

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

September 25, 2006 (12:15pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of:CBS Corporation
(Waltz Mill Facility)

Docket No. 0070-00698
NRC License No. SNM-770

September 25, 2006

CBS REPLY TO WESTINGHOUSE "COMMENTS"**I. INTRODUCTION AND SUMMARY**

On September 19, 2006, Westinghouse Electric Company LLC ("Westinghouse") filed "Comments" in opposition to CBS Corporation's ("CBS") Petition for Hearing in the captioned matter. CBS's Petition followed the NRC Staff's effective denial of CBS's "Application for Order Regarding NRC License No. SNM-770, NRC Docket No. 070-00698 or, in the Alternative, for an Amendment to SNM-770" ("Application"). Although Westinghouse avoided calling its filing an "Answer," an "Answer" is the only pleading allowed by the NRC's Rules of Practice in 10 C.F.R. § 2.309 (h) (1), and for all practical purposes, and in substance, Westinghouse's "Comments" are equivalent to an "Answer." As explained below, Westinghouse's filing is unauthorized and should be stricken. It is completely devoid of any merit in any event.

II. THE FACTS

At the outset it is important to understand the unique circumstances of this case and the extremely reasonable and modest nature of CBS's Application.

CBS is in the unique position of being legally bound to remediate certain contaminated structures (those covered by Westinghouse's SNM-770 license) on a site it

owns (the Waltz Mill Site or "Site") in accordance with criteria in another person's license (SNM-770). This CBS remediation obligation is backed by financial assurance documents secured and maintained by CBS that are relied on by Westinghouse to fulfill its financial assurance obligations as the SNM-770 licensee.

Thus, while the NRC Staff has made it clear that it will look to Westinghouse to fulfill its obligations as the SNM-770 licensee, the practical reality is that CBS is functioning very much like a licensee for the remediation of the SNM-770 structures in question, with one critical exception: the NRC Staff has refused to entertain any CBS application to change the remediation criteria that define CBS's obligations, since CBS is technically not the "licensee." Westinghouse has taken clever advantage of this Staff position by steadfastly refusing to cooperate with CBS in making any such filing.¹ The reason Westinghouse takes this position is not hard to understand. CBS's Application asks that the currently-applicable remediation criteria be modified because they are not reasonably achievable or necessary to fulfill the purposes of the NRC-approved "SNM-770 Remediation Plan." The remediation project for which CBS is responsible, as defined in that Plan, is only designed to accomplish a partial remediation in order that certain Site structures are suitable for continued licensed uses. However, Westinghouse has the ultimate responsibility to decommission the Site when the SNM-770 license is terminated decades in the future. So, the more remediation CBS is required to do and pay for now, the less remediation Westinghouse will be required to do and pay for later.

¹ It is true, as stated in Westinghouse's Comments at pg. 9, that "in the eight years since CBS proposed the criteria and obtained NRC approval, CBS never sought to amend these criteria," but that is because Westinghouse has refused to support any such CBS filing and has not made any such filing on its own. Moreover, until NRC Staff provided its responses to the Arbitration Panel's questions on March 17, 2006, it was not clear that any amendments to the remediation criteria were needed.

The remediation criteria that currently define CBS's remediation obligations for SNM-770 structures (set forth in a June 19, 1998 letter incorporated into the SNM-770 license) are also applicable to certain structures governed by CBS's TR-2 license because of how the NRC-approved "TR-2 Decommissioning Plan" is drafted. These TR-2 structures are on the same Site as the SNM-770 structures and, in some cases, are even part of the same building where SNM-770 licensed activities are authorized. Since CBS is the actual "licensee" for structures covered by the TR-2 license, the NRC Staff has properly entertained CBS's application to amend the remediation criteria as they apply to them but, as noted above, has refused to consider CBS's separate application in regard to the SNM-770 structures.

CBS's Application recognized that NRC would not likely entertain an application to amend someone else's license. So, the principal relief requested by CBS was different, extremely modest, and entirely reasonable. The June 19, 1998 criteria were always intended to apply to structures covered by both licenses, and it made no sense whatsoever to have different remediation criteria apply to similar buildings on the same Site. So, CBS's Application simply asked the NRC to declare that any approved changes to the June 19, 1998 criteria as they applied to TR-2 structures, made in response to CBS's TR-2 application, would apply to SNM-770 structures as well, but limited to defining CBS's obligations. The requested declaratory order would not amend Westinghouse's SNM-770 license; Westinghouse as the licensee would continue to be bound by the original June 19, 1998 criteria, unless and until it chose to take advantage of the NRC's ruling and apply to amend its SNM-770 license.

It is also very important to understand that the Waltz Mill Site is fully compliant with NRC requirements, other than the limited decommissioning and remediation matters discussed in the NRC's March 17, 2006 response to the Arbitration Panel's questions, and that the current condition of the contaminated structures covered by both licenses does not pose any undue risk. Instead, what is at issue in CBS's Application is whether the structural contamination has been reduced to levels that are as low as reasonably achievable ("ALARA"). The June 19, 1998 criteria were intended as a numerical benchmark for defining when sufficient remediation had occurred that the residual contamination was ALARA, and were based on predictions about what level of decontamination could be accomplished at reasonable cost and effort. It turned out that these predictions were wrong and so the Application proposes a new ALARA remediation goal that is dose based (25 mrem TEDE) and risk informed.

Finally, CBS filed its Petition because it appeared to be the only procedural tool available for getting the Commission to focus its attention on the unique circumstances of this case. Essentially, CBS is asking the Commission to exercise its general supervisory power over NRC Staff to correct an injustice, and the instant Petition seemed to be the only available tool. NRC Staff has elected not to file any Answer to CBS's Petition, although it clearly had the right to do so.

III. ARGUMENT

A. WESTINGHOUSE'S "COMMENTS" ARE UNAUTHORIZED AND MUST BE STRICKEN

Westinghouse is neither the applicant here (CBS is, procedurally at least, because it filed the Application at issue) nor, obviously, is it the NRC Staff. Therefore, in order to participate in this proceeding as a party and file any pleadings (such as the instant

“Comments”), Westinghouse must petition for leave to intervene under 10 C.F.R. § 2.309 and be admitted as a party. It has failed to file any such petition, and so its “Comments” are unauthorized and must be stricken. Moreover, it is not clear how Westinghouse would establish the requisite “injury in fact” for standing to intervene without running afoul of the same standing rules it claims apply to CBS because, as explained above, the Application filed by CBS does not seek to change any of Westinghouse’s obligations as licensee.

This Westinghouse failure is ironic (one of many ironies in Westinghouse’s “Comments”) because in its “Comments” Westinghouse seeks to take advantage of every alleged procedural requirement it could find in the NRC’s “Rules of Practice” to secure a denial of CBS’s Petition, while in fact it is Westinghouse (not CBS) that has stumbled procedurally.

B. A PROCEEDING COMMENCED WHEN NRC STAFF DENIED CBS’S APPLICATION

Westinghouse goes to great lengths to establish merely what is obvious from the statute and case law: that there is a statutory right to a hearing only if there is a “proceeding” for the “granting...or amending of any license” within the meaning of section 189a (1) (A) of the Atomic Energy Act, 42 U.S.C. § 2239 (a) (1) (A). However, Westinghouse fails to deal adequately with the specific question presented by CBS’s Petition, whether the NRC Staff’s denial of CBS’s Application commenced such a proceeding. This is because all of the cases cited by Westinghouse merely establish the general proposition that hearing rights are limited and defined by section 189a; none of the cited cases address precisely what a “proceeding...for the granting...or amending of any license” is or exactly when it begins.

The NRC Staff's denial of CBS's Application was, in essence, a threshold, jurisdictional determination. NRC Staff said, essentially, that the NRC's rules do not authorize any such filing. Case law ignored by Westinghouse is clear that this kind of threshold determination is entered in a "proceeding" for the amendment of a license within the meaning of section 189 a (1) (A). In *NRDC v. NRC*, 606 F.2d 1261 (D.C. Cir 1979), NRDC asked the NRC for a declaratory order stating that it had licensing authority over certain waste tanks proposed to be constructed by DOE. When the NRC declared that it had no jurisdiction over the tanks, and NRDC petitioned for review in U.S. District Court, NRC claimed that the Court of Appeals had exclusive jurisdiction under section 189 b of the Atomic Energy Act and the Hobbs Act. The Court of Appeals agreed with the NRC: it held that the NRC's declaratory order was entered in a "proceeding" for "the granting...of any license" because a declaration of jurisdiction is a necessary first step in any proceeding for the granting of any license. So too here: the NRC Staff's refusal to entertain CBS's Application constitutes a threshold determination that the NRC had no authority to entertain CBS's Application, and this determination is the first step in a "proceeding...for the amending of any license."² So, contrary to what Westinghouse argues, a proceeding does exist in which there are hearing rights.³

Since there is a "proceeding," it follows that the NRC may grant the principal relief requested by CBS—a declaratory order under section 554 (e) of the Administrative

² Westinghouse does not dispute that the NRC Staff's refusal to docket CBS's application constituted an effective denial, nor that this refusal constituted final agency action. However, Westinghouse endeavors to create the impression that the NRC's March 17, 2006 letter responding to the Arbitration Panel's questions represented the agency's final decision on the matter of remediation criteria, and that CBS's application was in the nature of a request for reconsideration or, worse, a refusal to comply with NRC direction.

However, CBS had advised the NRC before the March 17, 2006 letter that it might ask for an amendment to the criteria and the March 17, 2006 letter said nothing about such an application, leaving the issue open.

³ However, a "hearing" need not entail discovery and oral hearings. Many administrative hearings proceed without live testimony, discovery, and the like. CBS believes the facts are not in dispute and that its hearing request primarily raises legal issues that can be decided based on written presentations.

Procedure Act defining CBS's obligations. And, CBS is clearly the "applicant" for such an order in every logical and legal sense. The various NRC regulations cited by Westinghouse for the proposition that only a licensee may apply for a license amendment (e.g., 10 C.F.R. §§ 30.38 and 30.39) do not apply to CBS's application for a declaratory order because the requested order would not amend any license. CBS recognized that the NRC's rules contemplate that only the licensee may apply to amend its license; that is why the primary relief requested was a declaratory order, not a license amendment.

C. CBS HAS STANDING

Westinghouse argues that CBS lacks standing to request a hearing even if a "proceeding" exists. The crux of Westinghouse's argument is that CBS's interests are purely financial and that bare economic injury falls outside to zone of interests protected by the Atomic Energy Act. Westinghouse misreads the case law. Moreover, Westinghouse's argument leads logically to the ridiculous proposition that an applicant for an initial license or permit lacks standing to request a hearing because its interests are purely financial.

In *Niagara Mohawk Power Co. et al (Nine Mile Point, Units 1 and 2)*, CLI-99-30, 50 NRC 333 (1999), the Commission held specifically that "being forced to assume a greater-than-expected share of ...operating and decommissioning costs" constituted a cognizable injury under the Atomic Energy Act. *Id* at 341. CBS will suffer the same kind of financial injury here. In *Niagara Mohawk*, the Commission also recognized in the very next paragraph that radiological injury to one's property was cognizable under the Atomic Energy Act, but the case is clear (especially the Commission's use of the introductory word "Likewise" in its discussion of risks to property as a basis for standing)

that radiological injury to property is a separate basis for standing and not, as Westinghouse would have it, a qualification on standing based on having to pay an unexpected share of operating or decommissioning costs.

The rest of Westinghouse's discussion on this point is simply irrelevant. The fact that CBS gave Westinghouse an option to buy the Site does not detract from the fact that CBS is currently the owner of the Site. Moreover, whether the additional costs are unexpected or expected, or whether CBS voluntarily assumed them, or whether CBS actually proposed the criteria it now seeks to change, have no bearing on whether CBS's costs are within the zone of interests protected by the Atomic Energy Act. In fact, CBS did propose the criteria it now wants to change. However, as explained in the Application, the costs were entirely unexpected, and were not voluntarily assumed, because all parties had assumed that the current remediation criteria were reasonably achievable and, as remediation progressed, it transpired that they were not. Finally, this proceeding is not about allocating business risk between CBS and Westinghouse. There is nothing in CBS's application about allocating business risk. The application poses radiological safety questions of the kind encountered in other remediation projects and can be addressed using the same NRC regulations and policies that apply to other remediation and decommissioning projects.⁴

D. CBS HAS SUBMITTED ADMISSIBLE CONTENTIONS

Westinghouse argues that CBS has not submitted an admissible contention. CBS, which is an applicant and not an intervenor, does not need to file "contentions" meeting the requirements of 10 C.F.R. § 2.309 (f). The NRC's contention requirements focus on

⁴ Westinghouse also disputes certain other elements of CBS's standing-causation and redressability, but does not elaborate. CBS's injury is clearly traced to NRC Staff's denial of its application, and granting CBS's application would clearly redress CBS's injury.

disputes with an application and, obviously, an applicant does not dispute its own application. However, even assuming that 10 C.F.R. § 2.309 (f) somehow applies, Westinghouse's arguments are without any merit.

First, Westinghouse argues nonsensically that CBS has presented mere "procedural complaints" rather than litigable legal or factual issues. This fails to recognize the elementary principle that a "procedural complaint" may raise legitimate legal issues. Then Westinghouse argues that CBS has failed to support its legal argument, but does not explain why this is the case or what is missing from CBS's submission. Then Westinghouse re-argues its position on the absence of a "proceeding," a matter addressed above. Then Westinghouse argues there is no "uncertainty" that would warrant a declaratory order, but this is premised on the clearly erroneous proposition that the current criteria are fixed in stone and cannot ever be changed.

Westinghouse also argues that CBS has not shown how the NRC Staff denied its right to be heard or otherwise abused its discretion in refusing to issue the requested declaratory order, but does not explain why this is so. It criticizes the "spare" affidavit of Mr. Richard Smith," and seems to be saying either that an affiant cannot incorporate material by reference, or that NRC cannot be bothered to review CBS's application in deciding whether its complaints about denial have any merit. The former is baseless, and the latter is nonsensical.

Finally, Westinghouse argues that the information in the application referenced by Mr. Smith cannot meet NRC's pleading requirements, and that CBS has offered no reason to believe that NRC Staff refusal to entertain CBS's waiver request was unlawful or an abuse of discretion, but offers no explanation why this is so.

There is considerable irony in Westinghouse's arguments here. Westinghouse argues that CBS's contentions lack specificity and basis, but Westinghouse's own arguments are so devoid of specificity and basis that they are impossible to evaluate. Westinghouse seems to be proceeding on the erroneous premise that simple incantations about NRC's pleading rules are enough to defeat a contention. Westinghouse has not and cannot dispute the facts in CBS's application, and Westinghouse cannot dispute the proposition that this case presents unique circumstances that fully support the relief CBS requested.

IV. CONCLUSION

Westinghouse's "Comments" should be stricken. Moreover, they provide no basis to reject CBS's Petition, and that Petition should be granted for the reasons set forth therein.

Respectfully submitted,

A handwritten signature in black ink, consisting of a stylized 'M' followed by a long, sweeping horizontal line that extends to the right.

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