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NUCLEAR ENERGY INSTITUTE

August 31, 2016

The Honorable Stephen G. Burns
Chairman
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Subject: Nuclear Energy Institute Comments on SECY 16-0097, Fee Setting Improvements and Fiscal Year 2017 Proposed Fee Rule

Project Number: 689

Dear Chairman Burns:

The Nuclear Energy Institute (NEI)[1] commends the efforts undertaken by the Office of the Chief Financial Officer, as outlined in SECY 16-0097, to improve the transparency and simplify how the NRC calculates and accounts for fees, and improve the timeliness of when the NRC communicates fee changes. Fee collection has historically been a matter of concern to the industry[2] and we welcome the opportunity to discuss ongoing fee policy efforts during the September 16, 2016 Commission briefing. As NEI explained in testimony during recent congressional hearings addressing concerns with NRC fees, there are systemic problems with the agency's fee recovery structure.[3] As SECY-16-0097 acknowledges, some of these problems require legislation to ensure durable reform. Rather than limit itself to the modest potential improvements proposed in SECY 16-0097, the Commission should take a leadership role in addressing the problems that members of Congress and industry have identified with the current system. This should include, at a minimum, supporting legislation aimed at reforming the NRC fee recovery structure.

[1] NEI is responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including regulatory, financial, technical and legislative issues. NEI members include all companies 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] Report to the Congress on the U.S. Nuclear Regulatory Commission's Licensee Fee Policy Review Required by the Energy Policy Act of 1992, February 1994; SECY-95-017, "Reinventing NRC Fee Policy"; COMSECY 96-065, Strategic Assessment Direction Setting Issue: Fees (DSI 21).

[3] Testimony for the Record, Maria G. Korsnick, Chief Operating Officer, Nuclear Energy Institute, Before the Senate Environment and Public Works Committee, April 21, 2016; Testimony for the Record, Marvin S. Fertel, President and Chief Executive Officer, Nuclear Energy InstituteBefore the House Energy and Commerce Committee, April 29, 2016.

SECY 16-0097 identifies four fee policy changes that the staff wishes to study further along with 14 administrative improvements that would be implemented in FY2017. While a full understanding of the impact of the four proposed policy changes is not possible based on the short descriptions provided in the SECY paper, these limited descriptions lead industry to believe that the proposed changes fall far short of the changes necessary to improve the fee process. Moreover, it appears that some of the proposed changes would be contrary to stated objectives to improve fee transparency and equitability. This letter identifies a number of concerns raised by the proposed policy changes in SECY 16-0097 that we hope can be discussed during the planned briefing.

Policy Change 1: Modify the calculation of the annual fee based on the size of the licensed facility

Currently, all licensees in a fee class or category are charged the same annual fee, regardless of size. Under this proposal, the staff would explore alternative bases for calculating the annual fee.

It is not clear what problem or concern this proposal is addressing. The NRC has already completed a rulemaking to address the annual fee inequities that future small modular reactors would have faced due to their unique design characteristics (81 FR 32617). Nonetheless, the SECY paper proposes a change that would purportedly increase transparency of fee calculations (by clearly providing a mathematical relationship between annual fees and licensed thermal power output). However, we do not see the increase in transparency that this change is purported to provide. As noted in the SECY, OBRA-90 specifies that annual fees should—to the maximum extent practicable—have a reasonable relationship to the cost of providing regulatory services. Yet industry is not aware of any discernable relationship between facility size and the cost of providing regulatory services for the current class of operating reactors. To the contrary, previous NRC efforts to calculate fees based on detailed analysis of the relationship of specific generic regulatory activities to specific types of light-water reactors was not worthwhile and resulted in only minimal benefits to licensees compared to a flat-fee approach (see 60 FR 32230). In fact, the current methodology for calculating annual fees for power reactors, fuel facilities, and uranium recovery licensees was changed as part of the FY1995 fee rule (60 FR 32218) to "improve the relationship between annual fees and the cost of providing regulatory services to the classes and subclasses of licensees, and to improve NRC efficiency." Given this prior experience and higher agency priorities, we believe that the NRC should not pursue this proposed policy change.

Policy Change 2: Charge operating reactors a combined 10 CFR Part 170 and 10 CFR Part 171 fee, instead of hourly fees-for-service

Under this proposal, a new annual fee would be applied to operating reactors covering all project manager time plus technical reviewer time for a baseline number of licensing actions. This fee would also cover all hours associated with the baseline inspection program.

Similar to the previous policy change, it is unclear what problem this proposal would address. Industry has expressed concerns with increases in the number of inspection hours since inception of the revised reactor oversight process (in excess of 25%) despite the strong safety record of U.S. operating reactors. We have similarly expressed concerns on the unjustified increases in the costs of licensing actions (e.g., license renewals, early site permits). We believe the proposed change to charge operating plant licensees a flat charge covering baseline inspections and licensing actions would remove any incentive to better manage costs and expenditures in these areas. The preferred course of action, as identified in our May 6 letter, is to identify and communicate to licensees and applicants the schedule and anticipated level of effort for each

licensing action. By establishing a budget estimate in advance, the NRC will have another benchmark to judge whether it and an applicant are meeting their respective obligations during the review process. When there is an anticipated departure from the budget estimate, the NRC should promptly issue a change notice documenting that its review efforts exceed either forecast costs or schedule, along with an account for the reason why. This would allow both NRC and applicant management to more effectively monitor and manage the review process.

Policy Change 3: Charge a flat fee for each license amendment review or other similar routine activity for materials program licensees

Under this proposal, the staff would explore charging several flat fees for license amendments and other reviews, with different charges classified in tiers, based on the expected complexity of the review.

While we believe that the establishment of review categories with established anticipated cost would be useful, we recognize that the variability among different types of licensing actions would make establishment of equitable fees challenging. We are also concerned with the potential loss of accountability to review budgets. Under the constraints of OBRA-90, review time in excess of the flat fee would need to be collected and presumably would be covered under 10 CFR Part 171 annual fees. We believe a more appropriate course of action is to establish baseline review categories with established cost and schedule parameters that would be communicated to applicants up front. Review progress, in close coordination with the applicant, would then be closely monitored and managed.

Policy Change 4: Charge hourly fees for all contested hearings

Under this proposal, licensees or applicants would be charged hourly fees for all contested hearings. Currently, the costs for uncontested hearings and contested hearing involving national security initiatives are directly billed under 10 CFR Part 170. The costs for other contested hearings are recovered through generic annual charges.

In its March 22, 2016 request for information (81 FR 15352), the NRC requested stakeholder input on whether hearings for new licenses should be fee-billable or should the NRC continue to recover those costs through 10 CFR Part 171 annual charges. Stakeholder responses to this question were uniform in their direction that contested hearings should not be fee-billable. Specifically, NEI requested that the NRC "consider making hearings a non-fee activity and, if the current 10 percent fee-relief offset is insufficient to cover hearing activities, seeking appropriations to cover these activities." Contrary to these stakeholder views, the SECY proposes exploring directly billing applicants for all hearings. We strongly urge that this proposal not be pursued in its current form.

The NRC's longstanding policy has been to recover the costs for contested hearings through Part 171 annual fees assessed to the members of the particular class of licensees to which the applicant belongs (see 43 FR 7212-7213). The U.S. Court of Appeals for the Fifth Circuit endorsed the NRC's practice of excluding contested hearing costs from Part 170 as a "wise" policy. *Mississippi Power & Light Co. v. NRC*, 601 F.2d 223, 232 n.18 (5th Cir. 1979). The NRC's 1994 licensee fee policy review required by the Energy Policy Act of 1992 also addressed this question. In this review, the NRC collected stakeholder comments on "whether to broaden Part 170 to recover costs incurred for specific activities that are now collected as part of the annual fee, including... contested hearings." Stakeholder comments noted that the costs of contested

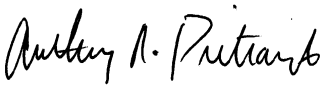
hearings are beyond the licensee's control and should not be billed on an individual basis. Commenters also noted the potential for generic issues to be raised and addressed during hearing providing a benefit to all licensees. The NRC agreed with these comments and reported to Congress that the agency would continue to assess fees for contested hearings under Part 171. We are not aware of any changes in conditions that would justify reexamining this longstanding policy. Given benefits of maintaining this policy and the potential legal hurdles with establishing a new one,[4] the NRC should not pursue this proposed policy change

Administrative Changes in FY2017

The SECY paper identifies 14 administrative changes that will be incorporated in the fee process during FY2017. While these changes are not described in detail and we await any clarifications that may be provided during the September 16 briefing, the changes appear to be relatively minor in impact. We note that many of the more substantive administrative changes identified by stakeholders are relegated to the category of "future consideration."

NEI appreciates your consideration of the industry's perspective and looks forward to continuing work with the Commission and staff to help ensure continual improvement. Please contact me if you have any questions.

Sincerely,



Anthony R. Pietrangelo

c: The Honorable Kristine L. Svinicki, Commissioner, NRC
The Honorable Jeff M. Baran, Commissioner, NRC
NRC Document Control Desk

[4] It may be difficult for the NRC to rely on the Independent Office Appropriations Act to authorize collection of fees in at least some contested hearings. *See Elec. Indus. Ass'n v. FCC,* 554 F.2d 1109, 1117 n.17 (D.C. Cir. 1976) (noting (1) "that in many hearings the [FCC] trial staff presumably represents an independent public interest, and some or all of their expenses might therefore be excluded from the basis of the fees", and (2) that there is "some substance" to the argument that requiring "applicants to pay the litigation costs of the opposing party [is] contrary to the holding of *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975)").