[7590-01-P]

NUCLEAR REGULATORY COMMISSION

10 CFR Part 170

RIN No. 3150-AH03

Cost Recovery for Contested Hearings Involving

U. S. National Security Initiatives

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed Rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is proposing to amend its regulations to allow the agency to recover its costs associated with contested hearings involving U. S. Government national security-related proceedings through licensing or other regulatory service fees assessed to the affected applicant or licensee. This proposed amendment would be a special exception to the Commission's longstanding policy of not charging this type of fee for contested hearings and instead recovering the costs through the annual fees assessed to licensees within the affected class.

DATES: The comment period expires (Insert date 30 days after publication). Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure only that comments received on or before this date will be considered.

ADDRESSES: Mail written comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, ATTN: Rulemakings and Adjudications Staff. Hand deliver comments to: 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 am and 4:15 pm Federal workdays. (Telephone 301-415-1678). Comments may be faxed to (301) 415-1101.

Comments may also be submitted via the NRC's interactive rulemaking Website (http://ruleforum.llnl.gov). This site provides the ability to upload comments as files (any format), if your Web browser supports that function. For information about the interactive rulemaking site, contact Ms. Carol Gallagher, 301-415-5905; e-mail CAG@nrc.gov.

With the exception of restricted information, documents created or received at the NRC after November 1, 1999, are also available electronically at the NRC's Public Electronic Reading Room on the Internet at http://www.nrc.gov/reading-rm/adams.html. From this site, the public can gain entry into the NRC's Agencywide Documents Access and Management System (ADAMS), which provides text and image files of NRC's public documents. For more information, contact the NRC Public Document Room (PDR) Reference staff at 1-800-397-4209, or 301-415-4737, or by email to pdr@nrc.gov.

FOR FURTHER INFORMATION CONTACT: Robert Carlson, telephone 301-415-8165, or Glenda Jackson, telephone 301-415-6057, Office of the Chief Financial Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

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I. Background

The NRC has a longstanding policy of charging the affected applicant part 170 fees to recover the agency's costs for any uncontested hearings that the NRC holds on applications to construct a power reactor or enrichment facility. These hearings are mandated by statute. However, the NRC's costs for all contested hearings[1] have been recovered through part 171

[1]A contested proceeding is defined in 10 CFR 2.4 as (1) a proceeding in which there is a controversy between the staff of the Commission and the applicant for a license concerning the issuance of the license or any of the terms or conditions thereof or (2) a proceeding in which a petition for leave to intervene in opposition to an application for a license has been granted or is pending before the Commission.

annual fees assessed to the members of the particular class of licensee to which the applicant belongs.

The NRC published the final rule establishing the part 170 and part 171 fees for FY 2002 on June 24, 2002 (67 FR 42612). During the comment period, the NRC received a comment from a nuclear industry group concerning the assessment of annual fees to the fuel facility class of licensees for recovery of the costs involving a contested hearing related to the application for a mixed oxide (MOX) fuel fabrication facility. The industry group commented that assessing the MOX contested hearing costs to the fuel facility fee class was unfair, and that it was a violation of the Omnibus Budget Reconciliation Act of 1990 (OBRA-90), as amended, to charge licensees for an agency activity or program from which the licensees receive no benefit. The commenter asserted that fuel facility licensees should not be responsible for bearing the costs of contested hearings associated with MOX fabrication because this process has no relation to the NRC's regulatory services from which fuel facility licensees obtain a benefit.[2] The commenter added that the beneficiaries of the MOX program are the Federal government and the nation's citizenry because it will aid in the reduction of weapons-grade plutonium. The commenter contended that commercial fuel facility licensees should not have to subsidize the Federal government's efforts to ensure national security, and that such costs should be appropriated through the General Fund and removed from the NRC fee base.

The NRC responded that it must recover its hearing costs through either part 170 fees for services or through part 171 annual fees in order to recover most of its budgeted costs (less

[2]The MOX program is a Federal government initiative to ensure national security through the disposition of plutonium from dismantled atomic weapons.

the amounts appropriated from the Nuclear Waste Fund) through fees as required by OBRA-90, as amended. The Commission's longstanding policy of recovering contested hearing costs through part 171 annual fees assessed to the affected class of licensee has been confirmed repeatedly in the course of many past fee rulemakings, in court pleadings, and in an NRC report to Congress on fees.

In this case, however, the Commission has stated in the FY 2002 final fee rule that there is merit in the commenter's concern about the assessment of annual fees targeted to the fuel facility class for the MOX contested hearing costs, because the hearing involves a U.S. Government national security initiative to dispose of plutonium stockpiles. Accordingly, the FY 2002 final fee rule provided that FY 2002 budgeted costs for the MOX contested hearing be recovered through part 171 annual fees assessed to all classes of licensees. The final rule also stated that it was the Commission's intent to issue a proposed rule for public comment that would, beginning in FY 2003, recover the costs for contested hearings involving U.S. Government national security initiatives through part 170 fees assessed to the affected applicant or licensee.

Accordingly, the NRC is seeking public comment on its proposal to recover the agency's costs for contested hearings directly involving U. S. Government national security initiatives, as determined by the NRC, through part 170 fees assessed to the affected applicant or licensee. This proposed change would be a special exception to the Commission's policy of not recovering contested hearing costs through part 170 fees assessed to the affected applicant or licensee. The proposed change would only apply to contested hearings directly associated with U. S. Government national security initiatives, such as Presidentially-directed national security programs. The affected applicant or licensee would be responsible for the

payment of the part 170 fees assessed for these types of contested hearings under the proposed approach. However, because part 170 fees would only be assessed for contested hearings directly involving U. S. Government national security initiatives, the Commission expects that generally the costs would ultimately be borne by the Federal government, rather than the applicant.

In addition to the contested hearing on the MOX fuel fabrication facility application, the contested hearing on the TVA license amendments to produce tritium at the Watts Bar and Sequoyah reactors for the nation's nuclear weapons program would be another example of a contested hearing directly involving a U. S. Government national security initiative for which Part 170 fees would be assessed under this proposed rule. Examples of contested hearings that do not involve a U.S. Government national security initiative include the contested hearing on the application for a uranium recovery license filed by Hydro Resources Inc., and the contested hearing on the independent spent fuel storage installation application filed by Private Fuel Storage L.L.C. Furthermore, the proposed rule would not change the existing policy of not assessing Part 170 fees for contested hearings associated with applications or licenses that are used to provide routine services to U.S. Government agencies.

It should be noted that the Independent Offices Appropriation Act (IOAA) prohibits the NRC from assessing part 170 fees to Federal agencies, except in limited circumstances, such as licensing and inspection of TVA power reactors. Therefore, the proposed change would not apply to most contested hearings involving U. S. Government national security initiatives where a Federal agency is the applicant or licensee.

In the future, the Commission plans to consider a similar approach for recovering NRC's costs for other activities involving U. S. Government national security-related programs, such as allegations and 10 CFR 2.206 petitions, through part 170 fees assessed to the applicant or licensee.

II. Proposed Action

The NRC is proposing to amend 10 CFR part 170 to establish a provision for assessing part 170 fees to the affected applicant or licensee to recover the NRC's full costs of contested hearings directly involving U.S. Government national security initiatives, as determined by the NRC. To implement this special exception to the Commission's longstanding policy of not assessing part 170 fees for contested hearing costs, the NRC is proposing to add a fee exemption to §170.11 for contested hearings, and to specifically exclude contested hearings directly related to U. S. Government national security initiatives, as determined by the NRC, from the fee exemption. The NRC is proposing to revise the definition of *Special Projects* to include contested hearings related to U. S. Government national security initiatives, and to make corresponding changes to the section related to the payment of special project fees and to fee category J. of §170.21 and fee category 12. of §170.31. Only those contested hearings directly associated with a U. S. Government national security initiative, such as those specifically related to Presidentially-directed national security programs, would be subject to cost recovery under part 170. The NRC would continue to recover its costs for those contested hearings that are exempted from part 170 fees through part 171 annual fees assessed to the particular class of licensees.

The final rule will not be a "major" final action as defined by the Small Business Regulatory Enforcement Fairness Act of 1996. Therefore, the NRC anticipates that the final rule would become effective 30 days after publication in the Federal Register. It is the agency's intent to publish the final rule no later than the first quarter of FY 2003.

As a matter of courtesy, the NRC is mailing this proposed rule to all licensees. The NRC will not routinely mail the final rule to all licensees; however the final rule will be mailed to any licensee or other person upon specific request. To request a copy, contact the License Fee and Accounts Receivable Branch, Division of Accounting and Finance, Office of the Chief Financial Officer, at 301-415-7554, or e-mail us at fees@nrc.gov. In addition to publication in the Federal Register, the final rule will be available on the Internet at http://ruleforum.llnl.gov for at least 90 days after the effective date of the final rule.

III. Plain Language

The Presidential Memorandum dated June 1, 1998, entitled, "Plain Language in Government Writing," directed that the Government's writing be in plain language (63 FR 31883; June 10, 1998). The NRC requests comments on this proposed rule specifically with respect to the clarity and effectiveness of the language used. Comments on the language used should be sent to the NRC as indicated under the ADDRESSES heading.

IV. Voluntary Consensus Standards

The National Technology Transfer and Advancement Act of 1995, Pub. L. 104-113, requires that Federal agencies use technical standards that are developed or adopted by

voluntary consensus standards bodies unless using such a standard is inconsistent with applicable law or is otherwise impractical. In this proposed rule, the NRC is amending part 170 to recover costs from applicants or licensees in contested hearings involving Commission-specified U.S. Government national security-related initiatives. This action does not constitute the establishment of a standard that contains generally applicable requirements.

V. Environmental Impact: Categorical Exclusion

The NRC has determined that this proposed rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(1). Therefore, neither an environmental assessment nor an environmental impact statement has been prepared for the proposed regulation.

VI. Paperwork Reduction Act Statement

This proposed rule does not contain information collection requirements and, therefore, is not subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

VII. Regulatory Analysis

This proposed rule was developed pursuant to Title V of the Independent Offices Appropriation Act of 1952 (IOAA) (31 U.S.C. 9701) and the Commission's fee guidelines. When developing these guidelines the Commission took into account guidance provided by the U.S. Supreme Court on March 4, 1974, in National Cable Television Association, Inc. v. United States, 415 U.S. 36 (1974) and Federal Power Commission v. New England Power Company,

415 U.S. 345 (1974). In these decisions, the Court held that the IOAA authorizes an agency to charge fees for special benefits rendered to identifiable persons measured by the "value to the recipient" of the agency service. The meaning of the IOAA was further clarified on December 16, 1976, by four decisions of the U.S. Court of Appeals for the District of Columbia: National Cable Television Association v. Federal Communications Commission, 554 F.2d 1094 (D.C. Cir. 1976); National Association of Broadcasters v. Federal Communications Commission, 554 F.2d 1118 (D.C. Cir. 1976); Electronic Industries Association v. Federal Communications Commission, 554 F.2d 1109 (D.C. Cir. 1976); and Capital Cities Communication, Inc. v. Federal Communications Commission, 554 F.2d 1135 (D.C. Cir. 1976). The Commission's fee guidelines were developed based on these legal decisions.

The Commission's fee guidelines were upheld on August 24, 1979, by the U.S. Court of Appeals for the Fifth Circuit in Mississippi Power and Light Co. v. U.S. Nuclear Regulatory Commission, 601 F.2d 223 (5th Cir. 1979), cert. denied, 444 U.S. 1102 (1980). This court held that --

(1) The NRC had the authority to recover the full cost of providing services to identifiable beneficiaries;

(2) The NRC could properly assess a fee for the costs of providing routine inspections necessary to ensure a licensee's compliance with the Atomic Energy Act and with applicable regulations;

(3) The NRC could charge for costs incurred in conducting environmental reviews required by NEPA;

(4) The NRC properly included the costs of uncontested hearings and of administrative and technical support services in the fee schedule;

(5) The NRC could assess a fee for renewing a license to operate a low-level radioactive waste burial site; and

(6) The NRC's fees were not arbitrary or capricious.

VIII. Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Commission certifies that this proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. This proposed rule would impose a fee on a very limited number of applicants or licensees to recover the costs of contested hearings involving Commission-specified U. S. Government national security related initiatives, and it is unlikely that these few organizations would fall within the scope of the definition of "small entities" set forth in the Regulatory Flexibility Act or the size standards established by the NRC (10 CFR 2.810).

IX. Backfit Analysis

The NRC has determined that the backfit rule, 10 CFR 50.109, does not apply to this proposed rule and that a backfit analysis is not required for this proposed rule. The backfit analysis is not required because these proposed amendments do not require modification of or

additions to systems, structures, components, or the design of a facility, the design approval or manufacturing license for a facility, or the procedures or organization required to design, construct, or operate a facility.

List of Subjects

10 CFR Part 170 -- Byproduct material, Import and export licenses, Intergovernmental relations, Non-payment penalties, Nuclear materials, Nuclear power plants and reactors, Source material, Special nuclear material.

For the reasons set forth in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 553, the NRC is proposing to adopt the following amendments to 10 CFR Part 170.

PART 170 -- FEES FOR FACILITIES, MATERIALS, IMPORT AND EXPORT LICENSES, AND OTHER REGULATORY SERVICES UNDER THE ATOMIC ENERGY ACT OF 1954, AS AMENDED

1. The authority citation for part 170 continues to read as follows:

Authority: sec. 9701, Pub. L. 97-258, 96 Stat. 1051 (31 U.S.C. 9701); sec. 301, Pub. L. 92-314, 86 Stat. 227 (42 U.S.C. 2201w); sec. 201, Pub. L. 93-438, 88 Stat. 1242, as amended (42 U.S.C. 5841); sec. 205a, Pub. L. 101-576, 104 Stat. 2842, as amended (31 U.S.C. 901, 902).

2. Section 170.3 is amended by revising the definition of *Special Projects* to read as follows

§170.3 Definitions.

* * * * *

Special Projects means those requests submitted to the Commission for review for which fees are not otherwise specified in this chapter and contested hearings directly related to U.S. Government national security initiatives, as determined by the NRC. Examples of special projects include, but are not limited to, contested hearings directly related to Presidentially-directed national security programs, topical report reviews, early site reviews, waste solidification facilities, route approvals for shipment of radioactive materials, services provided to certify licensee, vendor, or other private industry personnel as instructors for part 55 reactor operators, reviews of financial assurance submittals that do not require a license amendment, reviews of responses to Confirmatory Action Letters, reviews of uranium recovery licensees' land-use survey reports, and reviews of 10 CFR 50.71 final safety analysis reports.

3. In §170.11, paragraph (a)(2) is added to read as follows:

§170.11 Exemptions.

(a) * * *

(2) A contested hearing conducted by the NRC on a specific application or the authorizations and conditions of a specific NRC license, certificate, or other authorization. This

exemption does not apply to a contested hearing that the NRC determines directly involves a U.S. Government national security related initiative, including those specifically associated with Presidentially-directed national security programs.

* * * * *

4. In §170.12, paragraph (d) is revised to read as follows:

§170.12 Payment of fees.

* * * * *

(d) *Special Project Fees.* (1) Fees for special projects are based on the full cost of the review or contested hearing. Special projects include activities such as --

(i) Topical reports;

(ii) Financial assurance submittals that do not require a license amendment;

(iii) Responses to Confirmatory Action Letters;

(iv) Uranium recovery licensees' land-use survey reports;

(v) 10 CFR 50.71 final safety analysis reports; and

(vi) Contested hearings directly involving U.S. Government national security initiatives, as determined by the NRC.

(2) The NRC intends to bill each applicant or licensee at quarterly intervals until the review or contested hearing is completed. Each bill will identify the documents submitted for review or the specific contested hearing and the costs related to each. The fees are payable upon notification by the Commission.

* * * * *

5. In §170.21, the introductory text is presented for the convenience of the user and Category J is revised to read as follows:

§170.21 Schedule of fees for production and utilization facilities, review of standard referenced design approvals, special projects, inspections, and import and export licenses.

Applicants for construction permits, manufacturing licenses, operating licenses, import and export licenses, approvals of facility standard reference designs, re-qualification and replacement examinations for reactor operators, and special projects and holders of construction permits, licenses, and other approvals shall pay fees for the following categories of services.

SCHEDULE OF FACILITY FEES

(See footnotes at end of table)

Facility Categories and Type of Fees	Fees[1, 2]

* * * * *

J. Special projects:

Approvals and preapplication/licensing activities	Full Cost
Inspections[3]	Full Cost
Contested hearings directly related to U.S. Government national	

security initiatives ..... Full Cost

* * * * *

[1] Fees will not be charged for orders issued by the Commission under §2.202 of this chapter or for amendments resulting specifically from the requirements of these types of Commission orders. Fees will be charged for approvals issued under a specific exemption provision of the Commission's regulations under Title 10 of the Code of Federal Regulations (e.g., 10 CFR 50.12, 73.5) and any other sections in effect now or in the future, regardless of whether the approval is in the form of a license amendment, letter of approval, safety evaluation report, or other form. Fees for licenses in this schedule that are initially issued for less than full power are based on review through the issuance of a full power license (generally full power is considered 100 percent of the facility's full rated power). Thus, if a licensee received a low power license or a temporary license for less than full power and subsequently receives full power authority (by way of license amendment or otherwise), the total costs for the license will be determined through that period when authority is granted for full power operation. If a situation arises in which the Commission determines that full operating power for a particular facility should be less than 100 percent of full rated power, the total costs for the license will be at that determined lower operating power level and not at the 100 percent capacity.

[2] Full cost fees will be determined based on the professional staff time and appropriate contractual support services expended. For applications currently on file and for which fees are determined based on the full cost expended for the review, the professional staff hours expended for the review of the application up to the effective date of the final rule will be determined at the professional rates in effect at the time the service was provided. For those

applications currently on file for which review costs have reached an applicable fee ceiling established by the June 20, 1984, and July 2, 1990, rules but are still pending completion of the review, the cost incurred after any applicable ceiling was reached through January 29, 1989, will not be billed to the applicant. Any professional staff-hours expended above those ceilings on or after January 30, 1989, will be assessed at the applicable rates established by §170.20, as appropriate, except for topical reports whose costs exceed $50,000. Costs which exceed $50,000 for any topical report, amendment, revision or supplement to a topical report completed or under review from January 30, 1989, through August 8, 1991, will not be billed to the applicant. Any professional hours expended on or after August 9, 1991, will be assessed at the applicable rate established in §170.20.

[3] Inspections covered by this schedule are both routine and non-routine safety and safeguards inspections performed by NRC for the purpose of review or follow-up of a licensed program. Inspections are performed through the full term of the license to ensure that the authorized activities are being conducted in accordance with the Atomic Energy Act of 1954, as amended, other legislation, Commission regulations or orders, and the terms and conditions of the license. Non-routine inspections that result from third-party allegations will not be subject to fees.

6. In §170.31, the introductory text is presented for the convenience of the user and Category 12. is revised to read as follows:

§170.31 Schedule of fees for materials licenses and other regulatory services, including inspections, and import and export licenses.

Applicants for materials licenses, import and export licenses, and other regulatory services, and holders of materials licenses or import and export licenses shall pay fees for the following categories of services. The following schedule includes fees for health and safety and safeguards inspections where applicable:

SCHEDULE OF MATERIALS FEES

(See footnotes at end of table)

Category of materials licenses and type of fees[1]	Fee[2,3]
* * * * *	
12. Special projects:	
Approvals and preapplication/licensing activities	Full Cost
Inspections	Full Cost
Contested hearings directly related to U.S. Government national security initiatives	Full Cost
* * * * *	

[1] Types of fees - Separate charges, as shown in the schedule, will be assessed for pre-application consultations and reviews and applications for new licenses and approvals, issuance of new licenses and approvals, certain amendments and renewals to existing licenses

and approvals, safety evaluations of sealed sources and devices, generally licensed device registrations, and certain inspections. The following guidelines apply to these charges:

(a) Application and registration fees. Applications for new materials licenses and export and import licenses; applications to reinstate expired, terminated, or inactive licenses except those subject to fees assessed at full costs; applications filed by Agreement State licensees to register under the general license provisions of 10 CFR 150.20; and applications for amendments to materials licenses that would place the license in a higher fee category or add a new fee category must be accompanied by the prescribed application fee for each category.

(1) Applications for licenses covering more than one fee category of special nuclear material or source material must be accompanied by the prescribed application fee for the highest fee category.

(2) Applications for new licenses that cover both byproduct material and special nuclear material in sealed sources for use in gauging devices will pay the appropriate application fee for fee Category 1C only.

(b) Licensing fees. Fees for reviews of applications for new licenses and for renewals and amendments to existing licenses, for pre-application consultations and for reviews of other documents submitted to NRC for review, and for project manager time for fee categories subject to full cost fees (fee Categories 1A, 1B, 1E, 2A, 4A, 5B, 10A, 11, 12, 13A, and 14) are due upon notification by the Commission in accordance with §170.12(b).

(c) Amendment fees. Applications for amendments to export and import licenses must be accompanied by the prescribed amendment fee for each license affected. An application for an amendment to a license or approval classified in more than one fee category must be accompanied by the prescribed amendment fee for the category affected by the

amendment unless the amendment is applicable to two or more fee categories, in which case the amendment fee for the highest fee category would apply.

(d) Inspection fees. Inspections resulting from investigations conducted by the Office of Investigations and non-routine inspections that result from third-party allegations are not subject to fees. Inspection fees are due upon notification by the Commission in accordance with §170.12(c).

(e) Generally licensed device registrations under 10 CFR 31.5. Submittals of registration information must be accompanied by the prescribed fee.

[2] Fees will not be charged for orders issued by the Commission under 10 CFR 2.202 or for amendments resulting specifically from the requirements of these types of Commission orders. However, fees will be charged for approvals issued under a specific exemption provision of the Commission's regulations under Title 10 of the Code of Federal Regulations (e.g., 10 CFR 30.11, 40.14, 70.14, 73.5, and any other sections in effect now or in the future), regardless of whether the approval is in the form of a license amendment, letter of approval, safety evaluation report, or other form. In addition to the fee shown, an applicant may be assessed an additional fee for sealed source and device evaluations as shown in Categories 9A through 9D.

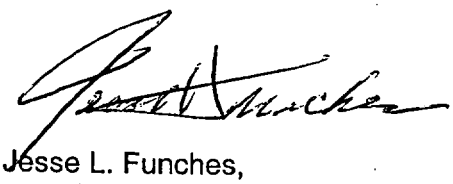
[3] Full cost fees will be determined based on the professional staff time multiplied by the appropriate professional hourly rate established in §170.20 in effect at the time the service is provided, and the appropriate contractual support services expended. For applications currently on file for which review costs have reached an applicable fee ceiling established by the June 20, 1984, and July 2, 1990, rules, but are still pending completion of the review, the cost incurred after any applicable ceiling was reached through January 29, 1989, will not be billed to the applicant. Any professional staff-hours expended above those ceilings on or after

January 30, 1989, will be assessed at the applicable rates established by §170.20, as appropriate, except for topical reports whose costs exceed $50,000. Costs which exceed $50,000 for each topical report, amendment, revision, or supplement to a topical report completed or under review from January 30, 1989, through August 8, 1991, will not be billed to the applicant. Any professional hours expended on or after August 9, 1991, will be assessed at the applicable rate established in §170.20.

* * * * *

Dated at Rockville, Maryland, this 17th day of July, 2002.

For the Nuclear Regulatory Commission.



Jesse L. Funches,

Chief Financial Officer.