

August 4, 1980

UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D. C. 20555

SECY-80-364

**CONSENT CALENDAR ITEM**

For: The Commissioners

From: Daniel J. Donoghue, Director  
Office of Administration 

Thru: William J. Dircks  
Acting Executive Director for Operations

Subject: FEES FOR WITHDRAWN APPLICATIONS FOR POWER REACTOR CON-  
STRUCTION PERMITS, OPERATING LICENSES, AND OTHER APPROVALS  
OR REVIEWS

Purpose: To secure Commission consent to a course of action to  
recover review costs.

Category: A minor policy matter with no health or safety significance.

Discussion: Two recent withdrawals of construction permit applications  
have highlighted a problem in the collection of fees  
for review of the applications.

- (1) On December 19, 1978 Public Service Electric and Gas Co. withdrew its construction permit application for Atlantic Generating Station, Units 1 and 2. The staff subsequently determined the actual costs to the agency for reviewing the application for these units. The actual costs were \$1,236,400 for Unit 1, and \$7,100 for Unit 2. By letter of January 8, 1980, the company was billed for \$737,100, representing for Unit 1, the maximum fee in 10 CFR 170.21(a) Schedule A.5.c. of \$855,000, plus \$7,100 for Unit 2, less \$125,000 already received as an application fee. The company has refused to pay.
- (2) On December 17, 1979 New England Power Company filed a "Motion of the Applicant to Withdraw their Application" with the Atomic Safety and Licensing Board Panel and by order dated December 26, 1979, the Atomic Safety and Licensing Board dismissed the proceeding. New England Power was notified on January 25, 1980 that the Commission considered the application for New England 1 and 2 withdrawn. The staff subsequently determined the actual costs to the agency for reviewing the application for these units. The actual costs were \$1,245,577 for Unit 1

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and \$16,215 for Unit 2. By letter of March 24, 1980, the company was billed for \$827,815, representing for Unit 1, the maximum fee in 10 CFR 170.21(a)A.3. of \$936,600, plus \$16,215 for Unit 2, less \$125,000 already received as an application fee. To date the company has failed to pay the fee required by Part 170.

In the case of withdrawn construction permit applications, the billing is based upon the language of 10 CFR 170.12(b)<sup>1/</sup> and footnote 3 to 10 CFR 170.21.<sup>2/</sup> 10 CFR 170.12(b), (e) and (f) also refer to fees as payable when, "the review of the project is completed."

It is the staff's view that the regulation calls for billing whenever a review is brought to an end, whether by reason of issuance of a permit, license, or other approval, by a denial of an application, or by its withdrawal. However, the matter is not without doubt. Part 170 does not explicitly state that a fee for review will be charged on a withdrawal of an application.<sup>3/</sup> The interpretation of the regulations permitting such a charge is, however, a reasonable one, and if stated explicitly would be legal under Title V of the Independent Offices Appropriation Act of 1952 (31 U.S.C. 483a)(IOAA) and decided cases upholding charges for government services rendered to applicants based upon cost to the agency. See e.g., Mississippi Power and Light v. NRC, 601 F.2d 223 (1979), cert. denied U.S. (1980), and cases cited therein. It is the clearly established policy under the IOAA that agencies are to collect fees for services rendered to the maximum extent allowed by law.

1/ 10 CFR 170.12(b) reads as follows:

"(b) License Fees. Fees for construction permits, operating licenses, manufacturing licenses, and materials licenses, are payable upon notification by the Commission when the review of the project is completed."

2/ Footnote 3 to 10 CFR 170.21, in pertinent part, reads as follows:

"When review of the permit, license, approval, or amendment is complete, the expenditures for professional manpower and appropriate support services will be determined and the resultant fee assessed, but in no event will the fee exceed that shown in the schedule of facility fees."

3/ In all cases where an application fee accompanying an application is charged, 10 CFR 170.12(a) authorizes retention of the total application fee paid in advance.

Support for the staff reading of the regulations may be found also in the implementation policy under IOAA as stated in the fee guidelines approved by the Commission and the Court of Appeals in Mississippi Power and Light v. NRC, supra. The guidelines state that the review of an application on request is a service for which a charge may be made. In the guidelines a fee may be assessed for a service rendered at the request of an applicant whether or not those services are linked to the issuance of a permit or license. For example, the guidelines support the inclusion in the fee schedule of "special projects and reviews" that do not result in issuance of permits, licenses, or approvals but are yet subject to a fee for the service based upon actual cost to conduct the review. (10 CFR 170.21(b), Schedule F). The review given a power reactor application that does not end in a permit or license is analogous to a special project with respect to the work performed and the service rendered to the applicant. The applicant has received a "special benefit" in the sense that he has received the review requested and required by law.

Attachment A indicates the scope of the problem. It lists the number of withdrawn applications since March 23, 1978 (the effective date of the revised fee schedule), and the number of announced cancellations, suspensions or postponements that may eventually be withdrawn or denied. So far the costs of review for withdrawn applications will exceed \$3,000,000.

The principal legal problem with trying to collect fees for work done on withdrawn applications is that the current regulations do not make it totally explicit that charges will be assessed in these circumstances. In Alyeska Pipeline Service Co., et al. v. U.S. (Ct. Cl. No. 384-78 decided June 18, 1980), the U.S. Court of Claims recently held that the Secretary of the Interior lacked authority to recover licensing costs pursuant to the IOAA because the agency had not set out any regulations authorizing the fees. The court noted that the purpose of setting fees prospectively by regulations was to give applicants "the opportunity to be heard before the amount of reimbursement is fixed and advance notice of the expenses they will incur if their application is granted." Slip Op. at 19. On both the points the NRC is in a much better position than was the Secretary of the Interior. The NRC does have judicially approved

regulations on license fees promulgated after an extensive rulemaking proceeding in which licensees and potential applicants had ample opportunity to comment. These regulations give applicants notice of the amount of reimbursement due when review of an application is completed.

The Executive Legal Director is of the opinion that, even though success in a civil collection action is somewhat uncertain because of the ambiguity of the present regulation, the Commission's case is sufficiently credible to justify an effort to recover the fees, including civil action in the U.S. Courts if necessary. The General Counsel concurs. The General Counsel also believes that from a litigating strategy standpoint the first lawsuit, if necessary, should be to recover fees for a typical review, such as New England 1 and 2, rather than for Atlantic Generating Station, Units 1 and 2, which involved unusual features.

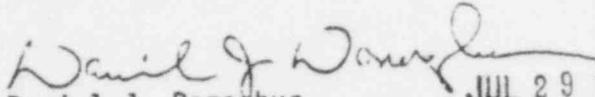
The staff is of the opinion that 10 CFR Part 170 should be amended immediately by interpretative amendments to clarify the intention of 10 CFR 170.12, footnote 3 to the schedule of fees in section 170.21, and the parallel language in footnote 4 to the schedule in section 170.31. Attachment B is a proposed amendment to accomplish this by amending 10 CFR 170.12(b), (e), and (f) to indicate the kinds of events that signify completion of review of a project, and to indicate that the fee is for the review of the application. Included are suspensions, postponements, withdrawals, and denials. The purpose of the amendments is to state explicitly what staff and counsel believe to be the proper interpretation of Part 170.

Recommendation:

1. Authorize the General Counsel to take action, if and when necessary, to recover the licensing review fees for denied, withdrawn, suspended, or postponed application reviews.
2. Approve the publication for comment in the Federal Register of the proposed amendment to 10 CFR Part 170.

Coordination:

The Executive Legal Director, the General Counsel, and the Directors, Office of Nuclear Reactor Regulation and Office of Nuclear Materials Safety and Safeguards concur.

  
Daniel J. Donoghue  
Director, Office of Administration

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Enclosures:

- A - Tabulation of withdrawn, suspended, or indefinitely postponed reactor projects
- B - Notice of Proposed Rule

Commissioners' comments or consent should be provided directly to the Office of the Secretary by c.o.b. Wednesday, August 20, 1980.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT August 13, 1980, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

This paper is tentatively scheduled for affirmation at an Open Meeting during the Week of August 25, 1980. Please refer to the appropriate Weekly Commission Schedule, when published, for a specific date and time.

DISTRIBUTION

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ENCLOSURE A

LIST OF WITHDRAWN AND ANNOUNCED DISCONTINUANCE  
OF NUCLEAR PLANTS

<u>Withdrawn Cases Since 3/23/78</u>	<u>Applicable Fees</u>
1. Atlantic 1/2 - Public Service Elec. & Gas Co. w/drawn 12/19/78	- \$ 740,000
2. NEP 1/2 - New England Power Co. w/drawn 12/17/79	- 830,000
3. Palo Verde 4/5 - Arizona Public Service w/drawn 9/27/79	- 550,000
4. Erie 1/2 - Ohio Edison Company w/drawn 1/23/80	- 870,000
5. Haven 1/2 - Wisconsin Electric Power Co. w/drawn 5/17/80	

Announced Cancellation, Suspension or Indefinite Postponements

- |                       |                          |
|-----------------------|--------------------------|
| 1. Barton 1, 2, 3 & 4 | - Alabama Power & Light  |
| 2. Summit 1 & 2       | - Delmarva Power & Light |

- |                        |   |
|------------------------|---|
| 3. Blue Hills 1 & 2    | - Gulf States Utilities                       |
| 4. Douglas Point 1 & 2 | - Potomac Electric Co.                        |
| 5. Fulton 1 & 2        | - Philadelphia Electric Co.                   |
| 6. North Coast         | - PRWR Authority                              |
| 7. Fort Calhoun 2      | - Omaha Public Power District                 |
| 8. Davis Besse 2 & 3   | - Toledo Edison Company                       |
| 9. Allens Creek 2      | - Houston Power & Light Co.                   |
| 10. Sundesert 1 & 2    | - San Diego Gas & Electric                    |
| 11. Greene County      | - PAsNY                                       |
| 12. Greenwood 2 & 3    | - Detroit Edison Co.                          |
| 13. Clinch River       | - Project Management Corp. <sup>1/</sup>      |
| 14. Montague 1 & 2     | - Northeast Nuclear Energy Co. <sup>1/</sup>  |
| 15. New Haven 1 & 2    | - New York State Electric & Gas <sup>1/</sup> |

1/ Included on page 1-4 of NUREG-0380 as postponed indefinitely.

Note - Items 1-12 above were taken from page 1-10 of NUREG-0380 (Brown Book, Volume 4, April 25, 1980).

1. Public Service Electric & Gas Co.  
Atlantic 1 & 2

Review Began - November 1973

Review Ended - December 1978

Percent Review Complete

Safety - 90-95% - The SER was issued in July 1977 and an ACRS subcommittee meeting has been held. Remaining work included full ACRS meeting, SER supplement and hearing.

Environmental - Approximately 75% of the environmental review was complete. DES issued October 1976.

Special Studies

Environmental Liquid Pathway Study was done

Unusual Review Circumstances -

NRR states that the review took longer than the typical case because of the uniqueness of the offshore location and that ORNL environmental review costs and NRR environmental manpower costs were high due to the uniqueness of the site.

2. New England Power Co.  
New England 1 & 2

Review Began - August 1976

Review Ended - December 1979

Percent Review Complete

Safety - Essentially 100% complete. SER issued June 1978. ACRS meeting held July 1978 and ACRS letter received July 1978. SER supplement issued July 1979.

Environmental - 25% complete - DES issued May 1979.

Special Studies -

None

Unusual Review Circumstances -

The site was owned by General Service Administration (GSA) when the application was filed. GSA published environmental impact statement on disposition of the site and awarded site to DOI, EPA and town. Applicant was excluded. Applicant appealed the GSA decision.

3. Arizona Public Service

Palo Verde 4 & 5

Review Began - March 1978

Review Ended - September 1979

Percent Review Complete

Safety - About 75% complete. SER issued February 1979. ACRS subcommittee and full committee meetings held March 1979 and April 1979.

Environmental - About 60% complete. DES issued April 1979.

Special Studies or Unusual Review Circumstances - None.

4. Ohio Edison Co.

Erie 1 & 2

Review Began - January 1977

Review Ended - January 1980

Percent Review Complete

Safety - Essentially 100% complete but no hearings held. SER issued July 1978. Full ACRS meeting held August 1978 and ACRS letter received August 1978. SER supplement issued January 1979.

Special Studies or Unusual Review Circumstances - None

ENCLOSURE B

Nuclear Regulatory Commission

[10 CFR Part 170]

Fees for Review of Applications

AGENCY: U.S. Nuclear Regulatory Commission

ACTION: Proposed rule

SUMMARY: The Commission is amending its rules on fees to clarify that fees for review will be charged, as appropriate, when review of an application is completed, whether by issuance of a permit, license, or other approval, or by denial or withdrawal of an application, or by any other event that brings active Commission review of the application to an end.

DATES: Comments are due by (insert date 30 days after FR publication).

FOR FURTHER INFORMATION CONTACT: William O. Miller, Chief, License Fee Management Branch, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555. Telephone: 301-492-7225.

SUPPLEMENTARY INFORMATION: Based upon the language of 10 CFR 170.12(b) and of footnote 3 to 10 CFR 170.21 (footnote 3 reads in pertinent part as follows: "When review of the permit, license, approval, or amendment is complete, the expenditures for professional manpower and appropriate support services will be determined and the resultant fee assessed, but in no event will the fee

exceed that shown in the schedule of facility fees. \* \* \*) the Commission has been billing power reactor construction permit applicants for the actual costs of review of their applications up to the time the applicant withdraws the application from Commission consideration.

It was the Commission's intent in promulgating 10 CFR Part 170 that charges be assessed whenever a review is brought to an end, whether by reason of issuance of a license, a denial of an application, or by its withdrawal, suspension or postponement. Such charges are authorized and directed under Title V of the Independent Offices Appropriation Act of 1952 (31 U.S.C. 483a) and supported by judicial decision upholding charges for government services rendered to applicants based upon cost to the agency. See e.g., Mississippi Power and Light v. NRC, 601 F.2d 223 (1979) cert. denied \_\_\_\_\_ U.S.

\_\_\_\_\_ (1980), and cases cited therein. The fee guidelines approved by the Commission and the Court of Appeals in Mississippi Power and Light v. NRC, supra, make clear the Commission's position that the review of an application at the request of a recipient of the service, is a service for which a charge may be made. In the guidelines, fees may be assessed for services rendered at the request of an applicant whether or not these services are linked to or result in the issuance of a permit or license. For example, the guidelines support the inclusion in the fee schedule of "special projects and reviews" that do not result in issuance of permits, licenses or approvals but are yet subject to a fee for the service based upon actual cost. (10 CFR 170.21, Schedule F). The review given a power reactor application that does

not end in a permit or license is analogous to a special project with respect to the work performed and the service rendered to the applicant.

The proposed interpretative amendments to 10 CFR 170.12 are intended to remove any possibility of misunderstanding the Commission's intent in appropriate cases to charge fees on withdrawal or denial of an application, and in cases of suspension or postponement of action on an application. The Commission will consider billing an applicant for costs incurred in the processing and review of an application upon either a statement of intent by the applicant to postpone further review effort or a delay in the construction schedule which causes the staff to postpone further review. In the event such an application is reinstated with significant changes, or review effort recommenced, subsequent charges will only accrue from the time of reinstatement or recommencement of review effort. In such cases the aggregate of charges for review of applications covered by the actual cost principle will not exceed the scheduled amount for the class of facility.

Although the impetus for the amendments stem from the withdrawal of power reactor construction permit applications, the amendments also will be applicable to certain materials licenses applications subject to the actual cost principle as stated in footnote 4 to 10 CFR 170.31. These are primarily major fuel processing and fabrication plants, waste storage and disposal facilities, spent fuel storage facilities, uranium milling plants, evaluation of casks and packages, and special projects.

Although the rules' changes in these amendments are interpretative only and could be published without notice and comment under 5 U.S.C. 553, the Commission has decided to solicit public comment and, therefore, is proceeding by normal notice and comment rulemaking procedure.

Pursuant to Title V of the Independent Offices Appropriation Act of 1952 (31 U.S.C. 483a) and Sections 552 and 553, United States Code, it is proposed to amend Title 10, Chapter 1, Code of Federal Regulations as follows:

1. Paragraphs 170.12(b), (e), and (f) of 10 CFR 170.12 are amended to read as follows:<sup>1/</sup>

§ 170.12 Payment of Fees

\* \* \* \* \*

(b) License Fees. Fees for review of applications for construction permits, operating licenses, manufacturing licenses, and materials licenses, are payable upon notification by the Commission when the review of the project is completed. For the purposes of this Part the review of a project is completed when a permit or license is issued, or an application for a permit or license is denied, withdrawn, suspended, or action on the application is postponed.

\* \* \* \* \*

(e) Approval Fees. Fees for review of applications for spent fuel cask and shipping container approvals, standardized spent fuel facility design approvals, and construction approvals are payable upon notification by the Commission when the review of the project is completed. For the purposes of this Part the review of a project is completed when the approval is issued, or the application for an approval is denied, withdrawn, suspended, or action on the application is postponed. Fees for facility reference standardized design approvals will be paid in five (5) installments based on payment of 20 percent of the approval

<sup>1/</sup> Additions to present text are underlined.

fee (see footnote 3 § 170.21) as each of the first five (5) units of the approved design are referenced in an application(s) filed by a utility or utilities. In the event the standardized design approval application is denied, withdrawn, suspended, or action on the application is postponed, fees will be collected when the review is completed and the five (5) installment payment procedure will not apply.

(f) Special Project Fees. Fees for review of special projects are payable upon notification by the Commission when the review of the project is completed. For the purposes of this Part the review of the project is completed upon notification by the staff that it has finished its review, upon withdrawal of the request, or suspension or postponement of further review.

[Authority: Sec. 501, 65 Stat. 290 (31 U.S.C. 483a), Sec. 161, 68 Stat. 948 (42 U.S.C. 2201)].

FOR THE NUCLEAR REGULATORY COMMISSION

Samuel J. Chilk  
Secretary to the Commission

Dated at Washington, D.C.  
this        day of        1980.