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ADJUDICATIONS STAFF

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ATTN: Rulemaking and Adjudication Staff

Subject: Comments on Federal Register Notice (67 Fed. Reg. 14818, March 27, 2002),
Proposed Rules: "Revision of Fee Schedules; Fee Recovery for FY 2002,"

This letter provides EPRRI's comments on the NRC's proposed changes to Part 170, "Fees for Facilities, Materials, Import and Export Licenses, and other Regulatory Services Under the Atomic Energy Act of 1954, As Amended." Our comments are focused on one aspect of the proposed changes to Part 170 – the review fee waiver policy (§170.11(a)(1) [formerly §170.21, Footnote 4]).

EPRRI believes that the changes made to NRC's fee waiver policy in FY2001, and the further changes being proposed for FY2002, discourage cooperative efforts between NRC and industry to address safety issues and opportunities for generic regulatory improvement. Further, EPRRI believes these changes are inconsistent with the NRC's goals to improve regulatory efficiency, effectiveness, to reduce unnecessary burden on stakeholders, and to promote increased realism in regulatory decision-making. Prior to these changes, NRC's fee waiver policy supported NRC's and industry's mutual interests to cooperate on generic regulatory improvement. The new changes provide disincentives by imposing unwarranted obstacles discouraging industry initiative and mutual cooperation.

This letter summarizes five key areas that we believe constitute defects in the current NRC proposal, and provides a set of recommendations to resolve those problems. The five areas are:

1. Purpose and precedent for the third waiver criterion ("*As a means of exchanging information between industry organizations and the NRC for the purpose of supporting NRC's generic regulatory improvements or efforts.*")
2. Commission policies on "Role of Industry" and industry initiative in the regulatory process
3. No waivers unless staff requests an item or industry input gets used in regulatory guidance: the "Role of Industry" and timing problems
4. No waivers for submittals that benefit industry
5. Budget considerations: Revenue-neutral to NRC; major burden on industry

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Purpose and Precedent for the Third Waiver Criterion:

The third Part 170 exemption criterion, as stated (*"As a means of exchanging information between industry organizations and the NRC for the purpose of supporting NRC's generic regulatory improvements or efforts."*) is neutral on the issue of which organization identifies a need and/or makes an initial request for consideration of a potential regulatory improvement. The history of the fee rule, up to 1999/2000, shows that NRC allowed for fee waivers for unsolicited proposals by industry organizations (e.g., EPRI) for generic regulatory improvement.

The first two Part 170 criteria are specific to NRC-initiated activities (criterion (i) addresses industry responses to generic letters and bulletins; criterion (ii) covers specific NRC requests to resolve an issue or to assist in developing a rule, reg. guide, generic letter, etc.) Only one of the three criteria need to be met for a fee waiver. However, criterion (iii) differs from the first two, in that NRC does not have to initiate a request to industry, and so that it is not linked to a specific NRC communications vehicle or regulatory guidance document. Since 1999, criterion (iii) has been interpreted with caveats that aren't part of the rule (e.g., "...only if requested by NRC..." and "...only if NRC intends to review the product for its own use..., and more recently, only if it benefits the NRC more than the industry"), resulting in inappropriate waiver denials.

In the FY2001 Fee Rule, NRC inserted the word "NRC's" in the third fee waiver criterion. On the surface this change appeared insignificant, since the rule clearly applies to the "U.S." NRC. However, interpretation of this change was problematic, because it rationalized the NRC to deny fee waivers for proactive industry initiatives:

- (1) It attempted to distinguish between fee waiver requests based on the industry's future use of the reports, in contrast to reports being submitted, reviewed, and approved for the purpose of NRC's generic regulatory improvements.
- (2) It cited a sentence from the statement of considerations for the FY 1994 fee rule that discusses NRC's development of generic guidance and regulations.

In the Proposed FY2002 Fee Rule, NRC goes further in establishing barriers to unsolicited proposals by industry for generic regulatory improvement, as discussed below.

These interpretations are inconsistent with the history of the fee rule and the many generic industry initiatives developed and submitted to NRC for review without fee, prior to 1999. NRC has now started denying EPRI's fee waiver requests for generic products submitted for the purpose of supporting generic regulatory improvement (e.g., RETRAN-3D computer code; Electro-magnetic Interference guidance).

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Commission Policies on "Role of Industry" and Industry Initiative in the Regulatory Process

The NRC views on industry initiatives (as reflected in the relevant SECYs, SRMs, public meeting presentations, etc.) consistently recognize the increased efficiency and effectiveness resulting from encouraging industry to investigate and propose self-solutions to technical issues, subject to NRC review. However, the proposed position on fee waivers for generic industry initiatives is inconsistent with Commission and NRC management encouragement of industry initiatives through the "Role of Industry."¹ Changes to NRC fee waiver criteria for generic industry efforts will discourage industry initiative and penalize self-generated industrywide generic initiatives.

The staff response, SECY-97-303 ("The Role of Industry and Use of Industry Initiatives") acknowledged that the fee structure for industry initiatives would be a significant issue. It specifically noted Footnote 4 to 10 CFR 170.21 as the waiver criteria that would need to be met to preclude the full cost of review being assessed as a fee.

SECY-00-0016 ("Industry Initiatives in the Regulatory Process") states: "... it is expected that addressing issues through industry initiatives would, overall, save resources for both the NRC and the industry. Most industry initiatives would address issues generically, rather than on a plant-specific basis, and staff experience is that the generic approach saves resources. Industry initiatives also allow the nuclear power reactor industry more flexibility in the selection of the schedule and technical approach for addressing the issue. Further, since industry and other members of the public would be involved at an earlier stage in addressing an issue, the staff expects better communication and more timely identification of appropriate actions to address emerging issues. This would also save resources and would improve timeliness of actions."

Any industry initiative necessarily involves submittal of proposals by industry to NRC for regulatory improvement, with supporting technical rationale, for staff review. Such proposals by industry are often unsolicited, and typically aren't conducive to an immediate staff decision to implement the proposal via a specific regulatory document, prior to careful review. Finally, as above, these proposals invariably benefit both NRC and industry.

No Waivers Unless Staff Requests an Item or Industry Input Gets Used in Regulatory Guidance: The "Role Of Industry" and Timing Problems

The new fee waiver criteria are impractical and inconsistent with how NRC really establishes regulatory guidance. The Proposed FY2002 Fee Rule states: "...fee waiver provisions... would

¹ Commission direction to the staff in its SRM on SECY-96-062 ("Strategic Assessment Issue Paper ... DSI-13: Role of Industry") was to "move as expeditiously as possible, within budget constraints, to evaluate on a case-by-case basis, initiatives proposing further NRC reliance on industry activities as an alternative to NRC activities."

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be revised specifically to state ...that the fee waiver criteria apply only when ... NRC, at the time of submission, plans to use the submission for ... the specific purpose of supporting generic regulatory improvement." Following are two examples of the problems created:

It is typically very difficult to determine if an industry report will be used for generic regulatory improvement before NRC conducts a detailed technical review. NRC typically determines if an industry report will be used in regulatory guidance after reviewing it, discussing it with industry, defining options for technical resolution of the issues, and perhaps suggesting modifications to that document to address NRC concerns. Implementation details of a specific generic regulatory improvement (i.e., selecting a generic communications vehicle for communicating that improvement to industry) is usually the last step in the process.

Forcing a decision at the time of submittal as to how an industry proposal would be used in regulatory guidance is not only difficult, it is often an impediment to effective communications toward a thorough mutual understanding of concerns and potential solutions. Early decisions regarding ultimate regulatory disposition can foreclose continued stakeholder communications because of NRC rules against discussing pre-decisional regulatory matters.

Not all solutions to all generic regulatory issues or opportunities for regulatory improvement (e.g., risk-informed, performance-based initiatives) need be documented in regulatory guidance. Often, NRC reviews an industry proposal to address a generic issue of concern to NRC, and after discussion and appropriate modifications, is satisfied that the industry guidance is sufficient to address the issue without further regulatory action (e.g., rulemaking, issuance of a bulletin). The CFO's new waiver policy opens the question of obtaining a waiver of review fees in the process of deciding whether or not industry guidance needs to be incorporated into regulatory guidance. This decision should be based solely on the significance of the issue to public health and safety protection. This new policy effectively requires a commitment to new regulatory guidance as a condition for a waiver, whether it is appropriate or not.

The new fee waiver policy requires a statement from the applicant as to the intended purpose of the submittal, and a decision from the NRC staff as to its intended use. However, EPRI's experience has been that the CFO has typically rejected the applicant's stated purpose, and has made it difficult for the staff to make an informed decision as to the intended use of the submittal. When we do state the purpose of our submittal of a document for which fee waiver is being requested, the CFO has consistently rejected EPRI's stated purpose, informing us that we didn't really submit the report for the purpose stated. When we discuss with NRC staff how an industry submittal should be structured so that it addresses mutual efforts in support of generic regulatory improvement consistent with the waiver criteria, we are criticized by the CFO for attempting to make informal agreements or doing something that runs counter to NRC's seeking to ensure all applicants are treated equally. As a result, staff is very reluctant to discuss any fee matters or usage matters with EPRI - the very discussions we need to have to provide information to assist the staff in making a recommendation to the CFO.

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No Waivers for Submittals that Benefit Industry

The proposed FY2002 Fee Rule states: "Fees will not be waived for reports/requests that are not submitted specifically for the purpose of supporting the NRC's generic regulatory improvements or efforts, because the primary beneficiary of the NRC's review and approval of such documents is the requesting organization. In this case, the waiver provision does not apply, even though the NRC may realize some benefits from its review and approval of the document." We believe that this proposal to base fee waiver decisions on which organization is the primary beneficiary of the staff review is untenable.

Generic efforts either support regulatory improvement or they don't, regardless of who proposes them. Approving fee waivers for generic industry proposals that facilitate regulatory improvement will encourage industry initiative that invariably benefits both industry and NRC, as discussed above in SECY-00-0016. In summary, fee waivers encourage actions that:

- Address issues generically, rather than on a plant specific basis
- Engage stakeholders in regulatory improvements at an earlier stage in addressing an issue
- Improve communication and more timely identification of appropriate actions
- Reduce unnecessary resource demands
- Allow industry more flexibility in selecting the schedule and technical approach
- Expedite resolution of issues; improve timeliness of actions
- Enhance regulatory efficiency and effectiveness

Reducing unnecessary regulatory burden and achieving greater realism in regulatory decisions are both NRC Strategic Performance Goals. Nevertheless, it appears from recent EPRI experience that any industry document that supports burden reduction or removal of unnecessary conservatisms automatically fails to qualify for a fee waiver, because it primarily benefits industry. However, most regulatory issues in need of resolution, or for areas of current regulation that are opportunities for generic regulatory improvement to enhance regulatory efficiency and effectiveness, efforts to remove excessive conservatism and unnecessary regulatory burden are almost always mutually beneficial to both industry and NRC.

Industry and other stakeholders believe that NRC should base regulatory guidance on what the "best science" indicates, and not impose a policy that encourages industry to ignore the best science and give NRC staff what it wants to hear, in order to obtain a waiver of review fees. Under an incentive regime like this, NRC could impose review fees on a high-value, risk-informed, performance-based initiative for generic regulatory improvement, supported by all licensees, on the sole basis that the staff didn't like the proposal. In fact, the proposed FY2002 Fee Rule states: "An example of the type of document that does not meet the fee waiver criteria

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is a topical report submitted for the purpose of obtaining NRC approval so that report can be used by the industry in the future to address licensing and safety issues." It is difficult to understand how such a submittal, if generic, would not support regulatory improvement.

Budget Considerations: Revenue-Neutral to NRC; Major Burden on Industry

Granting a fee waiver appears not to be lost revenue for NRC; granting or denying a waiver is "revenue neutral." Imposing a Part 170 fee does not increase NRC's budget because it reduces the total funding requirement to be recouped through Part 171 fees by an equivalent amount.

However, imposing a review fee on organizations like EPRI is a major budget problem. The membership of organizations like EPRI and NEI include all U.S. nuclear licensees. These organizations represent the entire industry and submit documents to NRC on their behalf to support activities of a generic nature. The nuclear steam system supplier owners groups also submit documents to NRC, some of which are generic in nature. All of these organizations operate on tight budgets that normally do not cover NRC review fees. Every review fee charged reduces the amount of research work we can do to support the membership. For EPRI, the fee waiver denials have the effect of slowing down efforts on risk-informed initiatives, burden reduction initiatives, etc. They have caused us to eliminate major R&D programs, as the review fees constitute a major percentage of the development costs.

Recommendation:

A fee waiver decision for a generic industry submittal by EPRI ultimately comes down to deciding whether NRC's costs come out of commercial reactor licensees' Part 171 fees or come out of EPRI's budget, which, like Part 171 fees, is funded by all commercial reactor licensees. When EPRI requests a fee waiver for a particular submittal, it does so on behalf of its membership, who agree to support the EPRI request with full recognition that the waiver shifts those specific review costs to Part 171 fees. (These considerations are similar to those made by NEI for its reports.) EPRI and its members prefer to request fee waivers, when appropriate, in order to sustain their approved and budgeted activities within the budget cycle, and for overall budget stability. EPRI specifically avoids requesting a waiver for submittals that are not of a generic nature and thus would not obtain support from our membership for shifting cost accountability to Part 171 fees.

Specifically, we recommend that the third fee waiver granting criteria should be implemented as follows: "*As a means of exchanging information between industry organizations and the NRC for the purpose of supporting NRC's generic regulatory improvements or efforts.*" if either of the following apply:

1. NRC requests the submittal from an industry organization because, for whatever reason and for whatever ultimate usage, it desires industry input to assist in regulatory improvement, or

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2. An industry organization representing all licensees (e.g., NEI, EPRI) submits a proposal for generic regulatory improvement, including unsolicited proposals and implementation details that need NRC review, and that is supported by its membership as a generic submittal.

This recommendation is fully consistent with Commission performance goals to make NRC activities and decisions more effective, efficient, and realistic, and to reduce unnecessary regulatory burden. It would eliminate disincentives enabling Commission policies on Role of Industry that seek proactive industry response to generic regulatory issues.

In turn, EPRI would continue to assure NRC that all submittals to NRC that include a fee waiver request have been reviewed by our members and have their support, in terms of content, generic value and applicability, and concurrence to cost recovery via Part 171. This formulation is equivalent to that used today for NEI submittals. It should also be applicable on a case by case basis for Owners Group submittals that qualify as "generic."

We appreciate the opportunity to provide comments on Federal Register Notice (67 Fed. Reg. 14818, March 27, 2002), Proposed Rules: "Revision of Fee Schedules; Fee Recovery for FY 2002.

Sincerely,



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Vice President & Chief Nuclear Officer

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