10. Assessing Fees to Design Certification Applicants for Costs Following the Final Design Approval

Comment. Two commenters stated that the Commission should revisit its policy decision to charge fees to design certification applicants following the issuance by the NRC staff of a Final Design Approval (FDA).

Response. The statement of considerations accompanying the proposed rule said that the NRC would charge a vendor 10 CFR Part 170 fees for a design certification to recover all the costs of certification except the costs of any hearing that might be held under 10 CFR 52.51(b) before an Atomic Safety and Licensing Board (60 FR 14673; March 20, 1995). These charges are required by existing rules. The only reason the NRC mentioned these fees in the statement of considerations was to reflect in a widely-read document a policy that NRC had articulated fully only in letters to the vendor applicants in December 1994. The letters were in response to inquiries from three vendors last summer. The vendors, particularly ABB-Combustion Engineering Nuclear Systems (ABB–CE), had argued that all the costs of certification should be recovered through annual fees charged to the NRC's current power reactor licensees. ABB–CE, which received an FDA last year for the System 80+ and has applied for certification of the same design, wrote extensive comments on what NRC said about certification fees in the statement of considerations.[2]

Having considered ABB–CE's arguments, which were largely those ABB–CE had made last summer, the NRC has decided not to change the existing rules and policy on this issue. Although this whole topic is, strictly speaking, not part of this rulemaking, the NRC considers this rulemaking notice to be a useful vehicle for informing a larger public in some detail of ABB–CE's arguments and our responses. NRC's statements here are largely a repetition of arguments NRC made in the letters to the vendors and in a February 24, 1995, letter to the Senate Committee on Appropriations.

Comment. ABB–CE charges that ''NRC is proposing to change its fee rules in the middle of the process to the detriment of certification applicants. * * * '' (Comments at 10)

Response. Section 170.21 of the Commission's regulations has long explicitly listed standard design ''certifications'' among the regulatory actions for which ''full cost'' will be recovered through fees charged to applicants. See 10 CFR 170.21 (1994), Schedule of Facility Fees, heading B, ''Standard Reference Design Review''. This policy has been the law since Part 52 was first promulgated. (See 54 FR 15372, 15399; April 18, 1989.) Even when, in the past, 10 CFR part 170 called for deferring payment of fees until a utility referenced the certified design, 10 CFR part 170 clearly said that the vendor would have to pay the ''full cost of review for a standardized design approval or *certification*.'' 10 CFR 170.12(e)(2)(1) (emphasis added).

Comment. ABB–CE's most important argument for changing long-standing policy is that, according to ABB–CE, there is no benefit to ABB–CE in certification, except perhaps an ''indirect'' benefit of making the certified design attractive to U.S. utilities. (Comments at 4) ABB–CE says, ''With the issuance of NRC's FDA in July 1994, * * * System 80+ constitutes a complete and approved standardized design which, without design certification rulemaking, has been accepted for bidding in the global marketplace.'' (Comments at 2) ABB–CE also argues that the nuclear utilities and their ratepayers and stockholders are the ''direct'' beneficiaries of certification, because it provides them with greatly reduced licensing risk, and because it contributes to the ''continued viability * * * of an important energy option'' and to the maintenance of the nuclear servicing-supply sector infrastructure. (Comments at 4)

Response. While the utilities may benefit from certifications, the vendor is more likely to benefit than is any given utility. The NRC knows neither whether, nor how many, applicants for combined construction permits and operating licenses (COLs) will benefit from a given certification. Certainly, not all current power reactor licensees will reference every certified design, and so current licensees will not benefit from every certification. If the design is referenced, the vendor will benefit directly, but most utilities will not. The NRC believes that had ABB–CE not had a reasonable expectation of deriving benefits from the certification, ABB–CE would not have applied for it.

Comment. ABB–CE points out that the vendor applicant does not become a ''holder'' of the design certification. In fact, a vendor other than the one that applied for certification can, as a matter of law, supply the certified design to a COL applicant. ABB–CE believes that this situation is incompatible with the notion that the original vendor is the primary beneficiary of the certification.

Response. The NRC agrees that the design certification applicant does not become a ''holder'' of the design certification. However, several things will make it difficult for a vendor other than the certification applicant to supply the design to a utility. First, proprietary information is protected during the certification proceeding (see 10 CFR 52.51(c)). Second, any vendor that supplies a design to an applicant for a COL must be prepared to provide the NRC with a large amount of design information not contained in the rule certifying the design. This information includes the detailed design of site-specific portions of the plant, and ''information normally contained in certain procurement specifications and construction and installation specifications'' (see 10 CFR 52.63(c)). Third, any vendor supplying a COL applicant a certified design which another vendor brought to certification must pay part of any deferred fees the original vendor owes (see 10 CFR 170.12(e)(2)(i)). Fourth and last, the original vendor's superior knowledge of the design will give that vendor a great advantage over competitors.

Comment. ABB–CE also argues that 10 CFR Part 170 fees should not be charged for a certification rulemaking because such a rulemaking is ''generic.'' ABB–CE points out that the Commission has said that it will not charge 10 CFR part 170 fees for ''generic rulemaking and guidance (e.g., 10 CFR part 52 and Regulatory Guides) for standard plants. * * *'' (56 FR 31478; July 10, 1991.) ''* * * NRC has used the certification,'' ABB–CE says, ''* * * to resolve broadbased policy issues that otherwise would have required independent public rulemaking proceedings.'' (Comments at 7) ABB–CE goes so far as to say that ''nearly all of the procedural and substantive provisions in the proposed rule for System 80+ are similar or identical to those for the ABWR.'' (Comments at 6)

Response. The proposed rules which would certify the System 80+ and the ABWR are no more generic than licenses certifying the same designs would have been.[3] The resolutions of policy issues in the proposed rules are resolutions specific to those two designs. Moreover, the two proposed rules are quite different. It is important to understand that the few pages of the

[2] Stone & Webster Engineering Corporation submitted brief comments on this issue. Those comments match some of ABB–CE's.

[3] It might have been difficult, if not impossible, for the System 80+ to be certified by license. Section 103d of the Atomic Energy Act says in part, ''No license may be issued to an alien or any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government.''