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OFFICE OF SECRETARY
ADJUDICATIONS STAFF

April 26, 2000

Secretary
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738

DOCKET NUMBER
PROPOSED RULE PR 170 + 171
(65FR16250)

ATTN: Rulemaking and Adjudication Staff

In the Matter of
Proposed Rule for Revision of Fee Schedules – FY 2000
10 C.F.R. Parts 170 and 171; 65 Fed. Reg. 16,250

Dear Secretary:

On March 27, 2000, the Nuclear Regulatory Commission ("NRC") published in the Federal Register and requested comments on a proposed rule to revise 10 C.F.R. Parts 170 and 171. 65 Fed. Reg. 16,250 (2000). The rule proposes to establish the user and annual fees in Parts 170 and 171 for fiscal year 2000, ostensibly to satisfy the Omnibus Budget Reconciliation Act of 1990 ("OBRA").

In response to this proposed rule, we are submitting these comments on behalf of Carolina Power & Light Company, Detroit Edison Company, FirstEnergy Nuclear Operating Company, Florida Power & Light Company, Vermont Yankee Nuclear Power Corporation, Nuclear Management Company, LLC, Northern States Power Company, Wisconsin Electric Power Company, Wisconsin Public Service Company, and IES Utilities, Inc. These companies operate commercial nuclear power reactors and will be substantially and adversely affected by the proposed fees.

As discussed below, the large annual fee assessed to nuclear power reactors is unjustified by the proposed rule, manifestly unfair, and contrary to the provisions of OBRA. Indeed, the NRC has previously acknowledged the concerns with the fairness and equity of its fee collection rules. See, e.g., 62 Fed. Reg. 29,194, 29,195 (1997). At a minimum, in light of the continuing inequity of the proposed rule as well as its noncompliance with Constitutional and statutory constraints, the NRC should eliminate the surcharge that is included in the annual fee without any relation to power reactor regulation.

OBRA's Requirements

In enacting the NRC fee provisions of the Omnibus Budget Reconciliation Act of 1990, Congress articulated the parameters and requirements for the development of those fees. First, relating to the user fees in 10 C.F.R. Part 170, Congress instructed that "any person who receives a service or thing of value from the Commission shall pay fees to cover the Commission's costs in providing any such service or thing of value." 42 U.S.C. § 2214(b). There is no exemption authority from this user fee provision. Every person[1] receiving NRC services or benefits must pay the full cost of those services through the user fees in Part 170.[2]

Second, relating to the annual fees in Part 171, which must now aggregate approximately 100 percent of the NRC budget less collections under Part 170 and appropriations from the Nuclear Waste Fund (and general fund when the appropriations are exempted from the fee provisions), Congress instructed the Commission to allocate the aggregate amount "fairly and equitably" among licensees. 42 U.S.C. § 2214(c)(3). Further, "[t]o the maximum extent

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[1] The Atomic Energy Act defines "person" as "(1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency other than the Commission, any State or any political subdivision of, or any political entity within a State, any foreign government or nation or any political subdivision of any such government or nation, or other entity, and (2) any legal successor, representative, agent, or agency of the foregoing." 42 U.S.C. § 2014(s).

[2] The proposed rule suggests that the Part 170 user fees are limited by the Independent Offices Appropriations Act of 1952 ("IOAA"), 31 U.S.C. § 9701, which has previously been interpreted as allowing assessment of user fees only to persons who are identifiable recipients of certain special benefits. See 65 Fed. Reg. at 16,250, 16,256. This suggestion is incorrect.

First, OBRA directs that user fees be assessed to "any person" for the receipt of "any service or thing of value." 42 U.S.C. § 2214(b). The NRC must give meaning to the provisions of OBRA, which expand the IOAA by making user fees mandatory and requiring such fees to be paid by "any person" who receives "any thing of value." If the OBRA and IOAA user fee standards were the same, the OBRA provisions would have been unnecessary. Compare Florida Power & Light v. NRC, 846 F.2d. 765, 769 (D.C. Cir. 1988), cert. denied, 490 U.S. 1045 (1989) (interpreting section 7601 of the Consolidating Omnibus Budget Reconciliation Act ("COBRA"), 42 U.S.C. § 2213, as establishing a standard separate and distinct from the IOAA and holding that Congress did not intend the NRC to apply the IOAA standard or the case law developed under that standard).

Second, OBRA leaves section 7601 of COBRA in effect. As noted above, the Florida Power & Light case holds that this existing authority in COBRA allows the NRC to recover generic costs through user fees without making artificial distinctions between private and public benefits. The Conference Report on OBRA expressly "reaffirms the statement of the [floor] managers [of COBRA] on the present authority" of the NRC to assess fees. H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 961 (1990). See also Allied Signal, Inc. v. NRC, 988 F.2d 146, 149 (D.C. Cir. 1993).

In any event, all of the surcharge items represent sufficiently specific benefits to sufficiently identifiable beneficiaries to be assessed as user fees, even under the IOAA standard.

practicable, the charges shall have a reasonable relationship to the cost of providing regulatory services . . . ." Id.

As indicated by the Conference Committee, Congress established these strictures so that its delegation of authority would be constitutional, in accordance with the Supreme Court decision in Skinner v. Mid-America Pipeline Co., 490 U.S. 212 (1989). See 136 Cong. Rec. H12692 (daily ed. Oct. 16, 1990). The conferees made clear that the annual fee provision was intended to delegate the authority to recover "administrative costs" not inuring directly to the benefit of regulated parties. 136 Cong. Rec. at H12692. The conferees instructed the Commission to recover the costs of "individually identifiable services to applicants and holders of NRC licenses" through Part 170, "so that each licensee or applicant pays the full cost to the NRC of all identifiable regulatory services such licensee or applicant receives." Id.

With respect to annual charges for generic costs, the conferees repeated the instruction that the annual charges be fair and equitable and allocated so that "'[t]o the maximum extent practicable, the charges shall have a reasonable relationship to the cost of providing regulatory services' to the licensees." Id. at H12693. With respect to generic costs that cannot be attributed to particular licensees or classes of licensees, the conferees stated,

> The Commission should assess the charge for these costs as broadly as practicable in order to minimize the burden for these costs on any licensee or class of licensees so as to establish as fair and equitable a system as is feasible.

Id. at H12692.

The Proposed Rule Does not Adequately Explain the Proposed Annual Fees

In its proposed rule, the NRC proposes to increase the annual fee charged to each reactor licensee to $2,815,000 per unit. 65 Fed. Reg. at 16,251, 16,262. This proposed fee is derived by simply escalating last year's annual fee by 1.4 percent, without giving any consideration to whether underlying costs have any rational connection to reactor regulation or any consideration whether the total assessment is as fair and equitable as is feasible. As a practical matter, the failure to provide any explanation and accounting of the expenses that are covered by this charge denies the companies a meaningful opportunity to comment.

In establishing the new fees without any particularized consideration of the underlying costs, the proposed rule does not follow Congress' instruction to allocate costs so that "to the maximum extent practical" the charges have a reasonable relationship to the cost of providing regulatory services to the licensees. Indeed, the NRC has given absolutely no consideration to whether the $2.815 million has any relationship to the cost of regulating nuclear reactors.

Neither the proposed rule nor the underlying work papers reflect any consideration of the services that are necessitating this fee or driving the increase. This is hardly "establishing as fair and equitable a system as is feasible," as OBRA requires.

Nor is there any basis to presume that the 1.4 percent increase in annual fees for power reactors has any causal connection to increases in the costs of regulating reactors. To the contrary, one would expect that the Commission's activities over the last few years to eliminate unnecessary levels of supervision and improve the efficiency of its regulatory processes would result in a decrease in the fees attributable to the expenses of reactor regulation. In fact, the only specific reason given for the need to increase the Part 171 annual fees is the reduction, as the result of Ohio becoming an Agreement State, in the number of NRC materials licensees paying fees. 65 Fed. Reg. at 16,253. This strongly suggests that the increase in the annual fee assessed to reactor licensees is in fact solely attributable to the costs of regulating materials licensees – costs that have no relation whatsoever to nuclear power reactors.

The Annual Fee Surcharge for Reactors is Unlawful and Unconstitutional

The proposed rule indicates that the annual fee for each reactor licensee will include a surcharge to cover budgeted costs having no relation to reactor regulation. In particular, the surcharge is said to cover Agreement State oversight, international activities, Site Decommissioning Management Plan activities, low-level radioactive waste generic activities, licensing and inspection of federal agencies, and costs not recovered from non-profit institutions and small entities. See 65 Fed. Reg. at 16,262. While the lack of any specific accounting in the proposed rule prevents an accurate quantification of this surcharge, it is likely (based on the surcharge identified in the 1999 fee rulemaking[3] and the increase in Agreement State costs attributable to Ohio becoming an Agreement State) that the program costs covered by this surcharge are approaching $60 million. It also appears that reactor licensees are bearing about 80 percent of the costs of these programs with no relationship to reactor regulation, so one would estimate the annual surcharge that is being assessed to reactor licensees is approaching $500,000 per reactor.

This surcharge included in the proposed annual fee is unlawful for a number of reasons. First, the items included in the surcharge do not appear to be "administrative costs" which Congress intended to be recovered through annual fees. Rather, the items appear to be programmatic costs that the NRC is simply unwilling to collect from others.

Second, virtually all of these costs should be recovered through user fees assessed directly on the persons receiving the benefits of these costs. As stated earlier, OBRA commands

[3] 64 Fed. Reg. 15,876, 15,884 (1999).

that "any person who receives a service or thing of value from the Commission shall pay fees to cover the Commission's costs in providing any such service or thing of value." 42 U.S.C. § 2214(b). "Any person" presumably includes other agencies, states, nonprofit institutions and small entities. Further, there is no exemption authority from this user fee provision.[4] Thus, support and oversight of Agreement States should be recovered through Part 170 fees assessed either on the Agreement States or on Agreement State licensees. Costs of international activities should be assessed to those agencies (such as the Department of State) for whom the NRC may be acting. The cost of site decommissioning management plan ("SDMP") activities should be assessed to the facilities that are on the SDMP list (all of which are former or current materials licensees). Decommissioning costs unrelated to reactors should be charged to the facilities to which these costs do relate. Costs for licensing and inspection of federal agencies should be charged to the regulated federal agency. Costs associated with nonprofit institutions and small entities should be recovered either directly from those entities or from a general fund appropriation. In sum, the NRC has no authority to ignore the requirement to assess user fees to persons who are receiving benefits of NRC services, as OBRA mandates, and thus no authority to impose these costs on reactors.

The Agreement State costs being charged to reactor licensees are particularly egregious. While the Agreement State costs are not quantified in this year's proposed rule or the supporting work papers, the FY 1999 proposed rule reported the cost of Agreement State oversight and regulatory support at $21 million. With the addition of Ohio, these costs for FY 2000 may be even higher. It is not only unlawful but also clearly unfair to continue to require reactor licensees to subsidize the costs of these activities, which are related solely to the regulation of

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[4] OBRA exempts federally-owned research reactors from the annual fee requirements, but it does not exempt such entities from the user fee requirements. See 42 U.S.C. § 2214(c)(4).

The NRC has previously suggested that the IOAA rules out imposing fees on any person on official business of the Government, and therefore that the NRC is barred from charging all but two Federal agencies Part 170 fees. See 62 Fed. Reg. at 29,195. The particular provision in the IOAA to which the NRC refers simply expresses a general "sense of Congress" and therefore is not controlling. See 31 U.S.C. § 9701(a). Further, there is no such limitation in 42 U.S.C. § 9701(b), which is the substantive provision in the IOAA authorizing agencies to impose user fees. More importantly, there is no such limitation in OBRA. In this regard, the NRC's interpretation would render 42 U.S.C. § 2214(b) (the user-fee provision in OBRA) meaningless, since it would have no effect other than as a reference to existing law. Rather than interpreting OBRA in a manner that gives no effect to the words, 42 U.S.C. § 2214(b) should be interpreted according to its plain meaning – that any person who receives a thing of value shall pay fees to cover the Commission's costs.

We also note that the Commission has proposed amending section 161(w) of the Atomic Energy Act to allow the Commission to collect "from any other Government agency, any fee, charge, or price that the Commission may require in accordance with section 9701 of title 31, United States Code [the IOAA]." See S.2016, 106th Cong., 2d Sess. § 9 (2000) (emphasis added). Either the Commission's own legislative proposal recognizes that the NRC may collect fees from other agencies in accordance with the IOAA, or it is entirely meaningless.

materials licensees. If the NRC is providing services to the Agreement States, the costs of those services should be charged directly as a Part 170 user fee to the Agreement States as "persons" who are "receiving a service or thing of value" from the Commission.

Third, even if the surcharge items were appropriate costs to include in an annual fee – they are not – the NRC has ignored Congress' instruction that "'[t]o the maximum extent practicable, the charges shall have a reasonable relationship to the cost of providing regulatory services' to the licensees." 136 Cong. Rec. at H12693. Virtually every one of the surcharge items relates to materials licensees. Therefore, if they are recovered through an annual fee, that fee must be assessed only on the materials licensees that have the closest relationship to these programmatic costs.

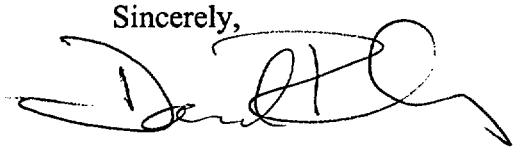
Fourth, the NRC has again failed to consider the reduced ability of reactor licensees to pass through costs to their ultimate customers. This is a factor that Congress intended the NRC to consider. Allied Signal, 988 F.2d at 149. In light of the restructuring of the electric industry, including the recent sale of nuclear generating facilities to be operated as merchant plants, reactor licensees no longer have the same ability to pass enormous fee costs on to customers. In sum, reactor licensees can no longer be expected to subsidize or bear the ever-increasing costs of the agency for activities unrelated to the costs of reactors.

Finally, the imposition of the surcharge on reactor licensees is unfair, arbitrary, and discriminatory. Congress intended the user fees in Part 170 to recover the full cost of the NRC's services from every individual, institution or group that receives or benefits from those services. There is thus no rational basis to impose on reactor licensees costs that have no relation to their regulation. Such assessments are intentionally and unconstitutionally discriminatory. They contravene OBRA's statutory requirement for a fair and equitable allocation of the NRC's costs, deny reactor licensees equal protection under the due process clause of the Constitution, and constitute an unfair taking of their property without just compensation. The NRC's imposition of its costs on reactor licensees without relation to the services or benefits they have received has no "fair and substantial relation to the object of" the user fees and bears no "rational relationship" to Congress's purpose in enacting them. See Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster City, 488 U.S. 336, 344-45 (1989); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 175 (1980), reh'g denied, 450 U.S. 960 (1981); Johnson v. Robison, 415 U.S. 361, 374-75 (1974). If reactor licensees can be charged for costs that have no relation whatsoever to their regulation simply because they happen to be licensees of the agency incurring these costs, why should not water treatment plants be charged the EPA's costs of remediating soil contamination from past mining operations? The answer is clear: such charges simply offend fundamental notions of fairness.

Conclusion

The NRC has not made a sufficient effort to allocate the costs of regulatory services to the beneficiaries of the services. Instead, it has shifted costs to power reactor licensees in an arbitrary manner. The proposed scheme is unfair and discriminatory, and is not in keeping with Congress' instructions in the Omnibus Budget Reconciliation Act of 1990. Accordingly, we strongly recommend that the NRC reconsider and revise its proposed rule to create a fee schedule that comports with the statutory requirements as well as fundamental notions of fairness.

Sincerely,



David R. Lewis
Counsel for the Licensees

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