

OCFO TICKET

09-May-01

Assigned	DAF
Item No	2001-138
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From	Marston
Office	EPRI
To	Meserve
Date	03/18/2001
Due Date	05/10/2001
Ticket No	LTR220
Subject	Concerns an Appeal of NRC's RETRAN-3D review fee decision
Instructions	Prepare response for signature of CFO. Commission to review prior to signature and dispatch
Distribution	
Copies	

SECY-017

ERMS-04

CFO

OFFICE OF THE SECRETARY
CORRESPONDENCE CONTROL TICKET

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PAPER NUMBER: LTR-01-0220 **LOGGING DATE:** 04/25/2001
ACTION OFFICE: CFO

AUTHOR: Theodore Marston (VP&CNO EPRI)
AFFILIATION: EPRI
ADDRESSEE: CHRM Richard Meserve
SUBJECT: Concerns an appeal of NRC's RETRAN-3D review fee decision

ACTION: Direct Reply
DISTRIBUTION: RF

LETTER DATE: 03/18/2001

ACKNOWLEDGED: No
SPECIAL HANDLING: SECY to Ack

NOTES: Prepare response for signature of the CFO.
Commission to review ~~ppa~~ for signature and
dispatch.

FILE LOCATION: ADAMS

DATE DUE: 05/17/2001 **DATE SIGNED:**

April 18, 2001

The Honorable Richard Meserve, Chairman
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852

SUBJECT: Appeal of NRC's RETRAN-3D Review Fee Decision

Dear Chairman Meserve:

This letter is an appeal to the Commission on a recent NRC staff decision to deny the request for a waiver of the 10 CFR Part 170 fees covering the staff's review of the RETRAN-3D safety analysis code. The waiver denial was communicated to EPRI in a letter from the NRC's CFO dated December 22, 2000.

For information, the following are attached: Attachment A, a chronology of this request, Attachment B, the complete Part 170 fee waiver criteria, Attachment C, an analysis of NRC Rationale for Denial of Fee Waiver, and Attachment D, a presentation on the issue (made to NRC management at a May 2, 2000 meeting).

EPRI has sought NRC approval of this review fee waiver for over two years; see Attachment A for details. The basis for the waiver request is the criterion listed in §170.21, Footnote 4, which states in part: "Fees will not be assessed for requests/reports submitted to the NRC ... as a means of exchanging information between industry organizations and the NRC for the purpose of supporting generic regulatory improvements or efforts;" see Attachment B for full text.

This Part 170 rationale is the same basis that EPRI and NRC have agreed to be appropriate for many other fee waivers over the last decade for EPRI documents submitted to NRC for review that support generic regulatory improvement. Examples include the ALWR Utility Requirements Document, BWR Vessel Internals Project (VIP) documents, generic digital I&C guideline documents, risk-informed ISI guideline documents, steam generator tubing inspection data and guideline documents, MOV performance prediction methods, and severe accident management guideline technical bases reports. NRC recently agreed to review another EPRI safety analysis code, MAAP-4 (used for severe accident analysis) under a waiver of Part 170 fees.

However, in the case of RETRAN-3D, NRC staff (CFO) has denied the request submitted on December 20, 1999 for a waiver of review fees. The CFO denial letter states that this code "... was not submitted to the NRC or reviewed by the NRC as a means of exchanging information between EPRI and the NRC for the purpose of supporting generic regulatory improvement or efforts."

In reviewing the circumstances of this request, we believe that the RETRAN-3D code:

1. will be used generically to benefit both industry and NRC through more accurate, best-estimate analysis capability for a broad range of reactor transient/accident conditions.
2. will be used for regulatory improvements or efforts, in particular to support risk-informing various aspects of 10 CFR Part 50 under Option 3 to SECY-98-300.
3. was submitted to NRC for the purpose of supporting generic regulatory improvements or efforts. The specific analysis proposed in my August 16, 2000 letter to Dr. Ashok Thadani, and agreed to by NRC staff, is prima facie evidence of this generic purpose.

Based on previous cases, it appears that the fee recovery regulations may not have been applied consistently. To date, the NRC staff has not articulated why fees for review of other generic requests/reports submitted to NRC by EPRI have been waived while the fees for this particular review are not being waived. Appendix C provides a summary of the various arguments that have been used as a basis for denial of the review fee waiver request in this case.

During meetings on May 2, 2000 with the offices of Nuclear Reactor Regulation (NRR) and Regulatory Research (RES) on this issue, EPRI agreed to provide more details on the specific generic regulatory improvements that were envisioned resulting from the use of RETRAN-3D. The analysis was provided in a White Paper to NRC on June 1, 2000. EPRI was subsequently asked by NRC to specifically commit to a particular analysis discussed in the White Paper as a necessary condition for approval of the fee waiver. This request was discussed with the EPRI NPC, and it was explained that a commitment of EPRI resources to a specific analysis, as recommended by NRC, should resolve the review fee issue. The NPC agreed to fund this commitment. The NRC denial letter was discussed with the NPC last month. It was a general understanding that the fee waiver conditions established on May 2 were valid.

The review fee charge to EPRI for RETRAN-3D, should this waiver not be approved, is over \$350K. This is a ten-fold increase over prior NRC review costs of equivalent generic products. These reviews cannot be planned and budgeted without a stable and consistent NRC policy--a policy that we believe should conform to Part 170 fee waiver criteria. Having to pay these large review fees will preclude the specific analyses that EPRI committed to NRC, as well as broader future safety code cooperation (e.g., recent agreement to support an NRC review of MAAP-4).

EPRI interprets the major intent of the Part 170 waiver criteria to be an encouragement to industry organizations to work cooperatively with the NRC on a generic basis to support regulatory improvement. This is exactly what EPRI (in its support to NEI) strives to do in its efforts related to NRC regulations. Anything that undermines this cooperation is counterproductive.

On March 2, 2000, Ralph Beedle (NEI) and I met with NRR senior management to discuss this matter. At the conclusion of that discussion, NRR committed to a follow-up discussion with us before a final letter was sent to EPRI with NRC's final decision. That discussion never occurred.

Dr. Richard Meserve
April 18, 2001
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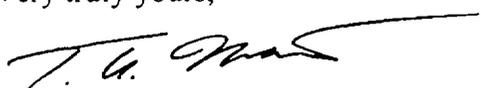
Prior NEI comments on Part 170 and Part 171 fees have made two points: (1) NRC should make its activities that result in fees to licensees more reviewable; and (2) NRC should not charge all licensees (via Part 171) for NRC activities related to contractors or single licensees (e.g., focused staff activities related to problems at a particular plant). It appears that NRC has interpreted these recommendations as inviting the shifting of generic activities out of a Part 171 fee basis into a Part 170 fee basis. Industry has never recommended such an approach and continues to support the Part 170 fee waiver criteria as currently written. NRC's PBPM system should enable tracking of staff activities charged under Part 171 just as easily as under Part 170.

In EPRI's June 1, 2000 White Paper and in my August 16, 2000 letter to NRC (Ashok Thadani), EPRI reiterated its desire to work cooperatively with RES on a specific safety analysis (PWR rod ejection analysis). Cooperation helps us avoid situations where NRC develops data to support its positions, and industry develops data to support their positions. We develop a common understanding of the technical issues and produce one set of jointly developed data for use by decision-makers. This is the cooperative approach agreed to in our RES-EPRI MOU. This is consistent with our comments provided to the special working group that you commissioned to review the RES Program.

The Part 170 waiver criteria benefit NRC and industry by encouraging cooperation, industry initiative, and generic approaches to issues, which reduce unnecessary resource demands on NRC and expedite resolution of issues on a generic basis. These attributes enhance regulatory efficiency and effectiveness. NRC's waiver denial runs counter to all these benefits.

I would appreciate the opportunity to discuss this appeal request in person with you and the other Commissioners at your earliest convenience. Thank you for your consideration of this request.

Very truly yours,



Theodore U. Marston
Vice President & Chief Nuclear Officer

TUM/bjr/9859L

c:	Commissioner Diaz	Sam Collins, NRR
	Commissioner Dicus	Ashok Thadani, RES
	Commissioner McGaffigan	Ralph Beedle, NEI
	Commissioner Merrifield	Bob Bishop, NEI
	William Travers, EDO	Greg Rueger, PG&E
	Jesse Funches, CFO	Gregg Swindlehurst, Duke

Attachments: A. Chronology of Correspondence and Events
B. Complete Citation from Part 170 of Generic Fee Waiver Criteria
C. Analysis of NRC Rationale for Denial of Fee Waiver
D. Presentation from 2 May 2000 meeting between EPRI and NRC management

Chronology of Correspondence and Events

1998

The initial review request was sent to NRC from G. Swindlehurst (Duke Power, Chairman, EPRI RETRAN Users Group) on July 8, 1998. That letter identified the generic use of the code for addressing emerging safety and licensing issues: "NRC review of RETRAN-3D is needed to advance the analytic capabilities of the industry in addressing emerging safety and licensing issues." However, it failed to specifically request fee exemption under §170.21 (4). Failure to explicitly request the waiver was an oversight. (As discussed in Attachment C, NRC has agreed this initial oversight should not impact the staff's fee waiver decision.)

NRC determined that the scope and detail of code documentation were sufficient for review and notified EPRI of NRC's acceptance of the code for review on December 4, 1998.

EPRI management assumed, following the July 1998 submittal letter, that the review would be done generically. However, on or before the date of the NRC acceptance letter in December 1998, it became clear to EPRI that review fees were going to be charged. A conference call was arranged for early January 1999 to provide the justification to NRC staff for a fee waiver.

1999

A conference call was held between EPRI and NRC staff on January 11, 1999, in order to request a waiver of fees per the criteria in Part 170. The omission of an explicit request for fee waiver in the July 1998 letter was discussed during that call. Review fee status could not be resolved on this call. NRC recommended that if EPRI wanted review fees waived, it should prepare and submit a formal waiver request, addressing various questions raised during the conference call.

EPRI's waiver request was prepared, reviewed with utility advisors, and submitted on April 22, 1999 by Jim Lang to NRC, addressed to Jesse Funches and James Wilson (EPRI PM in NRR). That letter referenced the January 11, 1999 conference call and provided information and rationale to address Part 170 waiver criteria and other issues raised by NRC staff during the January 11 call.

In response to a verbal request from the CFO's staff, EPRI provided NRC additional clarification of its waiver request in a letter dated July 7, 1999 from G. Vine to G. Jackson. The letter clarified that all industry organizations, as well as the public at large, have access to the extensive code documentation that has been placed in the NRC's Public Document Room. Further, the source code itself is made available to all U.S nuclear utility licensees. In addition, NRC, DOE, naval reactors, many universities, etc., have received royalty-free licenses for use of the current version of the code (RETRAN-02), upon request. RETRAN-3D availability will mirror these policies.

NRC's response was provided in a letter to EPRI dated August 27, 1999, signed by Jesse Funches, CFO. That letter denied the waiver request. NRC concluded that EPRI's request did not meet the Part 170 waiver criteria because "Although the code may be used on occasion to support generic effort to resolve issues, it is more likely to be used on an individual plant basis."

EPRI discussed the issue with NEI and with EPRI's Nuclear Power Council and concluded that an appeal for reconsideration of NRC's decision may be appropriate. In order to ensure all the issues were understood, NEI requested that this matter be placed on the agenda for the next public meeting between NRC and NEI management (November 17, 1999). During the discussion, NEI noted that industry sensed that the staff's interpretation of its fee waiver criteria had changed. Mr. Funches assured industry that the staff position on fee waivers had not changed. He then offered a further explanation for the EPRI waiver denial: If the initial purpose of the submittal was to support individual licensee applications as opposed to generic applications, then the waiver would be denied because that initial intended purpose (non-generic) would govern NRC's fee waiver decision, even if the eventual use of the code turned out to be primarily generic.

During that November 17, 1999 NRC-NEI meeting, EPRI informed NRC that it would be requesting reconsideration of the CFO decision. Jesse Funches responded that NRC would welcome another letter with more information on the generic regulatory uses of RETRAN-3D. Following that meeting, EPRI (G. Vine) contacted NRC-CFO (D. Dandois) at the CFO's request regarding the need for a written request from EPRI to suspend debt collection follow-up (interest accrual) for outstanding invoices. EPRI provided this suspension request in an e-mail dated November 18, 1999.

Based on the latest information from NRC management regarding its rationale for denial of the fee waiver request, EPRI (Dr. Robin Jones [then VP Nuclear and CNO]) sent a letter to NRC (Mr. Jesse Funches and Mr. John Zwolinski) dated December 20, 1999 requesting reconsideration, with an expanded discussion of the relevant issues and a more complete rationale for the waiver.

2000

On March 2, 2000, Ted Marston (the new CNO at EPRI) and Ralph Beedle conducted a drop-in visit with NRR during which the RETRAN-3D fee issue was discussed. During the discussion, NRR pointed out that a number of technical issues have arisen in the technical review which Ted Marston agreed to investigate. Also agreed to was a presentation to NRR and RES management on RETRAN-3D issues including waiver issues. At the end of the March 2 meeting, NRR committed to a follow-up discussion with EPRI & NEI before a final letter was sent to EPRI with NRC's final decision.

The EPRI presentation to NRC management requested on March 2 was conducted on May 2, 2000. This was a public meeting; NEI was also present. The senior NRC person present was Brian Sheron. EPRI (Marston, Vine) showed how RETRAN-3D would be used generically for regulatory improvement. EPRI and NRC discussed the many prior precedents for waiver of review fees for generic EPRI products. EPRI also made the case that waiving fees for generic

industry products encourages industry initiative and standardization and allows for more efficient use of both NRC and industry resources. NRC acknowledged that the reference to “industry organizations” in the Part 170 fee waiver criteria most certainly applied to organizations like NEI and EPRI. However, NRC concluded that although EPRI showed that RETRAN-3D might very well be used for regulatory improvements or efforts, there was no guarantee for such use. Even though 10 CFR 170 waiver criteria do not require this guarantee, NRR requested that EPRI and RES consider developing a plan for a specific application of RETRAN-3D as a demonstration of its use in regulatory improvement. RES and EPRI agreed to support this request. EPRI agreed to develop a White Paper that would investigate the options and identify a particular example analysis of interest to both NRC and industry.

On June 1, 2000, EPRI submitted a White Paper to RES, “Anticipated Analysis Tools, Models, and Data Needs for Use in Risk-Informed Regulatory Initiatives.” Subsequent discussions between EPRI and NRC regarding the contents of this White Paper showed that NRC staff was generally satisfied with the White Paper. However, as a precondition to approval of the fee waiver, NRC wanted a formal commitment from EPRI stating its intent to follow through with the example analysis proposed in the White Paper (PWR rod ejection accident).

EPRI (T. Marston) sent a letter to NRC RES (A. Thadani) dated August 16, 2000. EPRI’s August 16, 2000 commitment letter to this analysis was sent following extensive discussions with advisors and NEI. The letter specifically suggested that EPRI and RES explore options for working cooperatively on this effort, as provided for in the RES-EPRI MOU.

At that point, EPRI had satisfied every request and every condition imposed by senior NRR management and senior RES management for approval of the fee waiver.

On December 22, 2000, the NRC (CFO) sent a letter to EPRI (R. Jones) denying the waiver request. (Note this letter was incorrectly addressed to R Jones as EPRI’s Nuclear Vice President and CNO. Ted Marston became EPRI’s Nuclear Vice President and Chief Nuclear Officer in January 2000. EPRI’s August 16, 2000 letter that is cited in NRC’s December 22 letter was signed by Marston).

Copies of all of the above referenced documents are available on request.

Complete Citation from Part 170 of Generic Fee Waiver Criteria

The regulatory basis for granting an exemption from review fees is footnote 4 to the Special Projects fee category in the table presented in 10 CFR 50.170.21, which says:

[footnote] "4. Fees will not be assessed for requests/reports submitted to the NRC:

1. In response to a Generic Letter or NRC Bulletin that does not result in an amendment to the license, does not result in the review of an alternate method or reanalysis to meet the requirements of the Generic Letter, or does not involve an unreviewed safety issue;
2. In response to an NRC request (at the Associate Office Director level or above) to resolve an identified safety, safeguards, or environmental issue, or to assist NRC in developing a rule, regulatory guide, policy statement, generic letter or bulletin; or
3. As a means of exchanging information between industry organizations and the NRC for the purpose of supporting generic regulatory improvements or efforts."

Analysis of NRC Rationale for Denial of Fee Waiver

This attachment analyzes the NRC rationale for denial of fee waiver in greater detail. It is divided in two sections. The first section reviews each of the arguments against granting the fee waiver and how each was dispositioned. The second section quotes and responds, point by point, to the text from the letter from Jesse Funches to Robin Jones dated December 22, 2000.

Review of Historic Arguments against Granting Fee Waiver

1. Generic Applicability

RETRAN is a nuclear systems analysis code that is tailored for PWR and BWR applications but has also been adapted for use in non-LWR applications (e.g., RBMKs). Specifically, 49 U.S. utilities and about 20 international organizations have used RETRAN-02, as reflected in published papers, NRC submittals, and EPRI RETRAN User Group membership. In 1998, 18 utilities, representing over half of the nation's nuclear power plants, expressed support for obtaining NRC review of RETRAN-3D. These utilities were listed in the July 8, 1998 letter. Some of these utilities are already using RETRAN-3D, and applications of RETRAN-3D have been submitted or are planned by some of these organizations to take advantage of the new models. EPRI expects that the other U.S. utilities and many international utilities will migrate to RETRAN-3D now that the NRC has issued an SER on the code.

This issue was raised in early 1999 but is no longer an open question with NRC staff.

2. Generic Availability

In addition to broad public access to RETRAN documentation via the NRC's Public Document Room (PDR), the source code itself, although maintained proprietary for configuration control and other purposes, is made available to all U.S. nuclear utility licensees. All nuclear utilities except one are members of EPRI and have free access to the source code. The one non-member domestic utility has access to the source code on the basis of an additional charge they pay for EPRI products. The generic process for granting access to EPRI products by non-members was developed in coordination with NEI and agreed to by all nuclear utilities.

In addition, NRC, DOE, naval reactors, many universities, etc., have received royalty-free licenses for use of the current version of the code (RETRAN-02). Most non-licensee code users are provided with the source code, under obligations such as commitments to configuration control and code maintenance, restrictions on further dissemination for commercial purposes, etc. The only current exception to source code access relates to certain foreign nations due to U.S. government export control restrictions. All of these practices will apply to the new code.

This issue was raised in early 1999 but is no longer an open question with NRC staff, since it is not directly relevant to the fee waiver criteria. This issue was essentially resolved by NRC's initial acceptance of the code for review (at which time issues associated with adequate technical content of submission were resolved). EPRI's July 7, 1999 letter addressed/resolved this issue.

3. “Generic Regulatory Improvements or Efforts” (per waiver criteria as stated in Part 170)

RETRAN-02, (prior approved code) has been used to evaluate generic regulatory issues such as:

- BWR turbine trip induced power excursion
- BWR ATWS and water level control
- PWR natural circulation under degraded core conditions
- Chernobyl-like positive moderator coefficient effects
- BWR in-phase stability
- BWR shroud lift
- PWR SG tube rupture
- PWR pressurized thermal shock

The 9 international RETRAN conference proceedings document about 300 technical papers, many of which testify to the widespread and continuing use of RETRAN for generic studies.

RETRAN-3D has very broad capability to simulate plant response at all power levels and over the full spectrum of DBA (except LBLOCA) and some beyond-DBA events, including complex core transients. These capabilities go beyond those of the approved RETRAN-02 code and most other codes, primarily because RETRAN-3D uses 3-D kinetics, whereas RETRAN-02 uses point or 1D kinetics. This allows for a much more realistic, best-estimate approach to safety analysis. This capability for more realistic analysis is critically important to risk-informing the regulations. Increased realism is a key objective put forth by the Commission. RETRAN-3D will be used to analyze all operational transients, i.e., all Chapter 15 events except LBLOCA, such as BWR Control Rod Drop, PWR Rod Ejection, and PWR Steam Line Break. It also will be used to address generic safety concerns such as boron dilution and full/partial ATWS events, and low-power and shutdown cooling modes in various outage configurations

RETRAN-3D will be used in a substantial way by EPRI, EPRI contractors, and others to support regulatory reform activities, including efforts toward realistic, risk-informed regulation. The primary applications would include generic safety analysis, analysis of technical requirements that will be examined under “Option 3” to risk-inform 10 CFR Part 50, and pilot plant applications of various proposed risk-informed regulatory improvements and initiatives. Finally, EPRI also anticipates efforts by many organizations toward risk-informing the regulations for purposes of licensing advanced reactor designs, which will often involve using RETRAN-3D.

NRC staff has generally accepted that RETRAN-3D will be used “for the purpose of supporting generic regulatory improvements or efforts.” However, the CFO has imposed caveats on this regulatory basis for waiver of fees that allow it to be interpreted in a more restrictive manner.

4. Exchanging Information Between Industry Organizations and the NRC

Some arguments were offered in 1999 that EPRI should be treated like a commercial vendor. However, NRC staff concluded during the May 2, 2000 meeting that EPRI (and NEI) certainly qualify as “industry organizations” as intended in the waiver criteria.

5. CFO Caveats to “Generic Regulatory Improvements or Efforts” (as stated in Part 170)

The requirement for a waiver under Part 170 is that the submittal serve “...as a means of exchanging information between industry organizations and the NRC for the purpose of supporting generic regulatory improvements or efforts.” The regulation does not stipulate that NRC must request the information, or, in cases where a submittal will serve both generic and individual plant needs, that “generic regulatory” use must meet more restrictive criteria, implied by such terms as “most likely use,” “primary use,” or “initial use.”

However, the CFO does not agree. He has offered a number of different interpretations of Part 170 over the course of the last 18 months, some of which he has abandoned and others that he still holds as appropriate.

5a. 1999 Caveats and Interpretations of Part 170 that NRC has Subsequently Abandoned:

The NRC must request the industry submittal: This caveat is not required by the waiver criteria. The third waiver criterion allows for unsolicited, proactive industry proposals. It is neutral regarding which organization identifies the need for, or value of, a submittal. It might be argued that the second waiver criterion stipulates that NRC must request the application, but the CFO agrees this is not a relevant consideration, since the three criteria are joined by an “or.”

The NRC must intend to use the product for its own use: This caveat is not required by the waiver criteria. Even if it was, both history and the cooperative nature of the current proposal for application of RETRAN-3D suggest this caveat would be met. NRC and NRC contractors have used the prior RETRAN-02 version of the code for “generic regulatory improvements or efforts.” They have done so both as direct users of the code and as reviewers of industry usage. In the same vein, RETRAN-3D will be licensed for similar future use upon NRC request. Moreover, the RETRAN-3D era will likely far exceed the RETRAN-02 era in terms of the volume of generic regulatory improvements that are likely to be evaluated and pursued.

“More likely use...”: The CFO’s August 27, 1999 letter denying a fee waiver for RETRAN-3D argued that the EPRI request did not meet the Part 170 waiver criteria because “Although the code may be used on occasion to support generic effort to resolve issues, it is more likely to be used on an individual plant basis.” EPRI’s response letter, dated December 20, 1999 corrected this misunderstanding and also pointed out that the Part 170 criteria say nothing about “more likely use” or “primary use,” or “initial use,” or any other new qualifiers as might be formulated by the CFO to interpret the regulation in more restrictive ways. In the CFO’s December 22, 2000 letter, the argument about “more likely use” was dropped in favor of an “initial purpose” argument.

Also in its December 20, 1999 letter, EPRI argued that no organization can predict what fraction of either the initial or ultimate use of RETRAN-3D will be generic vs. plant-specific. This depends on how aggressively NRC and industry pursue efforts to risk inform the regulations and to apply risk insights to resolution of generic issues (including those not yet identified).

Plant-specific applications disqualify generic applications: The argument was offered in the NRC-NEI senior management meeting on November 17, 1999 that if the initial purpose of the submittal was to support individual licensee applications as opposed to generic applications, then the waiver would be denied because that initial intended purpose (non-generic) would govern NRC's fee waiver decision, even if the eventual use of the code turned out to be primarily generic. A similar argument was raised during the May 2, 2000 meeting, suggesting that if a computer code is used for plant-specific applications, then it does not qualify for "generic use." In reality, most products used for regulatory improvement have both plant-specific and generic uses. Sometimes generic use precedes plant-specific use (e.g., in cases where an issue is addressed and resolved generically first, followed by plant-specific implementation of generic guidance). Sometimes plant-specific use precedes generic use (e.g., in cases where a pilot application of an issue resolution is evaluated first, prior to finalizing generic guidance.)

Ultimately, most generic analysis tools are also used on a plant-specific basis at implementation. NRR uses the number of plant-specific applications of an approved generic product or topical as a measure of the success of that product and a vindication of the NRC resources applied to its review and approval.

Lack of Proper Identification of Waiver Request in Original July 1998 Letter: The only instance in which EPRI did not explicitly make it clear to NRC that a fee waiver was being requested was in the initial review request to NRC from G. Swindlehurst (Duke Power, Chairman, EPRI RETRAN Users Group) on July 8, 1998. That letter identified the generic use of the code for addressing emerging safety and licensing issues, but failed to specifically request fee exemption under Part 170.21 (4). Failure to explicitly request the waiver was a clear oversight.

EPRI personnel assumed for some time that the review was going to be done generically. NRC determined that the scope and detail of code documentation were sufficient for review and notified EPRI of NRC's acceptance of the code for review on December 4, 1998. Later in December 1998, it became clear to EPRI that review fees were going to be charged, so a conference call was arranged in early January 1999 to provide the justification to NRC for a fee waiver. The omission of an explicit request for fee waiver in the July 1998 letter was discussed during that call. Review fee status could not be resolved on that call, so the April 22, 1999 waiver request letter was sent.

Following the November 17, 1999 public meeting between NRC and NEI management, EPRI (G. Vine) contacted NRC-CFO (D. Dandois) at the CFO's request regarding the need for a request from EPRI to suspend debt collection follow-up (interest accrual) for outstanding invoices. During that call, Ms. Dandois noted that EPRI would need to formally appeal the August 1999 denial. Vine again raised the issue of the July 1998 letter that did not contain an explicit request for fee waiver, to make sure this one omission would not be used to override any further formal appeals. Ms. Dandois assured EPRI that this error would not govern NRC's decision--that the CFO's decision would be based on the law and the merits of the case made.

On March 2, 2000, Ted Marston and Ralph Beedle conducted a drop-in visit with NRR on the fee issue. During the discussion, NRR pointed out that a number of technical issues had arisen in the technical review. Marston acknowledged these issues and also acknowledged EPRI's failure

to properly request in writing a waiver of review fees on the initial request for review in July 1998. NRR accepted Marston's apology for this oversight and remarked that the fee waiver issues are predominantly policy and philosophy-dependent. NRR committed to a follow-up discussion before a final letter was sent to EPRI with NRC's final decision.

Again on May 2, 2000, during the public meeting with NRC on the RETRAN-3D fee waiver issue, Marston again acknowledged the oversight of not explicitly requesting a fee waiver in the July 1998 letter. During the EPRI presentation on the various fee waiver issues, this omission was discussed in the context of EPRI's position that its lapse should not become a basis for not granting fee waiver and that NRC's decision should be based on the merits. The position of the CFO's office that the waiver decision should be based on the merits (i.e., whether or not RETRAN-3D would be used to support generic regulatory improvements or efforts, irrespective of the July 1998 letter) was discussed and agreed to by NRR and RES. Representatives of the CFO Office were present for this discussion and did not object to the conclusion that the fee waiver decision should be based on the merits of the case presented, not on the July 1998 lapse.

EPRI believes this issue is closed. No one on NRC staff is making the argument that this fee waiver decision should not be made based on the merits of the case presented, given everything NRC knows today. No one is saying that the waiver request was disapproved because of the omission of a specific reference to the Part 170 waiver criteria in the original July 8, 1998 letter.

5b. Remaining Caveat and Interpretation of Part 170 that the CFO Still Holds as Appropriate:

The CFO's letter of denial dated December 22, 2000 drops the attempt to impose a new restrictive "more likely use" interpretation of Part 170 waiver criteria, but now adopts another interpretation of the regulation, that of "initial purpose." The December 22, 2000 letter appears to make the argument that EPRI submitted the code for review for a purpose different than the eventual use of the code (a distinction not made in the regulations). No facts are presented to support this assertion. In response, EPRI reiterates that the initial purpose, the current purpose, the future purpose, and the intended use for submitting RETRAN-3D for review have not changed and remain what they were two years ago: "supporting generic regulatory improvements or efforts."

The exact implementation details of a particular industry report are seldom known with complete accuracy at the time of submittal for review. Virtually all reports submitted to NRC with a generic purpose end up serving plant-specific purposes as well. Sometimes, the generic approval precedes any plant-specific applications. In other cases, a pilot application might be used to learn more about how implementation will work in practice prior to NRC approval of the generic report. Surely, the Commission did not intend that one of these scenarios deserves a fee waiver and the other does not. Similarly, one can envision cases where all the future applications of a submittal would not be fully appreciated by industry or NRC at the time of submittal. It is theoretically possible that in the course of review of an industry organization submittal that either that organization or the NRC or both might identify eventual uses that are different than those originally intended, despite the best judgments of both organizations about the merits of a particular submittal prior to the review. In other cases, some intended purposes of a submittal may not work out as intended. Surely, the NRC did not intend that a fee waiver would be voided

later in the review process if such changed insights develop. EPRI is not aware of any prior precedents for such hair-splitting distinctions being made in a fee waiver decision. These arguments were never raised before in the many cases when EPRI was granted a fee waiver.

Point-by-Point Analysis of NRC's December 22, 2000 Letter

The arguments in the NRC letter dated December 22, 2000 that support NRC's decision to deny the fee waiver are contained in the first and third paragraph on the second page of that letter. Following are direct quotes from the letter, in italics, followed by EPRI comment and analysis.

The first paragraph on the second page of the NRC letter is immediately preceded, at the bottom of the first page, by a quotation from the relevant regulation, 10 CFR 170.21. Footnote 4 of that paragraph in the regulation cites three specific conditions for which fees will not be assessed. Note that the three conditions are joined by an "or", meaning that meeting any one of the three conditions is sufficient to waive the fee:

[Footnote] *"4. Fees will not be assessed for requests/reports submitted to the NRC: ... 3. As a means of exchanging information between industry organizations and the NRC for the purpose of supporting generic regulatory improvements or efforts."*

"As indicated by the above, the waiver criteria relate to the purpose for which the report is submitted and reviewed, not to the eventual use of the topical report."

This extremely fine distinction is a significant extrapolation of the regulation that is not in the text, was not articulated by the Commission, and implies an illogical interpretation of the law. EPRI questions the basis for NRC claiming "As indicated by the above..." since the preceding text does not indicate any such differentiation. Under what condition would an industry organization submit a request/report to NRC (or would NRC accept a request/report from industry) in which the intended purpose (supporting generic regulatory improvements or efforts) did not match the intended eventual use (supporting generic regulatory improvements or efforts)?

If the purpose of this distinction between intended purpose and eventual use is to assert that EPRI did not intend, when submitting RETRAN-3D for review, that it would be used for the purpose of supporting generic regulatory improvements or efforts, then EPRI challenges that assertion, as discussed below. Also see discussion above under 5b.

"This is supported by the history associated with the development of the waiver provision. In the FY1994 proposed fee rule (May 10, 1974; 59 FR 24067), the NRC solicited public comment on its proposal to waive the Part 170 review fees for certain requests or reports submitted to the NRC. In the statement of considerations for the proposed rule, the NRC stated:

These reports, although submitted by a specific organization, support NRC's development of generic guidance and regulations (e.g., rules, regulations, guides and policy statements), and the resolution of safety issues applicable to a class of licensee such as those addressed in generic letters."

Contrary to the NRC assertion, there is nothing in these words or in the history of the fee rule that supports any distinctions between intended purpose and eventual use. Not only is the CFO misinterpreting the regulations and their history, but the specific quote from the statement of considerations, in its context, serves only to introduce the waiver criteria previously discussed which, as previously shown, stipulate no such distinctions.

“The RETRAN-3D reactor safety analysis code was not submitted to the NRC or reviewed by the NRC as a means of exchanging information between EPRI and the NRC for the purpose of supporting generic regulatory improvements or efforts.”

This assertion is not supported by any argument or evidence. EPRI has made it clear in each of the following instances that a major intended purpose of EPRI’s submittal of the RETRAN-3D code was to support generic regulatory improvements or efforts, thereby warranting a waiver:

- Conference call between EPRI and NRC staff on January 11, 1999
- EPRI (J. Lang) letter to NRC (J. Funches and J. Wilson) dated April 22, 1999
- EPRI (G. Vine) comments during NRC-NEI management meeting, November 17, 1999
- EPRI (R. Jones) letter to NRC (J. Funches and J. Zwolinski) dated December 20, 1999
- EPRI (T. Marston) comments during T. Marston and R. Beedle visit with NRR, March 2, 2000
- EPRI (T. Marston and G. Vine) presentation to NRC during public meeting on review fee issues, May 2, 2000
- White Paper, “Anticipated Analysis Tools, Models, and Data Needs For Use in Risk-Informed Regulatory Initiatives,” submitted to NRC-RES on June 1, 2000
- EPRI (T. Marston) letter to NRC (A. Thadani) dated August 16, 2000

In fact, the only outstanding obstacle following the May 2, 2000 public meeting to a waiver of review fees was the position taken by NRR (Sheron) that EPRI’s case for use of RETRAN-3D for regulatory improvement was too general, and that a specific generic implementation plan was needed to justify a fee waiver. NRR was willing to accept a waiver of review fees if EPRI would provide, via a plan developed jointly with RES, a better definition and analysis of specific (e.g., pilot) applications showing how RETRAN-3D would be used for regulatory improvement. EPRI agreed to produce a White Paper to answer this question, and a draft was provided to RES on June 1, 2000. After further discussion, it was agreed that the fee waiver could be justified if EPRI provided a commitment letter to execute a specific best-estimate analysis of a transient or accident condition that serves as a regulatory or licensing design requirement for U.S. plants.

In response to NRC’s specified conditions for a fee waiver, EPRI committed to conduct a best estimate analysis of PWR rod ejection accidents. This transient was suggested by RES on May 2, 2000, and fit well with the capabilities of RETRAN-3D. EPRI’s commitment letter (August 16) to this analysis was sent following discussions with advisors and NEI. The letter specifically suggested that EPRI and RES explore options for working cooperatively on this effort.

“EPRI requested that NRC review and approve the code, presumably so that the code could be used in the future.”

If the point of this sentence is to object to “future use,” then NRC should explain how EPRI could use a request/report submitted to NRC for review before it is approved by NRC.

“Use of the code by EPRI or other organizations to support their positions in the resolution of generic issues is not a basis to waive the Part 170 fee for review and approval of the code.”

EPRI and RES signed an MOU in 1997 that expressed their mutual commitment to cooperation in R&D and to reducing the duplication of industry and NRC efforts on resolution of generic issues. The Commission has fully supported this commitment to cooperation in the R&D, data-gathering, scientific phase of issue resolution. Cooperative efforts between EPRI and RES are to end when data are complete and ready to turn over to NRR and NEI for interpretation and issue resolution.

In EPRI’s June 1, 2000 White Paper and in EPRI’s August 16, 2000 letter to NRC (Thadani), EPRI reiterated its desire to work cooperatively with RES on the proposed rod ejection analysis effort. Cooperation helps us avoid situations where NRC develops data to support its positions, and industry develops data to support their positions. We develop a common understanding of the technical issues and produce one set of jointly developed data for use by decision-makers.

In a November 29, 2000 T. Marston letter to Comm. McGaffigan concerning RETRAN-3D technical issues, EPRI again emphasized its desire to work cooperatively with NRC on joint code efforts:

“EPRI and NRC have both explored the means by which our codes can become even more realistic, while pursuing the equally important goal of code integration. These efforts will require time and resources. Ashok Thadani and I have had some initial discussions regarding how we might cooperate on these efforts should we be successful in identifying and securing sufficient resources for success.”

Given this spirit of mutual cooperation, it is inappropriate for the CFO to imply that this code would be used to support industry positions [against NRC].

“We appreciate your offer to use the code to perform analysis in support of risk-informing the 10 CFR Part 50 technical requirements. However, that effort is not a basis to grant a fee waiver for the review of the RETRAN-3D computer code, since it occurred after the code was reviewed and does not affect the purpose for which the code was submitted and reviewed.”

This is problematic in two respects. First, NRC and EPRI made an informed and mutually agreeable decision in early 1999 to continue the review while efforts to resolve the fee waiver issue proceeded in parallel. NRC and EPRI made a conscious decision to not stop the review while resolving the fee waiver issue, with an understanding that this would not prejudice the fee decision. Doing so would have caused a loss of two years of NRC review efforts and industry-NRC interactions on this code.

Second, the proposed rod ejection analysis clearly “affects the purpose for which the code was submitted and reviewed,” because it confirms the purpose for which the code was submitted:

supporting generic regulatory improvements or efforts. Further, it was NRC that requested the specific analysis proposed in EPRI's August 16, 2000 letter. The understanding EPRI had with NRC when this proposed analysis was offered in a commitment letter to NRC was that this work would give NRC the basis it needed to approve the fee waiver. EPRI invested a significant amount of resources in developing the proposal and seeking utility support for this initiative. EPRI obtained unanimous utility executive concurrence to this initiative from all its members via the EPRI Nuclear Power Council. EPRI and the nuclear utilities view the CFO's decision to deny the fee waiver as renegeing on NRC's proposed basis for resolving the fee waiver issue.



Resolution of NRC Review Fee Issue for RETRAN-3D

Ted Marston
Gary Vine

May 2, 2000

RETRAN-3D/NRC 1

EPR2

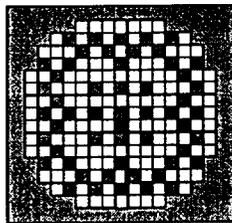


Industry Standard Analysis Tools

Fuel → Core → System → Containment



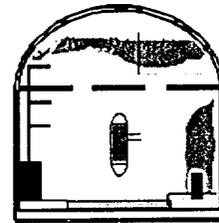
CPM-3
Lattice
Physics



CORETRAN
Core Physics
Simulator

System

RETRAN
System
Response



GOTHIC
Containment
Analysis

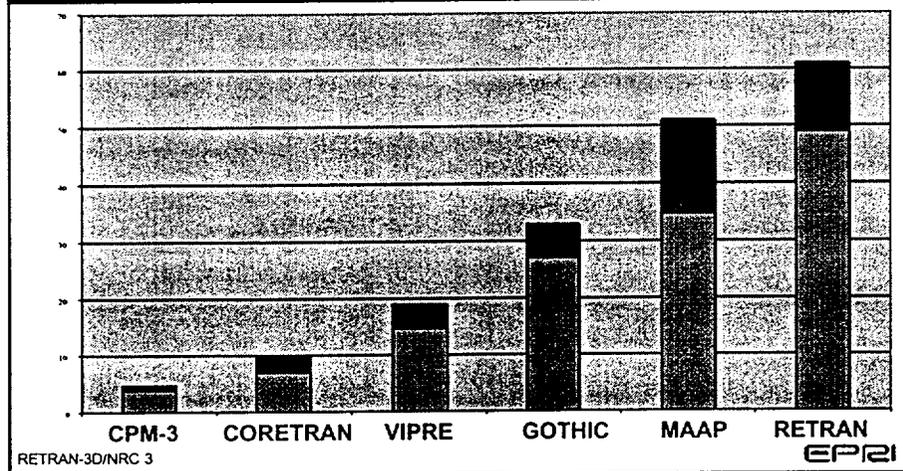
MAAP
Severe
Accidents

RETRAN-3D/NRC 2

EPR2



Number of Organizations Using EPRI Codes

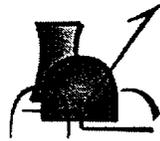


Basis for Waiver: Part 170

- The regulatory basis for granting an exemption from review fees is footnote 4 to the Special Projects fee category in the table presented in 10CFR50.170.21, which says:
- [footnote] "4. Fees will not be assessed for requests/reports submitted to the NRC:
 1. In response to a Generic Letter or NRC Bulletin that does not result in an amendment to the license, does not result in the review of an alternate method or reanalysis to meet the requirements of the Generic Letter, or does not involve an unreviewed safety issue;
 2. In response to an NRC request (at the Associate Office Director level or above) to resolve an identified safety, safeguards, or environmental issue, or to assist NRC in developing a rule, regulatory guide, policy statement, generic letter or bulletin; or
 3. As a means of exchanging information between industry organizations and the NRC for the purpose of supporting generic regulatory improvements or efforts."

RETRAN-3D/NRC 4

EPRI

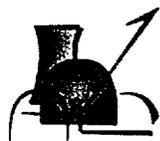


Intent of Fee Waiver Criteria: “...Generic...”

- **RETRAN is clearly generically applicable**
 - Essentially all U.S. licensees use RETRAN today
- **Problems with restrictive interpretations (“initial use,” “most likely use,” etc.):**
 - Not required by regulation
 - Implementation details not known at time of submittal
 - If generically applicable, then regulatory criterion met. A plant specific application should not become basis to disqualify
 - If generic use required to precede plant specific uses, then pilot applications are problematic
 - Generic applicability never an issue with ALWR, RI-ISI, etc.
- **Long standing NRC practice of waiving fees for generic product, charging fees for plant specific applications**

RETRAN-3D/NRC 5

EPRI

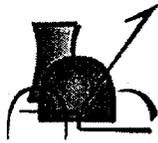


Intent of Fee Waiver Criteria: “...regulatory improvements or efforts...”

- **RETRAN will be used for reg. improvements:**
 - Long history of reg. use of RETRAN-02 (GSIs, etc.)
 - NRC and NRC contractors have used RETRAN
 - Risk-informed regulation requires realistic tools
 - Non-physical results can distort RIR
 - Analysis supporting RIR needs to be best estimate
 - **RETRAN-3D will be a primary source of best estimate analysis and insights for both Option 3 and GSIs**
 - Important element in implementing Option 3: best estimate DBA and transient analyses
 - GSIs: ATWS, BWR stability, mid-loop ops., etc.

RETRAN-3D/NRC 6

EPRI



Intent of Fee Waiver Criteria: “...regulatory improvements or efforts...”

- Part 170 exemption criterion is neutral on issue of which organization identifies the need:
 - “As a means of exchanging information between industry organizations and the NRC for the purpose of supporting generic regulatory improvements or efforts”
 - Doesn't say “...if requested by NRC...”; “...if NRC intends to review the product for its own use...”, etc.
 - Regulation allows for unsolicited, proactive industry proposals

RETRAN-3D/NRC 7

EPRI



Issues that are Resolved and/or Irrelevant to Fee Decision

- **Technical Quality of Submission**
 - Judged adequate when accepted for NRC review
 - RAI process being used to resolve staff/ACRS issues
- **EPRI did not properly identify its request for waiver of review fees in its initial submittal**
 - True. EPRI has acknowledged this to NRR
 - EPRI's lapse should not become basis for not granting fee waiver. Decision should be based on the merits
- **Proprietary issues**
 - EPRI has provided strong case for broad access
 - Matter is not relevant to fee waiver decision

RETRAN-3D/NRC 8

EPRI

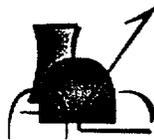


Prior Practice and Precedent

- **NRC has waived review fees for:**
 - NEI (and prior NUMARC) submittals
 - EPRI products submitted by NEI to NRC, e.g.,:
 - SAM Guidelines technical basis report
 - MOV Performance Prediction Methods
 - SGMP documents supporting NEI 97-06
 - Generic EPRI products, including:
 - ALWR Utility Requirements Document
 - BWR VIP documents; other SGMP documents
 - RI-ISI Generic methodology
 - Generic digital I&C guideline documents
- **Industry concerned that policy and legal interpretation have changed**

RETRAN-3D/NRC 9

EPRI



Incentives; Common Objectives

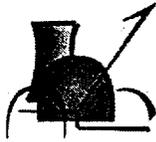
- **Incentives and Benefits, given an industry submittal that industry views as meeting “generic regulatory improvements or efforts” criterion:**

	NO WAIVER	GRANT WAIVER
NRC	NONE	MAJOR
INDUSTRY	NONE	MAJOR

Both NRC and industry benefit from appropriate granting of review fee waiver

RETRAN-3D/NRC 10

EPRI



Incentives; Common Objectives

- **Granting waiver is “revenue neutral” to NRC**
- **Fees impediment to generic code development**
- **Benefits of granting fee waiver:**
 - **Encourages industry initiatives**
 - **Engages stakeholders in regulatory improvements**
 - **Encourages generic approaches**
 - **Reduces unnecessary resource demands**
 - **Expedites resolution of issues**
 - **Enhances regulatory efficiency and effectiveness**