ABB

July 20, 1994
LD-94-053

Docket No. 52-002

Attn: Document Control Desk
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Subject: NRC's Fee Regulations for Design Certification

Dear Sirs:

ABB Combustion Engineering (ABB-CE), applicant for NRC approval under Part 52 of System 80+™, a standard evolutionary Advanced Light Water Reactor (ALWR) design, has reviewed NRC's fee regulations in 10 CFR Part 170 as they pertain to the System 80+ design certification rulemaking and understands them as set forth in the attachment to this letter. The purpose of this letter is to obtain your confirmation of our understanding.

Our understanding of these fee regulations was discussed with members of your staff and the staff of the Office of General Counsel in a meeting at OWFN on June 7, 1994. Representatives of Westinghouse Electric Corporation and General Electric Company were also present at that meeting. We are informed that our understanding of the fee regulations is shared by these applicants for design certification of the AP-600 and the ABWR and SBWR designs.

Because we are at a critical juncture in the schedule for design certification and expect very soon to be issued a Final Design Approval (FDA) for System 80+, your timely confirmation of our understanding will be greatly appreciated.

If you have questions related to this matter please contact me or Mr. Joseph Egan at 202-663-9200.

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ABB Combustion Engineering Nuclear Power

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Thank you for your prompt consideration.

Very truly yours,

COMBUSTION ENGINEERING, INC.

C. B. Brinkman
Director
Nuclear Systems Licensing

Attachment

cc: Ronald M. Scroggins (NRC)
Irwin (Trip) Rothschild (NRC)
Peter Lang (DOE)
John Trotter (EPRI)
Thomas Wambach (NRC)

NRC'S FEE REGULATIONS FOR DESIGN CERTIFICATION

Prepared by ABB Combustion Engineering,
Applicant for the System 80+ Evolutionary ALWR Standard Design

July 1994

Introduction

ABB-Combustion Engineering (ABB-CE) submitted its original application for approval of a standardized design for the System 80+ evolutionary Advanced Light Water Reactor ("System 80+"), Docket No. 52-002, in 1988. That application, submitted under 10 C.F.R. Part 52, Subpart B, has since undergone extensive review and re-review by ABB-CE and NRC staff. The standardized safety analysis report for System 80+, CESSAR-DC, now represents some 26 volumes of material, not including supporting documentation.

Pursuant to NRC's fee regulations under Part 170, as amended in 1991 (see 56 Fed. Reg. 31472 (July 10, 1991)), ABB-CE has paid to NRC millions of dollars in fees for NRC Staff's review of the System 80+ application. In 1991, the Nuclear Management and Resources Council ("NUMARC", now a component of the Nuclear Energy Institute) supported requests by ABB-CE and the other vendors seeking standardized design approval that fees for NRC Staff review should continue to be deferred, as was then in accordance with the provisions of Part 170, until application had actually been received by NRC for a combined construction and operating license ("COL") under Part 52, Subpart C. Id. at 31475. NRC declined, however, to continue to defer vendors' fees. Id. at 31476.

The System 80+ design is now completing its final review by NRC, and NRC's schedule for design certification, SECY 94-117, calls for System 80+ to receive its Final Design Approval ("FDA") no later than August 1994. Indeed, it presently appears that the FDA may be issued in July.

With the issuance of the FDA, System 80+ will constitute a complete and approved standardized design.

After issuance of NRC's "approval" of the design, any further regulatory review of the System 80+ will necessarily pertain only to the proposed generic rulemaking for design certification of System 80+ under Part 52, including preparation of the so-called standard "Design Control Document," as well as Staff and

Office of General Counsel ("OGC") review associated with the proposed generic rulemaking processes described in NRC's Advanced Notice of Proposed Rulemaking for the evolutionary designs. See Rulemakings to Grant Standard Design Certification for Evolutionary Light Water Reactor Designs, 58 Fed. Reg. 58664 (November 3, 1993). The final rule promulgating the certified design will be available to the general public, and any applicant may reference this design in its application for a COL for building and operating the certified plant.

It is ABB-CE's understanding of the regulations under Part 170 that no further assessment of NRC review fees is to be imposed once ABB-CE has been issued its FDA.

Fee Regulations for Standard Designs

With reference to NRC review fees, Part 52 states only that fees are as set forth in Part 170 and are payable in accordance with § 170.12. 10 C.F.R. § 52.49. Part 170 applies simply to an "applicant for ... standard design certification...." 10 C.F.R. § 170.2(g). Under Part 52, however, the "standard design certification" process is divided into two parts -- one the product of intensive interaction between NRC Staff and the vendor leading to an FDA that is owned by the vendor, and the other the product of NRC rulemaking activity leading to a rule applicable to the public generally. Issuance of an FDA constitutes final "approval" of the design by NRC and is a prerequisite for proceeding with design certification rulemaking. 10 C.F.R. § 52.43(b) and (c), and Appendix O.

As explained in the Statement of Considerations accompanying NRC's 1991 Part 170 amendments, Part 170 was intended to limit a vendor's payment of NRC review fees to that period preceding issuance of an FDA.[1] As stated there, NRC

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1 The language of Part 170 offers further evidence that NRC intended to distinguish between pre-FDA and post-FDA review periods. In discussing the deferral of "approval fees" incurred prior to the effective date of amendments to the Part 170 rule, Sections 170.12(e)(2)(ii)(A) and (e)(2)(ii)(B) distinguish between two cases, respectively, where, on the one hand, a design "has been approved but not certified and for which no application for certification is pending," and where, on the other hand, a design "has been approved and for which an application for certification is pending." In the former case, review fees are payable within five years of FDA issuance. In the latter case, review fees are not payable until after the certification is complete. This provision indicates that "approval fees" -- the title of § 170.12(e) -- though payable at

(continued...)

explicitly resolved to exclude from Part 170 "generic rulemaking and guidance (e.g. 10 CFR Part 52 and Regulatory Guides) for standard plants and contested hearings." 56 Fed. Reg. at 31476. Upon issuance of the System 80+ FDA, further regulatory review by NRC involving the design will pertain only to generic rulemaking and/or contested hearings, as described below.

Generic Rulemaking. NRC's rulemaking for design certification of the System 80+ standard plant is a "generic rulemaking." Once a rule is issued certifying the System 80+ design, applicants for a combined construction and operating license may reference the rule knowing that issues concerning the safety of the design, including radiological issues and specified environmental issues, have previously been "resolved." See 10 C.F.R. § 52.63(a)(4) and 58 Fed. Reg. at 58666. Unlike the situation existing under the Part 50 nuclear licensing regime, the rulemaking certifying System 80+ is applicable to and can be utilized by a broad variety of COL applicants referencing the plant for many years to come.

"Generic rulemaking" is typically undertaken, as is the case here, to resolve broad issues of general applicability in lieu of individual adjudications, such as those witnessed under Part 50. See Weinberger v. Hynson, Westcott, & Dunning, 412 U.S. 609, 624-25 (1973); American Commercial Lines v. Louisville and Nashville R.R., 392 U.S. 571, 591-92 (1968); F.P.C. v. Texaco, Inc., 377 U.S. 33, 42-44 (1964); United States v. Storer Broadcasting Co., 351 U.S. 192 (1955).

Had NRC wished to resolve "generic" issues in the context of individual adjudications, it could well have done so. See Union of Concerned Scientists v. AEC, 499 F.2d 1069 (D.C.Cir. 1974). Instead, NRC chose rulemaking to resolve the many generic issues arising from certification of a standard design. See Statement of Considerations for Part 52, where NRC noted that "a design certification will, like a rule, have generic application." 54 Fed. Reg. 15372, 15375 (April 18, 1989).

In the words of the rule itself:

> Standard design means a design which is sufficiently detailed and complete to support certification in accordance with subpart B of this part, and which is usable for a multiple number of units or at a multiple number of sites without reopening or repeating the review.

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[1](...continued)
different times, accrue in both cases only through "approval" (i.e., issuance of the FDA).

10 C.F.R. 52.3(c) (emphasis added). NRC's rulemaking for the standard design accomplishes the stated objective and is therefore "generic" with respect to the design.

The history of the adoption of Part 52 supports the generic nature of the design certification rulemaking. NRC's proposed rule provided for certification by rulemaking. 53 Fed. Reg. 32060, 32064 (August 23, 1988). Various commenters argued that design certification should also be accomplishable by license. Some argued that the applicant for design certification should have the option of proceeding either by rulemaking or by licensing. See, e.g., comment filed by Westinghouse Electric Corporation to Samuel J. Chilk (NRC), November 7, 1988. Other commenters, such as NUMARC, endorsed standardized design certification by rulemaking, but also urged that the proposed rule be amended to provide the holder of a certified design with the procedural protections afforded to NRC licensees. 54 Fed. Reg. 15372, 15375 (April 18, 1989).

The Commission rejected those proposals in its final rule. Section 52.51 prescribed rulemaking as the sole procedure for standardized design certification. Id. at 15391. Importantly, moreover, whereas the proposed rule referred to the "holder of a design certification," the Commission eliminated all such references to the "holder" in its final rule. The certified design, in the form of a Commission rule, will be available for implementation by qualified organizations other than the design certification applicant; indeed, § 52.47 provides that "any person" (rather than just the "holder," as in the proposed rule) could apply for renewal of the certification. Id. at 15392. Note, in contrast, the continuing reference to FDA "holder" in Appendix O to Part 52. Moreover, 10 C.F.R. § 52.73 provides that upon an appropriate demonstration of qualifications, NRC will issue a COL where the applicant is using a vendor other than the vendor that sponsored the design certification.

The Commission's comments regarding the final Part 52 rule likewise reflect an intent to make the design certification process truly "generic." The Commission declared that the "design certification will, like a rule, have generic application," id. at 15375, and made it clear that it did not consider a rule certifying a design as belonging solely to the designer. Thus, one of the basic rights of ownership -- the right to transfer property -- did not exist for the entity which had secured the design certification:

> ...[A] rule certifying a design does not, strictly speaking, belong to the designer. Therefore, such a rule cannot be transferred or revoked by adjudicatory enforcement.

Id. See also, id. at 15382-83.

In sum, the history of Part 52 establishes that the design certification rulemaking process is indeed "generic" by any accepted definition of that term, and that the benefits of the certification rulemaking were intended by NRC to inure to the public generally, and not just to the design certification applicant.

Contested Hearings. The System 80+ rulemaking is exempted from Part 170 fees on the grounds that this rulemaking will, as well as being generic, constitute a "contested hearing."

NRC's rulemaking for design certification of the System 80+ will constitute a "contested hearing," whether formal or informal, or if only by virtue of comments expected to be filed that may oppose one or more of the many aspects of NRC's approval of the standard design. See 10 C.F.R. § 52.51(b); SECYs 92-287 (August 18, 1992) and 92-287A (March 26, 1993), and SRMs on SECYs 92-287 and 92-287A dated September 30, 1992 and June 23, 1993, respectively.

Under the Administrative Procedure Act, even notice and comment rulemaking constitutes a "hearing." United States v. Florida East Coast Railway, 410 U.S. 224 (1973). Although the law does not provide a precise delineation of the meaning of the word "contested," it is likely that the System 80+ design certification will be "contested" by one or more commenters on one or more issues. It is also possible that individual utilities or other industry entities may take issue with one or more of the policy decisions applicable to System 80+ that were required by the NRC. Here, moreover, the applicable rulemaking procedures go well beyond NRC's traditional rulemaking processes in affording those who would contest the certification opportunities to do so -- both in the number of possible opportunities and in the possible levels of formality that may be obtained. See SECY's 92-287 and 92-287A.

Proposed New Amendments to Part 170

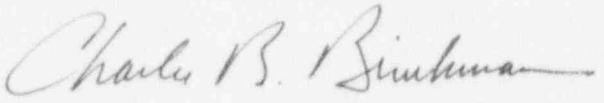
In proposed new amendments to Part 170 issued on May 10, 1994, 50 Fed. Reg. 24069, NRC clarified its view that fees incurred to support NRC's "development of generic guidance and regulations (e.g. rules, regulatory guides, and policy statements) and resolution of safety issues applicable to a class of licensee such as those addressed in generic letters should not be assessed under Part 170." Id. at 24067, 24069. Although the relevant proposed amendments deal with NRC's definition of "special projects" exempt from fees, they nevertheless confirm NRC's general policy, articulated in the Statement of Considerations accompanying the 1991 amendments to Part 170, not to assess Part 170 fees for generic rulemaking activities and other generically applicable endeavors.

Conclusion

Unlike issuance of an FDA, the benefits of which, in the absence of a referencing COL application, appear to inure principally to the FDA's "holder," issuance of the System 80+ final design certification rule will clearly bestow a benefit upon the public generally by providing an advanced evolutionary standardized design certification available for reference by a broad variety of COL applicants now or in the future. That rule, moreover, will have resolved the principal safety issues associated with the standard design, including radiological and specified environmental issues, for all plants of the referenced design.

For all the above reasons, ABB-CE understands that Part 170 does not provide for the imposition of NRC review fees for System 80+ design certification rulemaking, and that review fees for System 80+ will cease to accrue to ABB-CE upon issuance by NRC of the FDA for the standard design. Your confirmation of our understanding will be greatly appreciated.

Respectfully submitted,



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