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May 24, 2002

Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

ATTENTION: Rulemakings and Adjudication Staff

SUBJECT: Proposed Rule: *Revision of Fee Schedules; Fee Recovery for FY 2002* (67 Fed. Reg. 14818, March 27, 2002)

On April 26, 2002, the Nuclear Energy Institute (NEI),[1] on behalf of the commercial nuclear energy industry, submitted comments on the Nuclear Regulatory Commission's proposed rule, *Revision of Fee Schedules; Fee Recovery for FY 2002* (67 Fed. Reg. 14818). Based on additional evaluation not completed in time for inclusion in our earlier comments, NEI hereby supplements those comments. As these supplemental comments are being submitted less than 30 days following close of the comment period, we respectfully request that the NRC consider them as part of this rulemaking.

In sum, the industry now understands that the NRC proposes to charge fuel cycle facility licensees several hundred thousand dollars for potential costs associated with conduct of licensing hearings for the mixed oxide (MOX) fuel fabrication process for plutonium disposition. No explanation for the allocation of these fees to the fuel cycle facilities is provided in the proposed rule or its associated work papers.

Industry concerns regarding the NRC's fee allocation methodology are not new. Since at least the late 1990's, the industry has identified examples of and expressed serious concern about the NRC's penchant for charging licensees for programs and activities not directly related to licensee regulation. As noted previously, although the agency has statutory authority to recover fees for its regulatory, operational and administrative costs, in doing so it must comply with The Omnibus Budget Reconciliation Act of 1990 (OBRA-90), 42, USC 2214. OBRA-90 does not provide the NRC with the opportunity for unlimited and unbounded cost recovery. Indeed,

[1] NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, materials licensees, and other organizations and individuals involved in the nuclear energy industry.

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OBRA authorizes the NRC to collect annual fees from licensees (i.e., through Part 171), but such fees must "to the maximum extent practicable...have a reasonable relationship to the cost of providing regulatory services..." 42 USC 2214(c)(3). OBRA-90 further provides that licensees should not be compelled to subsidize activities unrelated to licensee regulation. As such, it is a violation of OBRA-90 to charge licensees for an agency activity or programs from which the licensees receive no benefit.

The NRC itself recognized that licensees should not be charged fees for programs from which licensees receive no benefit. The NRC's international and Agreement State assistance programs, for example, often were cited as an Agency action from which licensees received no benefit. Indeed, the NRC recently promoted passage of legislation to obtain funding for such programs through appropriations from the general Treasury. In response to the NRC's request, in 2000 Congress directed the NRC gradually to remove "inequitable costs" from the NRC fee base. Thus, the NRC is now allowed to reduce its fee base by two per cent per year for five years culminating in a 12 percent overall reduction.

Unfortunately, it has become evident that, despite the NRC's clear recognition that licensees should be not be charged for programs or activities from which they receive no benefit, that is precisely the nature of the proposal to charge fuel cycle facility licensees for hearing costs related to plutonium disposition. In 1993, President Clinton initiated a series of measures to monitor, protect, safeguard, cap and ultimately reduce the global stocks of excess weapons-grade plutonium. The plutonium disposition program is an out-growth of that initiative. The Bush Administration not only supports this program, but also has expanded a portion of it. Disposition of the plutonium is to be accomplished by mixing weapons-grade plutonium with uranium, yielding mixed oxide fuel (MOX) for use in commercial reactors. This process of transforming plutonium into MOX fuel will be performed in a commercial fabrication facility and, in order to engage in this process, the NRC must issue a license to the facility operator.

The industry strongly supports the plutonium disposition program. Certainly it will aid in the reduction of weapons-grade plutonium—an obvious and significant benefit to the United States and to all other members of the international community. Commercial fuel cycle facility licensees, however, should not be made to pay for--in essence, subsidize—the federal government's effort to ensure our national security through plutonium disposition[2]. The costs for the plutonium disposition bear no relation to services from which fuel cycle facility licensees obtain a benefit. Rather, because the benefit will be enjoyed by the nation's citizens

[2] Similarly, reactor licensees should not be responsible for the costs of hearings associated with tritium production as the tritium is generated to support the nation's weapon's program. The arguments made with respect to the MOX hearings apply equally to any tritium production hearings.

overall, it is analogous to the NRC's activities in the area of international programs, for which the NRC itself agreed licensees should not be charged fees.

According to the longstanding NRC user fee allocation policy, hearing fees for license applications are distributed among the particular licensee class affected (e.g., Part 50 licensees are charged for license renewal hearings through Part 171 fees). To the extent that all licensees benefit from such hearings by obtaining future administrative efficiencies and greater information, as well as fostering additional NRC staff experience and knowledge, there is logic to this approach. The issue at hand, however, arises because these fees do not benefit the fuel cycle facility class of licensees—the benefit flowing from the disposition of plutonium inures to the federal government. As such, the NRC should seek those fees from the federal government in the first instance.

Specifically, the NRC should seek to obtain a separate appropriation, apart from the fees charged to licensees and the fixed percentage of the budget appropriated through general funds. Such an appropriation would appear to represent the only equitable means of addressing the directives in OBRA-90. There is clear precedent to take such action. The NRC's initiative to assist Russia is an example of the agency obtaining reimbursement for its costs from the specific beneficiary of the NRC's work. In that case, the costs associated with the NRC's assistance to Russia, other than staff costs, were reimbursed by the Agency for International Development; there was a specific appropriation from general funds, outside the fee base, to cover staff costs. Similarly, the NRC has received a separate appropriation, i.e., outside of the fee base and in addition to the general funds appropriated through the percentage reduction Congress mandated to alleviate fee related "inequities," for work on external regulation of the Department of Energy and the Hanford vitrification effort.

The NRC's fee allocation methodology also is problematic when applied to entities licensed to perform enrichment processes. Currently there is only one enrichment certificate holder in the United States. If a second entity were to seek a certificate, the current methodology would yield the inordinately inappropriate result wherein the hearing fees for the applicant would have to be borne by the current enrichment certificate holder. In effect, the certificate holder would be *subsidizing its only domestic competitor* by paying for its competitor's licensing hearings.

The industry's concerns regarding allocation of hearing costs to fuel cycle facility licensees are emblematic of a larger problem the industry has identified in its proposed fee rule comments submitted in the past several years. That problem is the ongoing lack of transparency in the NRC's budget process and, more particularly, in the rulemaking material subject to public comment. The *Federal Register* notices announcing proposed NRC fee rules state that Agency work papers in support of the proposed fees are available at the NRC Public Document Room

and via the Agencywide Documents Access and Management System (ADAMS). Yet, this supporting material does not contain sufficient detail to allow meaningful evalution.

Thus, the industry and other interested stakeholders are severely hampered in their ability to comment on proposed NRC fee rules as a result of the Agency's continuing failure to fully explain why certain costs are allocated as they are. Notice and comment rulemaking provisions of the Administrative Procedure Act mandate that the Agency notify stakeholders of the specific costs associated with each activity and, to the extent licensees are charged through Section 171, a more specific explanation of what costs comprise that fee. This will allow stakeholders to provide the NRC with far more effective feedback and also is likely to prompt the Commission to exercise greater authority to promote increased fiscal responsibility.

As the industry has previously recommended, we again strongly encourage the Commission to perform an in-depth review of the Agency's fee allocation methodology as well as other aspects of the agency's budgeting process. The outcome of such an in-depth evaluation is likely to identify potential Agency management efficiencies and, we would expect, lead to a Commission directive to, among other things, provide the public with significantly greater information about the Agency's allocation of fees. Given the longstanding nature of stakeholder concerns regarding the agency's budgeting process, sound public policy would seem to dictate that the Commission initiates these actions in the immediate future.

That having been said, the problem at hand is the NRC's proposed 2002 fee rule charging fuel cycle facility licensees for the Agency's conduct of hearings on the plutonium disposition process. Imposition of these fees violates OBRA-90. The fees the NRC proposes to collect from these fuel cycle licensees are not attributable to them as they are not the beneficiaries of either the specific licensing issues resolved through hearing or the plutonium disposition itself. That benefit very clearly inures to the federal government and, in turn, to all of its citizenry. The agency is obligated to address this serious infirmity before promulgating the final 2002 fee rule.

Please contact me if you have questions or would like to discuss these comments further.

Sincerely,

Ralph E. Beedle