

NUCLEAR REGULATORY COMMISSION

10 CFR Part 171

[Docket No. PRM-171-1; NRC-2019-0084]

Nuclear Power Plant License Fees Upon Commencing Commercial Operation

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking; denial.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is denying a petition for rulemaking (PRM), dated February 28, 2019, submitted by Dr. Michael D. Meier on behalf of the Southern Nuclear Operating Company. The petition was docketed by the NRC on March 21, 2019, and assigned Docket No. PRM-171-1. The petitioner requested that the NRC revise its regulations related to the start of assessment of annual fees for a combined license holder to align with commencement of commercial operation of the licensed nuclear power plant. The NRC evaluated the petition in light of the considerations described in § 2.803(h)(1) and found that the requested change to the start of annual fees for COL holders is not consistent with the NRC's relevant past decisions and current policy (notwithstanding the petitioner's assertions of consistency) and would undermine basic principles underlying the fee structure. The NRC has determined that no amendment to the NRC's regulations is necessary because the issue raised by the petitioner is adequately addressed by existing NRC regulations, procedures, and guidance.

DATES: The docket for the petition for rulemaking PRM-171-1 is closed on **[INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

ADDRESSES: Please refer to Docket ID NRC-2019-0084 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- **Federal Rulemaking Web Site:** Go to <http://www.regulations.gov> and search for Docket ID NRC-2019-0084. Address questions about NRC dockets to Carol Gallagher; telephone: 301-415-3463; e-mail: Carol.Gallagher@nrc.gov. For technical questions, contact the individual listed in the FOR FURTHER INFORMATION CONTACT section of this document.

- **NRC's Agencywide Documents Access and Management System (ADAMS):** You may obtain publicly-available documents online in the ADAMS Public Documents collection at <http://www.nrc.gov/reading-rm/adams.html>. To begin the search, select "[Begin Web-based ADAMS Search](#)." For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1-800-397-4209, 301-415-4737, or by e-mail to pdr.resource@nrc.gov.

- **NRC's PDR:** You may examine and purchase copies of public documents at the NRC's PDR, Room O1-F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Victoria V. Huckabay, Office of Nuclear Material Safety and Safeguards, telephone: 301-415-5183, e-mail: Victoria.Huckabay@nrc.gov or Jo A. Jacobs, Office of the Chief Financial Officer, telephone: 301-415-8388; e-mail: Jo.Jacobs@nrc.gov. Both are staff of the U.S. Nuclear Regulatory Commission, Washington DC 20555-0001.

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I. The Petition

Section 2.802 of title 10 of the *Code of Federal Regulations* (10 CFR), "Petition for rulemaking," provides an opportunity for any interested person to petition the Commission to issue, amend, or rescind any regulation. On February 28, 2019, the NRC received a PRM from Dr. Michael D. Meier, on behalf of the Southern Nuclear Operating Company (the petitioner). The petitioner requested that the NRC revise its regulations related to the start of assessment of annual fees for a combined license (COL) holder, to align with commencement of commercial operation of a licensed nuclear power plant. Specifically, the petitioner requested that the NRC revise the timing of when annual license fees commence for holders of a combined license under 10 CFR part 52, "Licenses, Certifications, and Approvals for Nuclear Power Plants," in order to coincide with the time when a reactor achieves "commercial operation," rather than when a § 52.103(g) finding is issued, which is when the NRC finds that the acceptance criteria in the COL are met and the licensee can operate the facility.

The petitioner observed that the issuance of the § 52.103(g) finding will occur prior to reactor startup, and several months before commercial operation of the reactor. The petitioner further noted that during the startup phase, the reactor will not have achieved commercial operation, and the licensee will be incapable of deriving revenue from the production of energy beyond the *de minimis* amounts from test energy. The petitioner asserted that because commercial operation does not occur until several

months after the § 52.103(g) finding, the current language of § 171.15(a) does not align with the NRC's stated policy to assess annual fees based on the benefits of receiving authorization to operate. The petitioner proposed that the regulations in § 171.15(a) be revised such that the responsibility for NRC annual fees under 10 CFR part 171 on part 52 licensees be imposed at the time when the power reactor is deemed available for commercial operation under the licensee's and/or state regulatory agency's accounting rules.

The NRC identified three main assertions in the petition:

- 1) The existing language in the regulations imposes a responsibility to start paying annual fees before a 10 CFR part 52 licensee realizes the benefits of receiving an authorization to operate. The petitioner defines this benefit as "commercial operation."
- 2) The proposed revision would align annual fees assessed to 10 CFR part 52 licensees with the realization of benefits (of receiving the NRC's authorization to operate).
- 3) The proposed revision does not affect the intent that the annual fees be imposed fairly and equitably.

II. Public Comments on the Petition

The NRC published a notice of docketing and request for comment in the *Federal Register* on June 10, 2019 (84 FR 26774). The comment period closed on July 10, 2019. The NRC received five public comment submissions during the 30-day public comment period, from the Nuclear Energy Institute, several industry stakeholders, and one non-government organization. All five commenters expressed their support for the petition. In addition, two of the commenters proposed additional changes, suggesting

that the scope of the rulemaking be expanded, to apply to reactors licensed under 10 part 50 and small modular reactors, with conforming changes to § 171.19(e)(1).

III. Reasons for Denial

The NRC has evaluated the petition in light of the considerations described in § 2.803(h)(1) and found that the requested change to the start of annual fees for COL holders is not consistent with the NRC's relevant past decisions and current policy (notwithstanding the petitioner's assertions of consistency) and would undermine basic principles underlying the fee structure. The NRC has determined that no amendment to the NRC's regulations is necessary because the issue raised by the petitioner is adequately addressed by existing NRC regulations, procedures, and guidance, and the petitioner did not present any significant new information or arguments that would support the requested changes for the start of annual fees for COL holders. The petitioner did not demonstrate the existence of a regulatory gap between the regulations in 10 CFR part 171 and the Commission's policy to assess annual fees based on the benefits of receiving authorization to operate.

The NRC is required by statute, the Omnibus Budget Reconciliation Act of 1990, as amended, to recover approximately 90 percent of its budget in fees assessed to licensees, less portions specifically excluded from fee recovery. Starting in Fiscal Year (FY) 2021, the Nuclear Energy and Innovation Modernization Act will increase the amount of the budget to be recovered to approximately 100 percent, less those portions that are specifically excluded. To maintain the cohesiveness of the NRC's fee schedules, the Commission has maintained appropriate policies to comply with statutory requirements. The Commission has previously addressed this issue in the statement of considerations for the FY 2002 final fee rule (67 FR 42611; June 24, 2002), stating that

the NRC has not based its annual fees on licensees' economic status, market conditions, or the inability of licensees to pass through the costs to its customers. Instead, the NRC has only considered the impacts it is required to address by law.

The NRC's fundamental concern with the petitioner's proposal is the potential disruption to the integrity and equity of the process NRC uses to establish fees. A decision to assess fees based on the economic viability of the licensee potentially could destabilize the fee system. In keeping with the agency's independent, non-promotional regulatory role, the NRC's regulations deliberately are not tied to economic viability or profitability, and the NRC has not evaluated fees based on these concepts. Additionally, the petitioner's proposal could disrupt the fairness and equity balance within the fee schedules, as fees forgone by one licensee would be paid by the other licensees in that fee class through a corresponding increase in annual fees.

The NRC noted in the statement of considerations for the FY 2002 final fee rule that the existing policy of assessing annual fees based on whether a licensee holds a valid NRC license authorizing possession and use of nuclear material, irrespective of the licensee's intent to operate its facility or remain in standby, represents the fairest option available. Under 10 CFR part 52, the licensee receives that full authority when the Commission makes its § 52.103(g) finding, and under 10 CFR part 50, the licensee receives that full authority upon issuance of an operating license. The benefit that a § 52.103(g) finding and a part 50 operating license provides is the authority to use licensed material, notwithstanding a licensee's decision to avail itself of the authority to operate. This is because it is the authority to use licensed material that permits the licensee to initiate the startup and operational testing activities that are the precursors to commercial operation. Both 10 CFR part 50 operating licensees and COL licensees after the Commission's § 52.103(g) finding have substantially the same startup and operational testing required before commercial operation can begin. In sum, contrary to

the petitioner's assertions that its proposed change is consistent with the Commission's long-standing policy regarding the accrual of annual fees, the petitioner's proposal would fundamentally alter the Commission's policy of charging annual fees upon receipt of the benefit of authority to possess and use nuclear materials, including for testing purposes prior to commercial operation. As such, in the case of a COL holder or a power reactor operating license holder, a licensee's business decision as to the timeframe for commencing commercial operation, including initiation of the prudent steps for safe startup and operation, is not material to when the benefit to the licensee accrues.

The proposed change would also alter the fair and equitable assessment of fees within a fee class. As the Commission observed, a reduction in the fees assessed to one class or category of licensees would require a corresponding increase in the fees assessed to other licensees. Consequently, the NRC has not based its fees on licensees' economic status, market conditions, or the ability of a licensee to pass through its costs to its customers. The Commission has consistently taken the position that it will not consider economic factors because it could set an untenable precedent for the NRC with the potential to unravel the stability and viability of the entire fee system. Not only would other classes of licensees be required to subsidize a single entity or class of licensees through increased fees, but other categories of licensees also might request similar treatment based on analogous and unstable economic considerations. The staff believes that these points remain valid, and neither the petition nor the commenters have addressed the Commission's position on these points in their arguments.

The NRC's longstanding requirements for when the assessment of annual fees begins is found in § 171.3, "Scope." In the statement of considerations from the FY 2007 final fee rule (72 FR 31402; June 6, 2007), the Commission observed that the NRC modified §§ 171.3 and 171.16 to codify its longstanding practice regarding when the

assessment of annual fees begins for licensees subject to regulations that require a specific NRC authorization to operate subsequent to the NRC issuing the license. While COL holders under 10 CFR part 52 hold an operating license, the fee rule makes the distinction that they do not approach a comparable status to plants holding an operating license under 10 CFR part 50 until the NRC determines that the inspections, tests, analyses, and acceptance criteria are satisfied and makes the § 52.103(g) finding. Thus, the NRC stated in the FY 2015 final fee rule in response to a stakeholder comment that fairness concerns dictate that 10 CFR part 52 COL holders should not be charged the same fees as operating plants during their construction and pre-operational phases. The NRC further outlines this policy for reactor licensees in § 171.15(a), “Annual fees: Reactor licensees and independent spent fuel storage licenses.” The NRC does not charge reactors licensed under 10 CFR part 52 annual fees until after the Commission makes a § 52.103(g) finding.

The petitioner interpreted the statement of considerations from the FY 2007 final fee rule to mean that charging annual fees is associated with the “benefits of receiving the NRC’s authorization to operate.” The petitioner maintained that this benefit is not gained with the issuance of a § 52.103(g) finding, but with the start of “commercial operation” of the reactor. The PRM defined commercial operation as: “the power reactor will be capable of generating sufficient energy to reliably serve the licensee’s customers and generate sufficient revenue for the licensees to justify imposition of the annual fee.” This interpretation raised two challenges for the staff. First, there is no regulatory requirement for a licensee to notify the NRC when the licensee first begins commercial operation, and the term “commercial operation” is ambiguous and not defined in the NRC regulations or guidance. Second, the Commission’s longstanding and fundamental policy underlying the fee structure states that the imposition of the annual fee should not be related to the licensee’s financial justification if the NRC is to maintain the integrity of

the statutorily mandated fee collection requirements. The entire passage from the FY 2007 final fee rule that the petitioner references when discussing “benefits” states:

This is consistent with the policy that annual fees are assessed to licensees based on the benefits of receiving the NRC’s authorization to operate, whether or not the licensee chooses to operate (with the exception of power reactors in decommissioning or possession only status, which are assessed annual fees if they have spent fuel onsite). Once a facility is authorized to operate, it continues to pay its annual fee(s) even if it shuts down for safety or other reasons and needs Commission approval to restart.

The “benefits” received, as described therein, are the NRC’s authorization to operate upon the issuance of a 10 CFR part 50 operating license or the NRC’s issuance of a § 52.103(g) finding. The “benefits” referenced are not related to a determination of when commercial operation begins or the licensee’s ability to generate revenue.

In the FY 2002 final fee rule, the Commission adopted this fee policy when it did not assess annual fees on those entities holding only a power reactor construction permit. The Commission indicated its intention to continue this policy when it included a provision in the FY 2007 final fee rule, that expanded the scope of 10 CFR part 171 annual fees to cover COL holders. The statement of considerations for the FY 2007 final fee rule further explained that the NRC will only assess an annual fee to a COL holder after construction has been completed, all regulatory requirements have been met, and the Commission authorizes operation of the reactor. Additionally, the NRC published a proposed rule titled “Licenses, Certifications, and Approvals for Nuclear Power Plants” (71 FR 12781; March 13, 2006), that included a provision that states that a COL holder is not subject to the annual fee until the Commission authorizes fuel load and operation.

Other than COL holders, a uranium enrichment facility is the only other current type of licensee subject to regulations that require a specific NRC authorization to operate subsequent to the NRC issuing the license. In the case of uranium enrichment facilities, this authorization occurs after the Commission verifies through inspection that

the facility has been constructed in accordance with the requirements of the license, in accordance with §§ 40.41(g) and 70.32(k), at which point annual fees will be assessed.

The NRC's policy is consistent with the direction in 42 U.S.C 2214, "NRC user fees and annual charges," which states that:

[t]he Commission shall establish, by rule, a schedule of charges fairly and equitably allocating the aggregate amount of charges... among licensees... the charges shall have a reasonable relationship to the cost of providing regulatory services and may be based on the allocation of the Commission's resources among licensees or classes of licensees.

The NRC expends resources annually to issue licenses and subsequently

regulate the entities that possess those licenses. The NRC assesses annual fees based upon the resources required to perform its assigned responsibilities, not based on market forces or related economic factors. The collection of annual fees is required to recover the resources needed to regulate each fee class that are not otherwise recovered through charges assessed for specific services in each fee class under 10 CFR part 170. Additionally, NRC fees are not based on whether a licensed entity is commercially operating or commercially viable, and the NRC achieves fairness and equity in a major rulemaking process to assess annual fees.

As described above, the staff's considerations include the stability of the fee system and budget projections of anticipated fee collections, and the fairness and equity concern that other licensees will subsidize reactors considered to be in the "startup phase." While considering the fairness and equity concern, the staff notes that stakeholder comments, including from the NEI, which represents some of the members of the class of licensees that would be most directly impacted by this change, were supportive of the proposed change. Furthermore, the "benefit" received from the NRC is the license or authorization to operate, and not the achievement of an economic milestone. Additionally, regulatory resources must be recovered in accordance with statute, and the NRC cannot independently assess a licensee's commercial viability.

The staff further notes that the Commission has previously considered the question of whether annual fees should be assessed based on whether the licensee is operating the facility or receiving economic benefit from operation, or both, and has previously re-affirmed its longstanding policy not to base annual fees on economic factors.

IV. Conclusion

For the reasons cited in this document, the NRC is denying PRM-171-1. The NRC has determined that the issue raised by the petitioner is adequately addressed by existing NRC policy and regulations, and no amendment to the NRC's regulations is necessary. The petitioner did not present any significant new information or arguments that would support the requested changes for the start of assessment of annual fees for combined license holders. The petitioner did not demonstrate the existence of a regulatory gap between the regulations in 10 CFR part 171 and the Commission's policy to assess annual fees based on the benefits of receiving authorization to operate. Finally, the NRC evaluated the petition in light of the considerations described in § 2.803(h)(1) and found the petition inconsistent with the NRC's relevant past decisions and current policy and would undermine basic principles underlying the fee structure.

Dated at Rockville, Maryland, this day of , 20 .

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,
Secretary of the Commission.