

June 10, 2003

EPRI  
ATTN: David Modeen  
Vice President & Chief Nuclear Officer  
3412 Hillview Avenue  
Palo Alto, CA 94304-1395

Dear Mr. Modeen:

On behalf of the Commission, I am responding to your letter of February 28, 2003, which appeals to the Commission the decision of the Nuclear Regulatory Commission's (NRC) Chief Financial Officer (CFO) to deny EPRI's request for a waiver of Part 170 fees for the review of Report TR-102323, Rev. 2, "Guidelines for Electromagnetic Interference (EMI) Testing in Power Plant Equipment."

After carefully reviewing the information you provided and consulting with the NRC staff, the Commission finds no basis to revise the NRC's fee exemption policy nor to reverse the CFO's decision and therefore, your appeal for a fee waiver is denied. Your letter presents five key concerns with NRC's fee waiver policy. These comments are similar to comments submitted in response to the NRC's fiscal year (FY) 2002 proposed fee rule, which was published in the *Federal Register* on March 27, 2002. The NRC published a response to these comments in its FY 2002 final fee rule on June 24, 2002 (Enclosure 1). Also, your letter provides five areas of specific information/concerns regarding the CFO's fee waiver denial for review of the TR-102323, Rev. 2. These comments are very similar to comments provided in your January 22, 2001, and April 25, 2002, letters--to which the CFO previously responded. In addition, Enclosure 2 addresses each of your concerns raised in your letter of February 28, 2003.

The Commission appreciates your concerns regarding NRC fees. The Commission carefully considered your concerns in establishing its fee policies, promulgated through notice and comment rulemaking, and in its responses to this and other EPRI letters.

Sincerely,

/RA/  
Nils J. Diaz

Enclosures:

1. 6/24/02, Federal Register Notice  
(67 FR 42612)
2. Response to Concerns Regarding  
Overall Fee Policy

Response to Concerns Regarding Overall Fee Policy

*EPRI Concern #1: Fee waiver evolution has resulted in disjointed and inconsistent policy.*

NRC Response: The 10 CFR Part 170 fee requirements are based on the provisions of the Independent Offices Appropriations Act of 1952 (IOAA), which allows Federal agencies to assess fees to recover the costs the agency incurs in providing special benefits to identifiable recipients. The NRC's review of documents that are for the purpose of industry's generic regulatory improvements or use is a special benefit the NRC provides to identifiable recipients and is, therefore, subject to Part 170 fees. The NRC has consistently upheld this policy in considering fee waiver decisions.

The NRC waives the Part 170 fees for the review of industry documents "when (1) it has been demonstrated that the report/request has been submitted to the NRC specifically for the purpose of supporting NRC's development of generic guidance and regulations ... and (2) the NRC, at the time the document is submitted, plans to use it for one of the purposes given ..." i.e., generic guidance and regulations (10 CFR 170.11(a)(1)(iii)(A)(1) and (2)). The exemption applies "even if ultimately the NRC does not use the document as planned" (10 CFR 170.11(a)(1)(iii)(A)(2)). The fees are waived for these documents because the NRC's review and approval process is part of developing the NRC's generic regulatory program and, accordingly, it is appropriate to recover the costs through 10 CFR Part 171 annual fees assessed to the affected class of licensees. For example, fee waivers were granted for the prior versions of report TR-102323, Rev. 0, submitted to the NRC in 1994, and Rev. 1, submitted in 1997, because the NRC staff intended to use the information in the development of Reg Guide 1.180. However, in the case regarding EPRI's report TR-102323, Rev. 2, no justification exists to waive Part 170 fees.

The CFO makes the determination about whether a special project meets the criteria for a Part 170 fee exemption on a case-by-case basis after a careful review of the information submitted and in consultation with staff. If the CFO determines that the Part 170 criteria are met, the exemption applies even if, as stated above, the NRC does not use the document as planned.

*EPRI Concern #2: Legal basis for imposing review fees on generic regulatory improvement efforts is flawed.*

NRC Response: As stated in the FY 2002 final fee rule, the NRC is not persuaded that it should grant Part 170 fee waivers and instead simply collect these costs from Part 171 annual fees. The Conference Report of the Omnibus Budget Reconciliation Act of 1990 specifically states that the Conference Committee "... expects the NRC to continue to assess fees under the [IOAA] to the end that each licensee or applicant pays the full cost to the NRC of all identifiable regulatory services such licensee or applicant receives." The NRC has affirmed its commitment to comply with this direction through changes it has made in its regulations in recent years to increase the scope of Part 170 fees. For instance, in its FY 1998 fee rule, the NRC expanded the scope of Part 170 collections to include full cost recovery for Resident Inspectors and costs expended within 30 days after the issuance of an inspection report. In its FY 1999 fee rule, the NRC further expanded the scope of Part 170 collections to include incident investigations, some performance assessments and evaluations, reviews of some

reports and other submittals, and full cost recovery for time expended by Project Managers. The NRC has received additional direction on this issue in the Office of Management and Budget (OMB) Circular A-25, in which OMB states it is Federal policy that a user charge will be assessed against each identifiable recipient for special benefits derived from Federal activities beyond those received by the general public.

The NRC also rejects EPRI's assertion that OCFO logic suggests generic regulatory improvement efforts would never qualify for Part 170 fee exemptions since these efforts benefit industry as an identifiable recipient. In accordance with our regulations, the NRC has waived, and will continue to waive, the review fees for special projects as long as the NRC agrees that they will be used by the agency for the purpose of supporting the NRC's generic regulatory improvements or efforts.

*EPRI Concern #3: Fee waiver policy sets up major roadblocks to industry efforts to work with NRC.*

*NRC Response:* The NRC does not agree that its fee waiver policy sets up major roadblocks to industry efforts to work with the NRC, nor does it presume that any unsolicited input from industry is for industry's own use. When special projects genuinely support the NRC's generic regulatory improvements or efforts, the NRC grants Part 170 fee waivers. If a project does not meet this criteria, then appropriate Part 170 fees are assessed. The NRC agrees that often generic efforts between the NRC and industry benefit both parties. However, when industry is the primary beneficiary of a regulatory improvement, Part 170 fees should be, and are, assessed. As discussed in the FY 2002 final fee rule, this primary beneficiary concept is consistent with applicable case law, even if a change confers a benefit to the general public as well.

*EPRI Concern #4: Fee waiver policy is unworkable.*

*NRC Response:* As mentioned above, the NRC recognizes that some initiatives benefit both industry and the NRC, and does not agree that a regulatory improvement must fall into an "NRC-only" or an "industry-only" bin. However, when the primary beneficiary of an initiative is industry, it is the NRC's policy that Part 170 fees should be assessed, even if the initiative confers benefits to other parties. The NRC believes this is a rational policy that is consistent with the IOAA and applicable case law. Further, the NRC fee waiver policy recognizes that a preliminary technical scoping review of the relevant issues (not a full technical review) must occur before a determination can be made about a fee waiver. While the NRC's regulations state that a determination about a Part 170 fee waiver is based on the NRC's plans for that document at the time of submission, it is obvious this determination cannot be made immediately without a limited technical scoping effort. In the preamble of the FY 2002 final fee rule, the NRC recognizes this by stating, "The staff must provide technical advice and recommendations to assist the CFO in making the appropriate determination of fee waiver entitlement." This process ensures that the CFO is making an informed decision about fee waivers, while making a fee decision early in the process prior to commencing full technical review.

In the specific case of the EPRI report, while the NRC staff review exceeded the usual preliminary technical scoping limits for determining a fee waiver request, the review of this document continued because EPRI declined to withdraw its request for review of the Report, despite the NRC staff's suggestion that EPRI do so early in the review process.

*EPRI Concern #5: OCFO is blocking exchange of information needed to make informed fee waiver decisions.*

*NRC Response:* The NRC does not believe that the FY 2002 fee rule statements distinguishing between fee and technical matters are conflicting, nor that they block the exchange of information needed to make informed fee waiver decisions. The FY 2002 fee rule states that technical discussions should be made with the relevant program staff, while fee matters should be discussed with the CFO's staff. The FY 2002 final fee rule also states that the NRC staff must provide technical advice and recommendations to assist the CFO in making the appropriate determination of fee waiver entitlement. This process not only allows, but requires, the exchange of information that will result in informed fee waiver decisions.

#### EPRI Appeal of Fee Waiver Denial and Specifics of Fee Waiver Request

*EPRI Concern #1, EMI Fee Waiver: The October 18, 2002, decision by the CFO to deny EPRI's fee waiver request lacks fairness.*

*NRC Response:* EPRI sent its January 22, 2001, fee exemption request letter to the Document Control Desk of the NRC, for the attention of Leonard Olshan (Project Manager) of the Office of Nuclear Reactor Regulation (NRR) rather than the CFO, as provided in 10 CFR 170.5. This delayed the request reaching the OCFO for action. In his letter of February 14, 2002, which denied EPRI's first request for a fee waiver, the CFO apologized for the time it took to respond to your January 22, 2001, letter. He also explained that staff had to locate and review documents and other information from 1994 to fully understand the sequence of events associated with the review of TR-102323, Rev. 0 and TR-102323, Rev. 1, which added to the time to respond to your request. However, the NRC did bill EPRI quarterly for the review of the Report, beginning in July 2001. It should be noted to improve clarity, under new NRR procedures, before a fee bearing review can commence on a report for which a fee waiver has been requested, the OCFO must issue a letter approving the waiver. If the fee waiver is denied and the applicant still wants the report reviewed, the applicant must submit a letter requesting this fee billable review.

Prior to EPRI's January 22, 2001, submission of the Report to the NRC, EPRI discussed its intention to do so with members of the NRC's Office of Nuclear Regulatory Research and NRR at a public meeting on January 16, 2001. At this meeting, NRR questioned why EPRI would submit the Report, and suggested the Report was unnecessary since the NRC was already independently at work on a revision to Reg Guide 1.180. Also at this meeting (and again months later), the NRC staff suggested that EPRI either withdraw its request to have the Report reviewed, or terminate the review at an early stage so EPRI could get the benefit of commenting on the NRC's revision to the Reg Guide 1.180 when that document was published. Despite this, EPRI representatives encouraged the NRC staff to continue their review of the Report because it contained relaxations to the equipment qualification requirements that the NRC version might not address. On February 26, 2002, EPRI did request that the review of the Report be terminated.

The NRC did not solicit the submission of this report, and had no plans at the time of submission or anytime thereafter to use the Report for revision of Reg Guide 1.180 in its regulatory improvements. On the contrary, the NRC did not rely at all on the Report to develop Reg Guide 1.180. Therefore, under the requirements of 10 CFR 170.11(a)(1)(A)(1) and (2), there is no justification for granting a fee waiver for NRC's review of the Report. Accordingly, the amount billed to EPRI is for the NRC review costs incurred prior to EPRI's request to terminate the review.

*EPRI Concern #2, EMI Fee Waiver: OCFO arbitrarily declares that documents are not submitted for the purpose of NRC regulatory improvements.*

*NRC Response:* As stated above, the CFO makes the determination about whether a special project meets the fee waiver criteria based on a careful review of the information submitted and in consultation with staff. The CFO followed these established procedures and reached a conclusion contrary to EPRI's desired result. The CFO determined that the purpose of NRC's requested review of the Report was industry's generic regulatory improvements or use in order to provide special benefits to identifiable recipients, and hence was subject to Part 170 fees.

*EPRI Concern #3, EMI Fee Waiver: OCFO did not consider detailed evidence that EPRI's efforts in developing EMI guidance were for the purpose of generic regulatory improvement.*

*NRC Response:* The NRC did consider the relevant evidence regarding this fee waiver request, but does not agree with EPRI's assertion that a fee waiver is justified. Communications from the NRC agreed with industry's proposal for increased cooperation on electromagnetic compatibility research and data sharing, within the scope of the already existing Memorandum of Understanding (MOU). As stated explicitly in Article 2.1 of the MOU, the cooperative programs under the MOU were to focus on basic data needs, not on solutions to specific regulatory issues or conclusions as to the application of the data to regulation. Thus, EPRI's submission of the Report for the NRC's review to "facilitate a necessary revision to Reg Guide 1.180," is outside the scope of the MOU.

*EPRI Concern #4, EMI Fee Waiver: OCFO's October 18, 2002, letter contains factual errors.*

*NRC Response:* The NRC disagrees with EPRI's comments on this matter. As discussed above, the NRC did suggest that EPRI either withdraw its request to have the report reviewed or terminate the review. EPRI suggests the NRC staff statement (i.e., that EPRI should withdraw its request to have the Report reviewed and instead comment on the NRC's draft revision to Reg Guide 1.180) does not make sense, since EPRI could do both. The NRC does not dispute that EPRI could do both. However, from a fee standpoint, it was not advisable. EPRI's request that its unsolicited report be reviewed by the NRC, with the aim that the NRC incorporate parts of this document into Reg Guide 1.180 prior to publication, is subject to Part 170 fees. However, the review of comments that NRC solicits on a published draft document are not subject to fees.

*EPRI Concern #5, EMI Fee Waiver: Evidence belies OCFO claim that staff had no plans to use TR-102323.*

*NRC Response: While both the Report and the draft Reg Guide 1.180 undoubtedly utilized the same generic and publicly available information, the NRC developed this draft Reg Guide independently of the Report and did not use the information presented in that report to develop the draft Reg Guide.*