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May 9, 2014

Secretary
U.S. Nuclear Regulatory Commission
Att'n: Rulemaking and Adjudications Staff
Washington, DC 20555-0001

Subject: Comments Concerning Proposed Rule 10 CFR Parts 170 and 171, "*Revision of Fee Schedules; Fee Recovery for Fiscal Year 2014*", (79FR21036, dated April 14, 2014) (Docket ID NRC-2013-0276)

Exelon Generation Company, LLC ("Exelon") and its affiliate Constellation Energy Nuclear Group, LLC ("CENG") submit these comments on the Nuclear Regulatory Commission's proposed rule to revise the fee schedules in 10 CFR 170 and 171 for Fiscal Year 2014, published at 79FR21036 dated April 14, 2014 (hereinafter, the "Proposed Rule"). Exelon / CENG own the largest fleet of nuclear plants in the United States and will be substantially and adversely affected by the proposed fees. The Proposed Rule would increase the annual fee for each operating power reactor by $938,000 – from $4.39 million to $5.328 million – a 21 percent increase translating into a $20.636 million increase in the annual fees that must be paid by Exelon / CENG for their 22-operating reactor fleet. This enormous increase is unjustified by any significant increase in regulatory costs attributable to Exelon / CENG.

Further, the Work Papers (ADAMS Accession No. ML14064A394) upon which the Proposed Rule is based indicate that the annual fee charged to operating reactors is subsidizing some portion of approximately $221 million of new reactor costs. (*See* Work Papers, Table XIII, showing that the $799.3 million of FY 2014 allocations includes $41,442,000 in contract costs for new reactors plus 471.7 Full Time Equivalents ("FTE") with an average cost of $384,269 per FTE). The proposed rule and Work Papers provide insufficient information to determine how much of this new reactor cost is being recovered through user fees and how much is being subsidized by the annual fee paid by operating reactors. However, the Work Papers indicate that approximately 65 percent of the total FY 2014 allocations are being recovered through the annual fees. If one assumes that the same percentage of the new reactor allocations is recovered through the annual fees, then approximately $144 million of new reactor costs are being recovered through such annual fees paid solely by operating reactors. This would correspond to $1.44 million per reactor, or about $32 million charged to Exelon's fleet. Since neither Exelon nor CENG is currently pursuing any new plant licenses, this charge bears no relation to regulatory costs attributable to Exelon or CENG.

As discussed below, Exelon /CENG respectfully submit that the NRC Proposed Rule revising the 10 CFR 170 and 171 fee schedule is unjustified, manifestly unfair, arbitrary and capricious, and contrary to law. As a threshold matter discussed later in this comment letter, the Proposed Rule is not supported by sufficient information and explanation necessary to provide the requisite rational basis for the rule and permit meaningful public comment. Even putting this deficiency aside, the inclusion of the substantial costs for new reactor licensing in the annual fee for operating reactors violates applicable statutory constraints on the NRC authority to assess fees. Under these statutory constraints, described below, such costs should either be

recovered through user fees on the entities engaged in new reactor activities, or recovered through an annual fee on a more specifically defined class of licensees (defined to include holders of design certifications) engaged in new reactor activities. Further, the proposed rule violates statutory requirements by failing to subtract from NRC budgetary authority the cost of activities covered by appropriations from the Nuclear Waste Fund.

Statutory Constraints

The NRC collection of fees is governed by two statutes. The user fees in 10 CFR 170 are governed by the Independent Offices Appropriations Act of 1952 ("IOAA"), 31 U.S.C. 9701, as modified by the Omnibus Budget Reconciliation Act of 1990 as amended ("OBRA"), 42 U.S.C. 2214(b). The annual fees in 10 CFR 171 are governed by OBRA. As discussed later in these comments, the Commission's proposed fee structure violates both of these statutes.

The IOAA conveys the sense of Congress that each service or thing of value provided by an agency to a person (other than a governmental official) "is to be self-sustaining to the extent possible." (31 U.S.C. 9701(a)). The IOAA then authorizes agencies to prescribe regulations establishing the charge for a service or thing of value provided by the agency, and provides that "Each charge shall be (1) fair; and (2) based on (A) the costs to the Government; (B) the value of the service or thing to the recipient; (C) public policy or interest served; and (D) other relevant facts." (31 U.S.C. 9701(b)).

While the IOAA is permissive in allowing agencies to establish user fees, OBRA modifies the IOAA by making the user fees mandatory and requiring full-cost recovery. As OBRA provides, "[p]ursuant to the [IOAA], *any person* who receives a thing of service or thing of value from the Commission *shall pay* fees *to cover the Commission's costs* in providing any such service or thing of value." (42 U.S.C. 2214(b), emphasis added).

OBRA further provides that any licensee or certificate holder of the NRC may also be required to pay, in addition to user fees, an annual charge. (42 U.S.C. 2214(c)(1)). The aggregate amount of annual charges collected from all licensees and certificate holders must approximate 90% of the NRC budget authority for the fiscal year, less the amounts collected through user fees, amounts appropriated from the Nuclear Waste Fund, amounts appropriated for Waste Incidental to Reprocessing, and amounts appropriated for certain homeland security costs. (42 U.S.C. 2214(c)(2)). OBRA directs that the schedule of annual charges must "fairly and equitably allocate[e] the aggregate amount of charges among ... licensees." (42 U.S.C. 2214(c)(3)). It further provides that, "[t]o the maximum extent practicable, the charges shall have a reasonable relationship to the cost of providing regulatory services. . . ." (*Id*).[1]

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[1] To the extent there are costs that cannot be attributed to licensees or a class of licensee, "[t]he Commission should assess the charge for these costs as broadly as practicable in order to minimize the burden for these costs on any licensee or class of licensee so as to establish as fair and equitable a system as is feasible." H.R. Rep. No. 101-964, reprinted in 1990 U.S.C.C.A.N. 2374, 2666.

The Proposed Rule Is Unsupported by Sufficient Data and Explanation

The Proposed Rule and Work Papers fail to provide sufficient information explaining and supporting the derivation of the annual fee. The NRC failure to adequately explain and support its Proposed Rule denies meaningful opportunity for public comment and renders the proposal arbitrary and capricious.

For example, the Proposed Rule and the Work Papers do not provide any information explaining how the estimated 10 CFR 170 fee collections for FY 2014 ($324.5 million) are calculated. There is not a single statement in the Proposed Rule or any table in the Work Papers explaining or supporting this estimate. Since the annual fees are determined by subtracting the estimated 10 CFR 170 collections from the adjusted budget authority, the absence of support for the 10 CFR 170 estimate necessarily makes the calculated amount recoverable under 10 CFR 171 unsupported and arbitrary.

In addition, neither the Proposed Rule nor the Work Papers provide any information showing the specific costs that are being recovered through the annual fee. With respect to the annual fee for operating reactors, the Work Papers merely list all of the items comprising the entire NRC budgeted resources for new reactors, operating reactors, and certain unexplained materials licensing activities, in order to provide an estimate of the portion ($799.3 million) of the total budget authority allocated to operating reactors. The amount proposed to be recovered through the annual fee is then derived simply by subtracting from this amount the apparently arbitrarily established portion of estimated 10 CFR 170 collections ($280.5 million) attributed to entities paying user fees for reactor-related activities. The same approach is taken for the other classes of licensees and certificate holders that are being assessed an annual fee. As a result, it is impossible to determine from the Work Papers which of the specific line items in the list of budgeted resources are being recovered through user fees and which are being left for recovery under the annual fees. The descriptions of the line items themselves are very vague, preventing one from determining whether they are generic (and thus potentially appropriate for recovery under 10 CFR 171) or supporting a regulatory service to an identifiable beneficiary (thus appropriate for recovery under 10 CFR 170).[2] The absence of meaningful information prevents one from determining the extent to which "*all persons*" who receive a benefit or thing of value are being charged user fees under 10 CFR 170, whether the 10 CFR 170 user fees cover the full cost of providing the services or things of value, and consequently, and whether the proposed annual fee is limited to legitimate generic costs.

The Work Papers also allocate to operating reactors certain budgeted resources for the business lines pertaining to fuel facilities, nuclear materials users, and decommissioning and low level waste. (*See* Work Papers, Table XIII). There is no explanation anywhere how these activities apply to operating reactors. The line items under these business lines with amounts allocated to the operating reactors relate predominantly to training. If there are no direct

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[2] For example, the budgeted resources for new reactors include $41,442,000 in contract costs for new reactor licensing. *See* Work Papers, Table XIII. One cannot tell from the Work Papers (1) how much of this cost relates to contracts supporting specific Design Certification or licensing proceedings; (2) how much is recoverable under the Part 171 fees; (3) what amount is being recovered through the annual fee, and therefore (4) whether any recovery under Part 171 is reasonable.

program support activities allocable to operating reactors under these business lines, it is unclear how there can be training costs allocable to reactors.

Finally, the Work Papers allocate to operating reactors over $10 million ($2,574,000 in contract costs plus 20.6 FTE) for Spent Fuel Storage and Transportation. (*See* Work Papers, Table XIII). As there is no meaningful description, one cannot determine whether the allocated costs are attributable solely to the Waste Confidence Rule rulemaking or include other activities as well. The NRC FY 2014 Congressional Budget Justification indicates that the Commission's activities related to Spent Fuel Storage and Transportation include:

- high-level waste to include laboratory studies and field investigations to understand key technical issues and risk insights, technical inputs to resolution of regulatory gaps, exercise of performance assessment scoping tool for risk insights, and continued coordination of alternative disposal strategies with other aspects of the back end of the fuel cycle.

- monitoring national-level developments stemming from the January 2012 report of the Blue Ribbon Commission on America's Nuclear Future.

(*See* NUREG-1100, Vol. 29, FY 2014 Congressional Budget Justification (Apr. 2013), at 79-80).

If the portion of Spent Fuel Storage and Transportation costs allocated to operating reactors includes these sorts of costs for spent fuel disposal activities (some of which is still being paid through previous appropriations from the Nuclear Waste Fund), or for long-term storage activities attributable to the Department of Energy's failure to meet its contractual obligations, these costs should be specified separately. Any budgetary resources relating to spent fuel disposal or other DOE activities should be accounted for separately, not only to inform operating reactors what costs they are being asked to bear, but also to allow a determination of whether such costs should be offset from the carry-over appropriation relating to review of the Yucca Mountain license or recovered through a user fees assessed to DOE or the Nuclear Waste Fund.

The $10 million in Spent Fuel Storage and Transportation costs allocated to Operating Reactors is in addition to the $27.5 million for spent fuel storage and decommissioning activities that is recovered through an annual fee on power reactors and 10 CFR 72 licensees that do not hold a 10 CFR 50 license. (*See* 79FR21045-46; and Work Papers, Table XIV). The NRC should also provide a detailed breakdown of this annual fee specifying any amounts that are attributable to spent fuel disposal activities or for long-term storage activities attributable to the Department of Energy's failure to meet its contractual obligations. Any activities relating to DOE's obligations under the Nuclear Waste Policy Act should either be offset by the carry-over appropriation from the Nuclear Waste Fund or recovered from DOE through a user fee.

The Administrative Procedure Act requires an agency to make available to the public in a form that allows meaningful comment the data the agency used to develop the proposed rule. (*Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1181 (D.C. Cir. 1994), citing 5 U.S.C. § 553(b)). The notice must include available data and studies in intelligible form so that the public sees an accurate picture of the reasoning used by the agency to develop the proposed rule. (*Id., citing Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 520-31 (D.C. Cir.), *cert. denied*, 459 U.S. 835 (1982)). A reasonable explanation of the cost basis for proposed fees is one that the

concerned public can understand, at least with the aid of other information that was also reasonably available to the public during the time for public comment. (*Engine Mfrs. Ass'n,* 20 F.3d at 1181). "An agency commits serious procedural error when it fails to reveal portions of the technical basis for the proposed rule in time to allow for meaningful commentary." (*Connecticut Light & Power Co.*, 673 F.2d at 530-31).

The tables in the Work Papers do not allow one to determine whether the Proposed Rule meets statutory requirements. The tables simply lay out the entire NRC budgeted authority, and provide no indication which of the budgeted resources are being recovered through user fees and which are being recovered through annual fees. Such "impressive looking but utterly useless tables" do not provide the requisite information. (*Engine Mfrs. Ass'n,* 20 F.3d at 1181). The agency should provide the basis for key assertions and a reasonable basis for its conclusions. (*Id.* at 1182). Without this information, the proposed rule fails to demonstrate that (1) the user fees recover full costs from all persons who receive a service or thing of value; (2) remaining costs recovered through the annual fees are allocated "fairly and equitably" so that "[t]o the maximum extent practicable, the charges shall have a reasonable relationship to the cost of providing regulatory services," as OBRA commands.

The Proposed Annual Fee on Operating Reactors Is Excessive, Unfair, and Violates Statutory Requirements.

The Proposed Rule violates the statutory standards in three significant respects. First, the Proposed Rule fails to subtract from the NRC budget the costs of activities that are covered by appropriations from the Nuclear Waste Fund. Second, the proposed 10 CFR 170 fees fail to recover from every person who receives a service or thing of value the full cost of such service or thing of value. This failure harms Exelon / CENG because it leaves an inordinate and unreasonable amount of the Commission's budget to be collected through annual fees borne predominantly by 100 reactor licensees, and over twenty percent by Exelon / CENG. Third, the Commission has failed to allocate the annual fee "fairly and equitably" so that "[t]o the maximum extent practicable, the charges shall have a reasonable relationship to the cost of providing regulatory services."

<u>The NRC Calculation of Non-Fee Items Fails to Include Activities Covered by Appropriations from the Nuclear Waste Fund</u>

The Proposed Rule violates OBRA because the Commission has not subtracted from its budget authority the costs of activities that are covered by appropriations from the Nuclear Waste Fund. OBRA requires the Commission to assess fees recovering approximately 90% of its budget authority, less the cost of certain non-fee items including "amounts appropriated from the Nuclear Waste Fund." (42 U.S.C. 2214(c)(2)). Pursuant to writ of mandamus,[3] the Commission has resumed work on review of the Yucca Mountain application. (*See U.S. Department of Energy* (High Level Waste Repository), CLI-13-08, slip op. (Nov. 18, 2013)). This work is occurring in FY 2014 and is covered by approximately $13.5 million in previous unexpended

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[3] *See In re Aiken County*, 725 F.3d 255 (D.C. Cir. 2012), *reh'g en banc denied*, 2013 U.S. App. LEXIS 22003 (D.C. Cir., Oct. 28, 2013).

appropriations from the Nuclear Waste Fund that remain available to the NRC.[4] Yet no credit is provided for this funding in calculating the non-fee exclusions that factor into determining the total amount that must be recovered through annual and user fees. (*See* 79 FR 21038-39 indicating that the non-fee items consist of $1.4 million for WIR activities, $0.9 million for Inspector General Services for the DNFSB, and $21.8 million for generic homeland security activities). The failure to subtract the costs of activities covered by the carry-over appropriations from the Nuclear Waste Fund violates OBRA and results in reactor licensees being overcharged by as much as $13.5 million.

A Greater Amount of the NRC Budget Should be Collected Through 10 CFR 170 User Fees

Although the lack of adequate supporting information prevents one from fully determining the extent of this non-compliance, it seems apparent that the Proposed Rule fails to charge user fees for all recipients of services, and fails to recover the full cost of those services. Of the $930 million that the Commission must recover through fees, only $324.5 million is estimated by the Commission to be recoverable through the 10 CFR 170 user fees. This could only be correct if approximately two-thirds of the Commission's budget does not benefit any identifiable entity, which Exelon / CENG presume cannot be the case. The Commission has previously acknowledged the consistent industry recommendation that the NRC collect more of its budget through 10 CFR 170 fees (*see, e.g.*, 72FR5108, 5111 dated February 2, 2007) but has not done enough to address this concern.

As a specific example, the 10 CFR 170 rules do not appear to impose user fees for vendor inspections. (*See* SECY-98-260 at 8 November 5, 1988 recommending that vendor inspections remain subject to recovery under 10 CFR 171 because "Reactor Vendors are not NRC licensees and not directly subject to most NRC regulations").[5] OBRA *requires* full cost recovery from "*any person*" receiving a service or thing of value, not just applicants and licensees. Vendors are specifically identifiable persons receiving the benefit of NRC inspections in order to establish their qualifications to provide safety-related services. There is no basis to exclude these services from 10 CFR 170 user fees. The Work Papers reflect nearly $13 million in budgeted resources for vendor inspections relating to new reactors ($250,000 in contracts and 32.6 FTE at an average cost of $384,269 per FTE), and presumably there are additional vendor inspections conducted relating to operating reactor activities (though no separate line item identifies this work). Such costs must be collected through 10 CFR 170, not 10 CFR 171.

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[4] *See, e.g.*, Monthly Status Report: Activities Related to Yucca Mountain Licensing Action, Report for February 2014 (ML14058A602).

[5] In the same vein, the Proposed Rule states incorrectly that OBRA "*allow[s]* the NRC to collect user fees for the recovery of the costs of providing special benefits to identifiable *applicants and licensees* in compliance with 10 CFR part 170 and under the authority of the IOAA." 79 Fed. Reg. at 21,038 (emphasis added). "Pursuant to the [IOAA], *any person* who receives a thing of service or thing of value from the Commission *shall pay* fees to cover the Commission's costs in providing any such service or thing of value." 42 U.S.C. § 2214(b) (emphasis added).

Further, as discussed above, the NRC has not included any carry-over appropriation from the Nuclear Waste Fund in calculating the non-fee items that are subtracted from the total budgetary authority to determine the amount that must be recovered fees. If the costs of these activities are not subtracted from the total budget as a non-fee item, as OBRA directs, they should be recovered through user fees assessed to DOE or Yucca Mountain. If these activities are not accounted for properly, operating reactors may be assessed over $13 million that should come from the Nuclear Waste Fund. As previously discussed, the absence of any specific identification of the costs that are being recovered under 10 CFR 171 prevents any meaningful analysis whether other recipients of services are being charged the full cost of those services through user fees. In other words, because the Work Papers do not identify what specific costs are being recovered under 10 CFR 171, it is not possible to determine whether the 10 CFR 171 charges include costs that should more appropriately assigned to specific identifiable beneficiaries. Nevertheless, the disproportionate amount of the NRC budgetary authority that is being recovered through the annual fees (over $600 million of the $930 million that the NRC must recover) strongly suggests that the user fees fail to recover full costs.

For example, the budgeted resources for new plants include over $5 million in advance reactor research ($1,565,000 in contract costs plus 9.3 FTE at an average cost of $384,269 per FTE) and $7.7 million in new reactor research ($3,136,000 in contract costs plus 11.9 FTE at an average cost of $384,269 per FTE). While the Work Papers do not provide sufficient information to determine whether these costs are being recovered under 10 CFR 170 or 10 CFR 171, Exelon submits that all such research costs should be recovered from the persons that are most benefiting from such research, and much of this cost could be recovered through user fees. The identifiable beneficiaries of such research may include applicants for and holders of design certifications and manufacturing licenses (including vendors seeking pre-application review), applicants for and holders of combined licenses, or in certain cases, the Department of Energy, depending on the purpose and scope of the research. The same treatment should be applied to other support costs only benefiting new reactors, such as rulemaking and development of standards undertaken to allow new reactor licensing to proceed. Indeed, Exelon cannot perceive any reason why new reactor costs should not be recovered entirely through fees paid by participants in new reactor licensing, i.e., the applicants, licensees, holders of design certifications, and vendors that are engaged in new reactor activities.[6]

Recovering such support costs from identifiable beneficiaries through 10 CFR 170 user fees is permissible under the IOAA and far more equitable than seeking recovery through an annual fee on reactor licenses such as Exelon who are not currently pursuing any new reactor

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[6] For example, the NRC 2014 Congressional Budget Justification indicates that new reactor research funding supports the resolution of technical issues in Design Certification Reviews. *See* NUREG-1100, Vol. 29, FY 2014 Congressional Budget Justification (Apr. 2013) at 48. Such funding should be recovered through user fees charged to Design Certification applicants. The 2014 Congressional Budget Justification states that advanced reactor program research will support the review of integral pressurized-water reactors. *Id.* at 49. The costs of this research should therefore be recovered through the user fees charged to applicants (or pre-applicants) seeking design review or certification of such reactors. Again, the absence of sufficient information in the Work Papers makes it impossible to determine whether such research is indeed being recovered through user fees or is simply being imposed on all operating reactors through the annual fee.

licensing. While the IOAA has been interpreted as allowing assessment of user fees only to persons who are identifiable recipients of certain special benefits, this interpretation does not preclude full recovery of all costs including support activities required for the NRC to provide its services. The special benefits for which a user fee should accrue are not limited to the granting of licenses or other approvals, but include any government service that "provides business stability or contributes to public confidence in the business activity of the beneficiary."[7] Under NRC guidelines upheld upon judicial review, special benefits include services "necessary to assist a recipient in complying with statutory obligations or obligations under the Commission regulations." (*Mississippi Power & Light*, 601 F.2d at 226 n.3). "All direct and indirect costs incurred by the NRC in providing special benefits may be recovered." (*Id).* Administrative and support costs, including training, should be recovered. (*Id.* at 232). Moreover, as the Commission itself has maintained, research is a "regulatory service" because "research programs are necessary for the Commission to have continuing confidence that licensed reactors can be operated consistent with the public health and safety and the Commission's regulations. (*Florida Power & Light Co. v. United States*, 846 F.2d 765, 769-70 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1045 (1989)). By the same logic, research supporting new plant activities is a "regulatory service" to the entities engaged in such activities because it enables and provides confidence in the NRC licensing and regulation of those activities.

Any Annual Fee for New Reactor Costs Should Be Assessed to a Class of Licensee That Benefits From Such Activities, and Not to All Operating Reactors

If the NRC is unable to recover the full amount of its new reactor costs through user fees, it should define a new, more focused class of licensees that should be assessed the annual fee needed to collect the remainder. In order to meet the statutory requirement that the generic costs be allocated "fairly and equitably" so that "[t]o the maximum extent practicable, the charges shall have a reasonable relationship to the cost of providing regulatory services" to such licensees, the annual fee for new reactor activities should be assessed to holders of design certifications, design approvals and manufacturing licenses, licensees that hold or have active applications for combined licenses,[8] holders of active construction permits, and holders of any other NRC approvals allowing or pertaining to new plant activities. Because OBRA authorizes annual charges collected from "licensees and certificate holders" (*see* 42 U.S.C. § 2214(c)), this annual fee probably could not be assessed to design certification *applicants* per se – making this an inferior alternative to direct collection through user fees. However, the NRC does have the authority to define a "new reactor licensee" to include any approval or form of permission granted under its regulations in 10 CFR 52, consistent with the Administrative Procedure Act (at 5 U.S.C. 551(8)) and similar to the approach it has taken in defining a "materials license" in 10 CFR 171. (*See* 10 CFR 171.5). Thus, the NRC can define a licensee for purposes of the fee in 10 CFR 171 so that the 10 CFR 171 fees apply to *holders* of design

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[7] The NRC may also recover the full cost of providing a service to an identifiable beneficiary regardless of incidental benefits flowing from the provision of that service to the public. *Mississippi Power & Light Co. v. NRC*, 601 F.2d 223, 230 (5th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980).

[8] If the NRC can assess an annual fee to all operating reactor licensees to recover new reactor costs, it can assess such a fee to the subset of operating reactor licensees engaged in new reactor activities (regardless of whether they hold a COL yet).

certifications, design approvals or any other such approvals (including for example vendors who have obtained NRC approval of a QA program in order to pursue work and NRC review of new plant designs).

Imposing any annual fee that may be needed for these activities on holders of design certifications, design approvals and manufacturing licenses, licensees that hold or have active applications for combined licenses, and holders of active construction permits, would impose the new reactor costs on those entities that have the closest relationship to the regulatory services, and would be the most fair and equitable allocation. In contrast, imposing these fees on all operating reactor licensees, including many like Exelon that are not currently pursuing any new reactor licensing applications, while giving a free pass to the reactor vendors directly benefiting from NRC new reactor activities, violates OBRA's requirement to allocate annual fees fairly and equitably, an in a manner ensuring that "[t]o the maximum extent practicable," the annual fee has "a relationship to the cost of providing regulatory services" to the class of licensee paying this fee.[9]

Further, the NRC current approach of automatically charging the vast majority of supposedly generic costs to operating reactors dates back to times where power reactor licensees were almost all regulated electric utilities with the ability to recover their costs through rates. This is no longer the case. In fact, neither Exelon nor CENG is an electric utility with the ability to pass through its costs to ratepayers through cost of service based rates. In enacting OBRA, Congress specifically advised the Commission to take into account, in establishing its fee schedule, whether licensees have the ability to pass through these costs to the ultimate customer. (*See Allied Signal, Inc. v. NRC*, 988 F.2d 146, 149 (D.C. Cir 1993)). It is therefore inappropriate for the Commission simply to heap a $20 million increase on Exelon. With deregulation, it is no longer reasonable to assume that reactor licensees have the ability to pay and recover such costs. Indeed, in the current environment, such cost increases may contribute to unnecessary and undesirable plant closures.

<u>The Annual Fee for Operating Reactors Should Apply to Holders of Combined Licenses</u>

The annual fee for operating reactors under 10 CFR 171 should be assessed not just to the 100 current operating licensees but to the additional holders of combined licenses as well. Currently, the annual fees do not apply to the holder of a combined license until such time as the Commission makes a finding under 10 CFR 52.103(g) allowing operation. (*See* 10 CFR 171.15(a)). This is inequitable because many of the NRC generic activities for operating reactors, such as the Fukushima NTTF activities, benefit combined license holders just as much as 10 CFR 50 operating licensees. If holders of combined licenses are not included in the assessment, they will be the beneficiaries of these services without ever bearing any of the costs. Further, the current combined license holders are far better positioned to recover these costs than many current operating licensees because the combined license

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[9] In enacting OBRA, Congress specifically rejected a proposal that the total amount intended to be recovered through annual charges be divided among power reactor licensees equally, stating instead that "the conferees intend that the NRC assess the annual charge under the principle that licensees who require the greatest expenditure of the agency's resources should pay the greatest annual charge." H.R. Rep. No. 101-964, reprinted in 1990 U.S.C.C.A.N. 2374, 2667.

holders remain electric utilities able to recover their costs through rates, and regulatory costs during construction are largely capitalized.

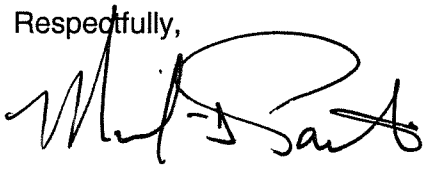
The Proposed Rule Reflects Underutilization and Inefficiency in NRC Resources That Should Be Corrected in Future Budgets

While there is little time left in FY 2014 to correct the budgetary resource allocations on which the Proposed Rule is based, the substantial proposed increase in the annual fee for operating reactors suggests increasing underutilization and inefficiency in the NRC Staff. The Proposed Rule reflects declines in current year licensing actions, delays in major design certification applications and combined operating licenses, and the shutdown of two operating reactors. (79FR21045). Nevertheless, the total FY 2014 budget authority increased by $70 million (*id.* at 21039, Table I) and the total budgeted resources allocated to reactors increased by $65 million (*id.* at 21045, Table XIII). As reflected in Table XIII of the Work Papers, there is an estimated reduction of 76.7 FTE allocated to new reactors in FY2014 (offset somewhat by a $17 million increase on contract costs) but an increase of 53.4 FTE allocated to operating reactors. This shifting of resources from new reactors to operating reactors raises a legitimate concern that perhaps underutilized NRC Staff previously assigned to new reactors are being reassigned to operating reactors to preserve their employment. With the termination of Yucca Mountain licensing activities previously eliminating the need for 99 FTE at the end of FY 2011,[10] the current levels of NRC staffing are hard to explain.

The NRC current estimate of the direct hours per FTE provides another troubling measure. While the current estimate of direct hours per FTE has been increased slightly from FY 2013 to 1375 hours per FTE, that estimate remains well below the 1446 hour estimated in 2005, and even further below the 1776 hours estimated in previous fiscal years. (*See* 70FR30526, 30533 dated May 26, 2005). The current, low level of productivity does not appear justifiable. Accordingly, Exelon strongly encourages the Commission to re-examine its staffing levels and make appropriate adjustments in future budgets.

Exelon and CENG appreciate the opportunity to submit these comments. If you have any questions about these comments or require further information, please contact James Barstow, Director, Licensing and Regulatory Affairs, at 610-765-5664.

Respectfully,



Michael Pacilio
President and Chief Nuclear Officer Exelon Nuclear

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[10] *See* NUREG-1100, Vol. 27, FY 2012 Congressional Budget Justification (Feb. 2011), at 14.