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May 3, 2019

Ms. Maureen E. Wylie
Chief Financial Officer
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Subject: Fee Exemption Request for Activities Performed for the NEI Composite Adversary Force

Project Number: 689

Dear Ms. Wylie:

In a letter dated August 21, 2018, the Nuclear Energy Institute (NEI)¹ disputed the fees charged to NEI in Invoice LFB 18-5202.² Specifically, in accordance with 10 C.F.R. §§ 170.51 and 15.31, NEI objected to being assessed for over 200 hours of "Mock Adversary Force Observation" during April and May 2018 for observation of the process used to select Composite Adversary Force (CAF) team members.

NEI explained in its August 2018 letter that 10 C.F.R. Part 170 does not authorize the U.S. Nuclear Regulatory Commission (NRC) to assess such fees. Furthermore, although NEI has been coordinating the CAF selection process for more than ten years, the NRC had never previously assessed NEI fees to cover its "observation" of the selection process. Additionally, NEI had never requested, and the NRC had never informed NEI it had granted NEI, a fee exemption. Nonetheless, in a letter dated December 10, 2018, the NRC's Chief Financial Officer (CFO) denied NEI's August 2018 appeal, stating that:

"Oversight of the Composite Adversary Force (CAF) is considered a special project because while NEI provides this service to NEI members to support NRC conducted force-on-force inspections, the NRC must verify that the CAF meets the appropriate performance requirements and mitigation of conflicts of interest ... The NRC staff had previously concluded that activities on invoice LFB 18-5202

¹ NEI is the organization responsible for establishing unified policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include entities 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 Letter from J. Pollock, Vice President, NEI, to M. Wylie, CFO, NRC (Aug. 21, 2018) (ML18234A038).

for CAF Oversight were not fee billable under 10 CFR Part 170, "Fees for Facilities, Materials, Import and Export Licenses, and Other Regulatory Services Under the Atomic Energy Act of 1954, as Amended" because the CAF was used to assist the NRC in generic regulatory efforts for the force-on-force inspection process of all operating power reactors. While the CAF was used at all operating reactors, the fee exemption at 10 CFR 170.11(a)(ii) was applicable. The NRC staff, however, revisited this matter and ultimately concluded that since the CAF is no longer used at all operating power reactors, the 10 CFR 170.11(a)(ii) exemption no longer applies."³

This was the first time the NRC had ever informed NEI that its CAF program was considered a "special project" and that NRC had been—apparently for over a decade and without notice—granting NEI fee exemptions. Given the significant policy issues raised by the CFO's December 2018 denial, NEI raised its concerns related to the changes in the agency's fee billing practices in a letter to the Chairman dated February 13, 2019.⁴ NEI explained, among other things, that: (1) imposition of the change in position regarding assessment of fees for observation of the CAF selection process, without prior notice, is inconsistent with the Commission's Principles of Good Regulation; and (2) the new interpretation of the fee exemption regulation for special projects articulated in the CFO's denial could have broad implications for future fee waiver requests. NEI requested that CFO's denial of NEI's appeal be reconsidered and the policy implications associated with the CFO's new interpretation of the fee exemption regulation be reviewed.

NEI has received a letter from the Office of Nuclear Security and Incident Response (NSIR) providing notice that NEI "will be billed for CAF oversight activities during calendar year 2019."⁵ Without waiving the arguments NEI previously made in its August 2018 and February 2019 letters, reserving its rights, and out of an abundance of caution, NEI requests that the CFO grant NEI a fee exemption in accordance with 10 C.F.R. § 170.11(a)(1)(ii) for any past and future NRC activities performed for CAF oversight activities.

Under 10 C.F.R. § 170.11(a)(1)(ii):

"No application fees, license fees, renewal fees, inspection fees, or special project fees shall be required for ... [a] special project that is a request/report submitted to the NRC ... [w]hen the NRC, at the time the request/report is submitted, plans to use the information in response to an NRC request from the Office Director level or above to resolve an identified safety, safeguards, or environmental issue, or to assist the NRC in generic regulatory improvements or efforts (e.g., rules, regulatory guides, regulations, policy statements, generic letters, or bulletins)."

NRC oversight of NEI's CAF program satisfies this standard for two independent reasons, either of which is sufficient for a fee waiver: (1) the NEI CAF program resolves a safety, safeguards, or environmental issue in

³ Letter from M. Wylie, CFO, NRC, to J. Pollock, Vice President, NEI at 2 (Dec. 10, 2018) (ML18289A774) (emphasis in original) ("NRC December 2018 Letter").

⁴ Letter from M. Korsnick, CEO, NEI, to K. Svinicki, Chairman, NRC (Feb. 13, 2019).

⁵ Letter from D. Johnson, Branch Chief, NRC, to Susan Perkins-Grew, Senior Director, NEI (Feb. 7, 2019).

response to a Commission directive; and (2) the NEI CAF program assists the NRC in generic regulatory improvements or efforts.

First, NEI developed the CAF program “in response to an NRC request from the Office Director level or above to resolve an identified safety, safeguards, or environmental issue.” In 2003, NSIR evaluated alternatives for the development and implementation of a process that would result in a credible, well-trained, and consistent mock adversary force to be used in force-on-force exercises. The Director of NSIR recommended, and the Commission ultimately approved, the alternative that became NEI’s CAF program. Therefore, the NRC has not had to establish its own adversary force (an alternative that was considered). Nor has the NRC had to oversee separate adversary forces for each licensee (another alternative that was considered). Importantly for purposes of the fee exemption, in reliance on the Commission’s decision, NEI established the CAF program to resolve this issue. Accordingly, NEI’s actions to resolve this issue in response to the NSIR Director’s recommendation and the Commission’s decision resulted in the formation of the CAF program and thus satisfies 10 C.F.R. § 170.11(a)(1)(ii).

Second, NEI’s CAF program is also entitled to a fee exemption because it “assist[s] the NRC in generic regulatory improvements or efforts.” NEI members are the licensees for 81 of the 98 operating power reactors and 47 of the 59 reactor sites in the U.S. By having a common NEI CAF team for more than 80 percent of the operating reactors and 80 percent of reactor sites, NRC does not have to perform oversight activities for separate adversary forces for each NEI member or alternatively, establish NRC’s own adversary force. This benefits the agency because it saves the NRC both time and resources. The use of a single CAF team for all NEI members also increases NRC regulatory efficiency as it provides a consistent approach for CAF team selection and implementation. Accordingly, NEI’s CAF program assists the NRC in generic regulatory improvements or efforts in accordance with 10 C.F.R. § 170.11(a)(1)(ii).

The CFO’s December 2018 denial appears to concede that NEI’s CAF assisted the NRC in generic regulatory improvements or efforts because the NRC granted fee exemptions prior to 2018. But that letter states the NRC’s prior determination was premised on the CAF being “used to assist the NRC in generic regulatory efforts for the force-on-force inspection process of *all* operating power reactors.”⁶ According to that letter, the exemption is no longer applicable because “the CAF is no longer used at all operating power reactors.”⁷ But nothing in 10 C.F.R. § 170.11(a)(1)(ii) or in the NRC’s implementation of that regulation indicates that the NRC can or will only grant a fee exemption if the generic regulatory improvement or effort is applicable to every operating reactor. To the contrary, the NRC defines “generic” as “[a]ffecting two or more facilities and/or licensees/certificate holders, or holders of other regulatory approvals (including design certification rules).”⁸ Moreover, the NRC regularly approves fee exemptions for generic regulatory improvements and

⁶ NRC December 2018 Letter at 2 (emphasis in original).

⁷ *Id.*

⁸ Management Directive 6.4, Generic Issues Program at 20 (Jan. 2, 2015) (ML18073A162).

Ms. Maureen Wylie

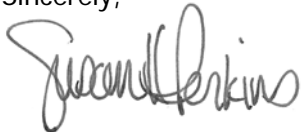
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efforts that by their very nature *cannot* apply to all operating power reactors.⁹ Given that the NEI CAF is still being used to assist in generic regulatory efforts for 80 percent of operating power reactors, there is no basis to conclude that it does not assist the NRC in generic regulatory improvements or efforts. Taking a contrary interpretation would be inconsistent with the NRC's Generic Issues Program, and would disrupt the regulatory activities of numerous organizations that rely on fee exemptions for activities that benefit both the NRC and the industry but are not relied on by 100 percent of an entire class of licensees.

If you have any questions or require additional information, please contact Jonathan Rund at (202) 739-8144 or jmr@nei.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Susan H. Perkins". The signature is fluid and cursive, with the first name "Susan" being the most prominent.

Susan H. Perkins

c: Ms. Marissa Bailey, NSIR/DSO, NRC
Mr. Dante Johnson, NSIR/DSO/SOSB, NRC
NRC Document Control Center

⁹ See, e.g., Letter from M. Wylie, CFO, NRC, to A. McGehee, BWRVIP Program Manager, Electric Power Research Institute (Apr. 1, 2019) (ML19073A238) (granting a 10 C.F.R. § 170.11(a)(1)(ii) fee exemption for review of guidance for boiling water reactors seeking a second license renewal).