP), and combined operating licenses (COL).

Westinghouse provides a wide range of nuclear plant products and services to utilities in the United States and throughout the world, including advanced nuclear plant designs, fuel, service and maintenance, instrumentation and control, and equipment. More than 40 percent of the world's 434 operating commercial nuclear power plants have been provided by Westinghouse and its licensees. In April 2000, Westinghouse purchased the nuclear businesses of ABB, and with the integration of ABB into Westinghouse this percentage is now approximately 50 percent, giving Westinghouse the world's largest installed base of operating nuclear power plants.

Westinghouse participated in the development by the Nuclear Energy Institute ("NEI") of its comments on the Proposed Rule and fully supports and endorses the positions set forth in the NEI comments. The purpose of these Westinghouse comments is to provide the Nuclear Regulatory Commission ("NRC" or "Commission") with additional insight into the overall concern of Westinghouse with regard to the Proposed Rule, as well as certain specific Westinghouse concerns with respect to several specific aspects of the Proposed Rule.

Westinghouse was the applicant for certification of two of the designs which have received standard design certifications from the NRC – the AP1000 design, certified in 2006 in Appendix D to 10 CFR Part 52, and the AP 600 design, certified in 1999 in Appendix C to 10 CFR Part 52. The nuclear business of ABB-CE, now owned by Westinghouse, was the applicant for certification of the System 80+ design, which was certified in 1997 in Appendix B to 10 CFR Part 52. Accordingly, Westinghouse has a substantial interest in making certain that the rules relating to design certifications, early site permits and

combined operating licenses contain appropriate provisions so that designs certified by the NRC and the NRC licensing process provide a viable and attractive option to the U.S. utility industry for future plant orders.

Westinghouse Supports The Comments Submitted by NEI

Westinghouse participated in the development by the Nuclear Energy Institute ("NEI") of its comments on the Proposed Rule and fully supports and endorses the positions set forth in the NEI comments. The purpose of these comments is to express to the Nuclear Regulatory Commission ("NRC" or "Commission") the overall concern of Westinghouse with regard to the Proposed Rule, as well as to provide additional insight and specific Westinghouse concerns with respect to several specific aspects of the Proposed Rule.

Westinghouse Concern That The Proposed Rule Will Introduce Substantial Uncertainty and Instability to the Part 52 Licensing Process

Westinghouse underscores the concerns of NEI over the significant deficiencies in and problems with the amendments proposed by the NRC in the current rulemaking. When the NRC added Part 52 to its regulations in 1989 to provide for the issuance of early site permits, standard design certifications and combined operating licenses, the NRC declared that its action was "intended to achieve the early resolution of licensing issues and enhance the safety and reliability of nuclear power plants." (54 Fed. Reg. 15372 (April 18, 1989)). However, rather than enhancing standardization and making the licensing process more predictable and stable – two of the goals of Part 52 – many of the amendments to NRC regulations proposed in the current rulemaking will have the contrary effect and, in many respects, will introduce substantial uncertainty and instability into the Part 52 licensing process. Unless major changes are made to the rule amendments currently being proposed by the NRC, the amendments threaten to undermine the stated Commission goals of a predictable and stable licensing process for future nuclear power plants. Westinghouse believes it is important for the Commission to correct the deficiencies in the Proposed Rule to achieve the goals of standardization and of Part 52 sought by the Commission and by the nuclear industry.

There appears to be a fundamental philosophical problem with respect to many of the amendments in the Proposed Rule. The proposals in the Proposed Rule for changes to current Commission regulations in many instances reflect a reluctance to accept the discipline intended when the Part 52 licensing process was established. In adopting Part 52, the Commission declared its intent was "to have a sensible and stable procedural framework in place for the consideration of future designs, and to make it possible to resolve safety and environmental issues before plants are built, rather than after." (54 Fed. Reg. 15372 at 15373 (April 18, 1989)).

The necessary discipline sought by the Commission and industry meant that once a proposed standard design has been reviewed and a design certification rule has been approved and is in effect, the Commission:

"shall treat as resolved those matters resolved in connection with the issuance or renewal of a design certification." (10 CFR §52.63(a)(4)).

Similarly, once an early site permit has been issued and is in effect, the Commission:

“may not impose new requirements, including new emergency planning requirements, on the early site permit or the site for which it was issued unless the Commission determines that a modification is necessary either to bring the permit or the site into compliance with the Commission’s regulations and orders applicable and in effect at the time the permit was issued, or to assure adequate protection of the public health and safety or the common defense and security.” (10 CFR §52.59(a)(1)).

An effective combined license process which accords finality to issues previously resolved is critical to making standardization a working reality. The philosophical problem with regard to the Proposed Rule accounts for the many instances in which the proposed changes in NRC regulations would introduce substantial substantive changes to the current standardization processes and requirements.

In short, many of the proposals for amendments to current NRC regulations turn the carefully crafted NRC Part 52 licensing process from one of early identification and resolution of safety issues and a more stable, predictable licensing process to one which undermines standardization and which will discourage the type of commitments necessary for the development, approval, and use of standardized final designs, early site approvals and combined operating licenses. Moreover, if the Proposed Rule, with its almost incomprehensible scope and breadth, are adopted by the Commission, their very complexity will introduce substantial uncertainty and instability into the licensing process for future plants at the very time when there has been increased interest in constructing and operating new nuclear power plants in the United States.

Westinghouse believes it is necessary for the Commission to go back to basics, to review the rulemaking record underlying Part 52 and the Commission determinations when it adopted Part 52, and to impose discipline in such a manner that the processes contained in the rules for design certifications, early site permits, and combined operating licenses are in keeping with the basic intent of the Commission in its lengthy development of the standardization process. In the Westinghouse view, the battle for standardization, and hence the future of nuclear power in the United States, ultimately will be won or lost not only on the quality of the designs that are being proposed and the quality of the utilities which order and operate future nuclear power plants, but also on the quality of the processes which are applicable in approving the designs, sites and licenses for the plants.

The quality of those processes can either enhance or destroy standardization and the future of the nuclear industry in this country. If adopted by the Commission, many of the proposed amendments to NRC regulations contained in the Proposed Rule will represent a defeat for standardization in the battle for the viability of future nuclear power plants.

With this fundamental philosophical problem in mind, Westinghouse has the following additional comments to several specific aspects of the Proposed Rule..

Changes by Design Certification Applicants

Any revision to current NRC regulations should include a revision to the current 10 CFR §52.63 to allow the original design certification applicant (or its successor) to obtain amendments to the design certification rule. For proposed changes to the certified design, the design certification applicant should be

able to petition the Commission for, and obtain, an amendment to the design certification rule to incorporate "beneficial" changes to the design certification, including: (1) design changes that would result in significant improvements in safety; (2) design changes that would result in significant improvements in efficiency, reliability and/or economics; (3) design changes that result from continuing engineering or design work or are required because of lack of availability of components specified in the original design certification; and (4) design changes necessary to correct minor errors in the original design certification. (Where proposed changes involve changes to Tier 2, the design certification applicant should be able to make such changes using a Section 50.59-like change process. Tier 2 is "the portion of the design-related information contained in the generic DCD that is approved but not certified....")

Current NRC regulations appear to prevent any amendment to a design once the design has been certified by rule:

"...unless the Commission determines in a rulemaking that a modification is necessary either to bring the certification or the referencing plants into compliance with the Commission's regulations applicable and in effect at the time the certification was issued, or to assure adequate protection of the public health and safety or the common defense and security." (10 CFR §52.63(a)(1)).

Thus, no amendment to a design certification rule appears to be allowed to incorporate the type of beneficial changes referred to above.

Each applicant for a design certification rule must submit to the NRC all of the information necessary for the NRC to reach a final conclusion on all safety questions associated with the design. This enables the Commission to make the required finding for issuance of the standard design certification under 10 CFR §52.54. However, after issuance of a design certification rule, additional design work continues to be performed by a design certification applicant in order to provide added details relating to the design. In the course of performing this detailed design development, improvements to the design will be identified, including improvements relating to the safety of the design. In addition, such additional design work will identify changes that could result in significant improvements in the efficiency and/or reliability of plant operation, and in improvement in the economics of a plant design.

Westinghouse submits that a design certification applicant should be permitted to petition the Commission for, and obtain, an amendment to the design certification rule in order to make such beneficial changes to the design certification rule until the first COL referencing the design has been issued. An amendment should be granted if the commission finds that the design will continue to maintain adequate protection of the public health and safety and the common defense and security and the proposed amendment complies with the Atomic Energy Act and Commission regulations. Where changes are proposed to Tier 2, Westinghouse believes that a design certification applicant should be permitted to make such changes using a Section 50.59-like change process.

Such authorization will benefit standardization and will promote regulatory efficiency because these changes would become requirements for all plants that reference the certified design. Because the ability to make such changes would end when the first COL is issued referencing the design, there will be no lessening of the benefits of standardization by allowing such a process.

In addition to those situations where beneficial amendments to a design certification rule are appropriate because of additional design work, there are other circumstances where there is a need to allow a certified design applicant to amend the design certification rule. A standard design certification is valid for fifteen years from the date of issuance of the certified design rule. It is inevitable that during this fifteen year period components specified in the standardized design will no longer be manufactured or available. There also may be instances where a specified component is later determined not to be acceptable. Further, there may be instances where minor errors found in the certified design need to be corrected. In each of these situations, a method is required whereby the original applicant for a design certification can propose and obtain a generic amendment to the certified design.

Some of the situations referred to in the preceding paragraph may not arise until after one or more nuclear power plants utilizing an approved standardized design are licensed and operating. In such cases, the design certification rule amendments only should apply to plants that are not yet in operation.

Need for a "Grandfather" Clause

In adopting Part 52, the NRC was concerned with finality. Section 52.63(a)(4) thus states:

"Except as provided in 10 CFR 2.758, in making the findings required for issuance of a combined license...the Commission shall treat as resolved those matters resolved in connection with the issuance or renewal of a design certification."

The concept of finality was critical to achieving the stability sought through the Part 52 licensing process. Lack of finality was one of the major deficiencies of the Part 50 licensing process, and obtaining finality once a design is certified and/or an early site approval is issued was one of the major goals of the Part 52 process. If adopted in its present form, the Proposed Rule would represent a retreat from the NRC quest for finality in the early site permit, design certification, and combined license processes.

The Proposed Rule contains more than thirty new requirements on applicants for early site permits and design certifications. However, the Proposed Rule is silent on whether the proposed new requirements would be imposed on applications for ESPs pending at the time of adoption of a final rule under the pending rulemaking, on ESPs which already have been issued at the time of adoption of a final rule, or both. Similarly, the Proposed Rule also is silent on whether the proposed new requirements would be imposed on designs which already have been certified, on applicants for those certified designs, and/or on applicants for designs which have not yet been certified at the time of issuance of a final rule.

Further, the proposed rule is silent on whether, in the COL licensing process, the new requirements could be raised and imposed on a COL license applicant who references an early site permit or a certified design, thereby reopening, via the "back door", the site permit or the certified design. In other words, the Proposed Rule leaves open the question of whether, in the COL licensing process (including any licensing hearing), the referenced ESP or standardized design will be subject to reopening because of the adoption by the Commission of the new requirements in the Proposed Rule.

This question of possible retroactive application of the proposed new requirements on existing ESPs or certified designs, or on applications for ESPs or design certifications, pending at the time of adoption of the new rule, introduces new, substantial uncertainty into the Part 52 process and is very troubling. Westinghouse believes that to apply the new regulations retroactively would frustrate the idea of finality which is a cornerstone of Part 52. For a design to have been certified, the Commission must have been

satisfied that relevant Commission regulations were met. Inherent in the certification of a design must be that no alternative or additional features are required for the design and that all safety issues associated with the design have been satisfied. Similarly, for an early site permit to have been issued, the Commission must have been satisfied that applicable Commission regulations were met.

In the NRC Stakeholders Meeting to Discuss Proposed Rule Change 10 CFR Part 52, a representative of Westinghouse raised the question of no retroactivity of the Proposed Rule by stating (Transcript, p. 151):

“...an assumption that we would not have to go back and reopen the design certification rules that are currently in existence in order to take a count [sic] of the new requirements, assuming that the new requirements are included in the rule as it is finally adopted.

“The question is at the COL stage, I am assuming that the new requirements would also be foreclosed as issues because of 52.63. And, therefore, the design cert couldn't be reopened at the COL stage merely to look at these new issues that have been added by regulation amendment that is currently being proposed.”

The NRC representative responded affirmatively to this assumption, as follows (Transcript, pp. 151-152):

“Yes, I believe that is a correct assumption. First of all, this rulemaking, this proposed rule is a forward fit rule. We are not back fitting [sic] to the existing design certifications. And second of all, there is a provision on resolution of issues in the existing design certification rules – and I recall it is section 6 of the design certification rules that explicitly states how those issues are resolved and the circumstances under which it could be changed.

“But, in general, I believe what you are saying is correct.”

Thus, Westinghouse supports the NEI position that any final rule adopted by the Commission should include a “grandfather” clause to exempt early site permits and certified designs that are in existence, and applications for early site permits and certified designs that are pending, on the effective date of any new requirements. Any new requirements promulgated by the Commission should not apply to early site permits which have been issued or standard designs which have been certified prior to promulgation of the new requirements; and any new requirements should only apply to early site permit applications and certified design applications filed after the effective date of the new regulations.

Certification by Rulemaking and the Role of the Design Certification Applicant

During discussions leading to the adoption of Part 52, Westinghouse sought to allow designs to be certified either by license or rule. Westinghouse was concerned that design certification by rulemaking would not accord the proponent of a certified design the type of protection that would be accorded to a licensee if a design was licensed. In adopting final Part 52 rule, the NRC rejected the Westinghouse position of allowing certification either by rule or license. The NRC elected to permit design certification only by rulemaking. (54 Fed. Reg. 15372 at 15375 (April 18, 1989)). Thus, applicants for certified design approvals did not become “holders” of the a certified design, and the protections afforded to licensee under the Atomic Energy Act and the Administrative Procedure Act were not provided to such applicants. All references to such an applicant for a certified design approval as a “holder” of the design were deleted when the final Part 52 rule was adopted.

Certain of the proposed changes to Commission regulations in the Proposed Rule would apply provisions that are applicable to licensees to applicants for design certifications, despite the fact that such design certification applicants are not afforded the protections accorded to licensees under the law. This represents a fundamental shift in the nature of design certification and the status of design certification applicants. Such a fundamental shift is inappropriate, is unfair to design certification applicants, and in many instances is not authorized by law.

Westinghouse believes that all provisions in the Proposed Rule that would apply to applicants for design certification the requirements applicable to Commission licensees should be deleted.

Conclusion

Design certifications, early site permits and combined licenses represent the future of the nuclear industry in the United States. Westinghouse believes that the Proposed Rule, if adopted in its current form, would introduce major uncertainties into the standardization process and would undermine the stated Commission goal of a stable and predictable licensing process for future nuclear power plants. If the amendments to NRC regulations in the Proposed Rule are adopted by the Commission without the substantial changes urged by NEI, Westinghouse and other nuclear industry members, the type of commitments necessary for future nuclear power plant development in the U.S. will be discouraged. Accordingly, Westinghouse urges the Commission take into consideration the comments contained in this letter, together with the comments of NEI and other nuclear industry members, in promulgating any revisions to current NRC regulations.

Westinghouse thanks the NRC for the opportunity to comment on the Proposed Rule and looks forward to further interaction with the NRC as this rulemaking progresses.

Very truly yours,



Andrea Sterdis, Manager
Licensing and Customer Interface
Regulatory Affairs and Standardization

cc: The Honorable Nils J. Diaz, Chairman, NRC
The Honorable Edward McGaffigan, Jr., Commissioner, NRC
The Honorable Jeffrey S. Merrifield, Commissioner, NRC
The Honorable Peter B. Lyons, Commissioner, NRC
The Honorable Gregory B. Jaczko, Commissioner, NRC
Mr. Luis A. Reyes, Executive Director of Operations, NRC
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Subject: Transmittal of Westinghouse Letter DCP/NRC1743

This Westinghouse letter is sent to you via email on behalf of Andrea Sterdis, Manager, Licensing and Customer Interface, Regulatory Affairs and Standardization.

In addition, today this letter is shipped to Annette L. Vietti-Cook via Federal Express.

Attached is Westinghouse letter DCP/NRC1743, "Comments of Westinghouse Electric Company LLC re: NRC Proposed Rule: Licenses, Certifications, and Approvals for Nuclear Power Plants, 71 Fed. Reg. 12782 (March 13, 2006)," dated May 30, 2006.

<<DCPNRC1743.pdf>>

Please contact me if you experience any difficulty with this electronic transmission.

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