DOCKETED
USNRC

September 3, 2002 (10:30AM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

DOCKET NUMBER
PROPOSED RULE PR 170
(67FR 49623)

NEI
NUCLEAR ENERGY INSTITUTE

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Vice President &
General Counsel

August 30, 2002

Ms. Annette L. Vietti-Cook
Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

ATTENTION: Rulemakings and Adjudication Staff

SUBJECT: Proposed Rule: Cost Recovery for Contested hearings Involving U.S. National Security Initiatives (67 Fed. Reg. 49623, July 31, 2002)

Dear Ms. Vietti-Cook:

On May 24, 2002, the Nuclear Energy Institute (NEI)[1] submitted supplemental comments on the Nuclear Regulatory Commission's (NRC) proposed fee rule.[2] NEI informed the agency of the industry's objections to the proposal to charge fuel cycle facility licensees for potential costs associated with conduct of licensing hearings for the mixed oxide (MOX) fuel fabrication process for plutonium disposition. In the instant proposal, the NRC would revise its fee rule by permitting recovery of the agency's costs for contested hearings involving national security related initiatives through assessment of fees on the affected applicant or licensee. Thus, the proposed rule change would create an exception to current practice of charging a class of licensees for contested hearings through application of 10 CFR Part 171, and instead would reallocate those costs to the individual applicant or licensee involved in the national security initiative.

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[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.

[2] Revision of Fee Schedules; Fee Recovery for FY 2002 (67 Fed. Reg. 14818; March 27, 2002).

Template = SECY-067

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Our comments on this proposal are described below. Section I explains the industry's position with regard to the proposed approach to recovering costs for contested hearings on national security initiatives. Section II requests further elaboration of the NRC's future plans to consider a similar approach for costs for other activities involving national security related programs. Section III summarizes the industry's recommendations for additional NRC action.

I. Proposed Cost Recovery for Contested Hearings on National Security Initiatives

NEI's May 24 letter expressed the industry's ongoing objection to assessing licensees fees (under either 10 CFR Part 170 or Part 171) for programs and activities not related to licensee regulation. Our position was, and continues to be, that although the agency has statutory responsibility to recover fees for its regulatory, operational and administrative costs,[3] it must also comply with the Omnibus Budget Reconciliation Act of 1990 (OBRA), 42 USC 2214. And, OBRA does not provide the NRC with the opportunity for unlimited and unbounded cost recovery from licensees.

The industry continues to seek to ensure that the NRC's implementation of IOAA and OBRA yields fee assessments that, "to the maximum extent practicable...have a reasonable relationship to the cost of providing regulatory services..." 42 USC 2214(c)(3). Because OBRA further provides that licensees should not be compelled to subsidize activities unrelated to licensee regulation, compliance with OBRA means licensees cannot be charged for an agency activity or program unless licensees derive a benefit there from.

The instant Federal Register notice states that the NRC has concluded that the class of commercial fuel cycle facility licensees should not be made to pay for—i.e., subsidize—the federal government's effort to ensure our national security through plutonium disposition.

[3] The Independent Office Appropriations Act (IOAA) requires agencies to assess fees to recover the agency's costs for providing any services or thing of value to identifiable recipients. It further provides that each charge should be fair and based on the cost of providing the service. Thus, IOAA provides the statutory basis for fees charged pursuant to 10 CFR Part 170. The NRC believes that it is precluded from charging other federal agencies for costs associated with services provided to those agencies, notwithstanding the fact that, in those instances, the federal agencies are the sole beneficiaries of the NRC's services.

> [T]here is merit in [NEI's] concern about the assessment of annual fees targeted to the fuel facility class for MOX contested hearing costs, because the NRC licensing action that is the subject of the hearing involves a U.S. Government national security initiative to dispose of plutonium stockpiles.[4]

The NRC also recognizes that the same principle applies equally to reactor licensees, insofar as they should not be responsible for the costs of hearings associated with tritium production as that activity supports the nation's weapon's program.

> In addition...any 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 on a licensing action directly involving a U.S. Government national security initiative for which part 170 fees would be assessed under this proposed rule.[5]

Thus, the agency agrees that costs for agency activities related to plutonium disposition and tritium production (including contested hearings) bear no relation to services from which the classes of fuel cycle facility licensees or reactor licensees obtain a benefit. Despite the agency's conclusion that an affected class of licensees should not have to shoulder the economic burden of the federal government's broad reaching security initiatives, the agency now is proposing to recover costs for activities associated with these initiatives through assessment of fees to the individual licensee or applicant involved.[6]

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[4] 67 Fed. Reg. 49623-49624.

[5] *Id* at 49624.

[6] The Supplementary Information section of the Federal Register notice states that the special exception proposed would "specifically exclude contested hearings on licensing actions directly related to U.S. Government national security initiatives, as determined by the NRC." *Id.* Although that section contains examples of contested hearings directly involving a U.S. Government national security initiative, the NRC has not provided a specific definition of the "U.S. Government national security initiative." To eliminate future confusion or, worse, misapplication of the exception based on a misinterpretation of the NRC's intent, the Supplementary Information section should state that a "national security initiative" specifically excludes proceedings and licensing actions related to individual plant security modifications. It should also explain that even Federal legislation that, for example, would potentially require changes to nuclear facility security, does not constitute a "national security initiative" for the purpose of applying the proposed exception.

The industry previously has argued that national security initiatives, like international programs and agreement state assistance programs, should be funded through appropriations from the U.S. Treasury. The industry continues to believe it is appropriate for the NRC to seek fees for national security initiatives from the U.S. Treasury in the first instance. That is, the Commission should seek to obtain a separate appropriation, apart from the fees charged to licensees and the fixed percentage of the budget currently appropriated through general funds. Such an appropriation would appear to represent the only equitable means of addressing the directives in OBRA and IOAA.

As also noted in our May 24 letter, there is clear precedent to take such action. In the case of the initiative to assist Russia, costs for NRC's assistance, other than for NRC staff, were reimbursed by the Agency for International Development and there was a specific appropriation from general funds, outside the fee base, to cover NRC staff costs. Similarly, the NRC has received a separate appropriation for work on both external regulation of the Department of Energy and Hanford vitrification activities.

To date, the NRC has not sought to obtain recovery of its costs for national security initiatives through a separate appropriation, as would be permissible under OBRA. Instead, the agency has proposed an approach that, as a practical matter, represents an improvement to the current approach. It laudably attempts to assign the fees to the true recipient of the agency's services.

> [B]ecause part 170 fees would only be assessed for contested hearings on licensing actions directly involving U.S. Government national security initiatives, the Commission expects the costs would ultimately be borne by the Federal government, rather than the applicant [or licensee].[7]

The cited statement implies that the NRC believes its approach is justified because the costs associated with NRC fees will be paid pursuant to the contractual arrangement between the applicant or licensee and the government. The result posited by the NRC, in fact, is likely to become a reality. Unfortunately, however, despite the improvement this approach represents, it remains inconsistent with the fundamental and well established principle that licensees should not be compelled to subsidize activities unrelated to licensee regulation.

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[7] *Id*

Because legislative action may be necessary to implement the approach the industry advocates, the current proposal should be, at most, implemented as an interim measure. The NRC should actively pursue whatever legislative changes are necessary, including amendment of IOAA, to ensure licensees are not required to fund activities unrelated to their regulation.

II. Future allocation of costs for other activities involving national government security related programs

The Federal Register notice informs stakeholders the agency will consider a "similar approach for recovering NRC's costs for other activities involving US Government national security-related programs." The examples identified are "allegations and 10 CFR 2.206 petitions." The Federal Register notice does not provide any additional explanation.

We assume that the NRC is contemplating additional rule changes to accommodate recovery of agency costs associated with allegations and 2.206 petitions based on and/or involving Government national security-related programs. We further infer that such a rule would assess those fees on the licensee or applicant involved in the programs, and not on the individual or entity filing the allegation or 2.206 petition. We understand, however, that other stakeholders have reached a different conclusion. As reported by the media, certain stakeholder groups have interpreted the discussion in the Federal Register notice to mean that the NRC would charge fees to the individual or group requesting a hearing or filing an allegation or 2.206 petition related to a national security initiative. Clearly, there is a need for the NRC to specifically explain its future intent to assess fees for costs associated with proceedings on "national security related programs."

III. Summary

In all instances, the NRC should set its fees in a manner consistent with the established principle that licensees are not to be charged for programs or activities from which they do not receive a benefit. Thus, the instant proposal should be implemented as an interim measure. NRC expeditiously should seek separate appropriations (in addition to the fixed percentage of its budget currently appropriated through general funds) for costs associated with contested hearings on government security initiatives. In parallel, and at an equally expedited pace, the agency should actively seek whatever legislative changes are deemed necessary. Among the legislative changes we envision being sought is amendment of IOAA to

provide the NRC with the authority to recover from federal agencies costs for services provided to those federal agencies.

In addition, the NRC should provide a more specific explanation of additional exceptions it plans to make to permit allocation of fees assessed for costs associated with national security related programs to individual applicants or licensees (e.g., with respect to petitions filed pursuant to 10 CFR 2.206 or allegations related to national security related programs in an NRC licensing context).

If you have questions or would like to discuss these comments further, I can be reached at 202.739.8139.

Sincerely,

Robert W. Bishop