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(58 FR 21116)

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July 12, 1993

Mr. Samuel J. Chilk, Secretary  
Attn: Docketing and Service Branch  
US Nuclear Regulatory Commission  
Washington, DC 20555

Reference: Request for Comment on NRC Fee Policy, Federal Register, Volume 58,  
No. 73, April 19, 1993, Page 21116

Dear Sir:

We appreciate the opportunity to comment on the above referenced matter because of the grave potential implications on radiation science research and education programs in which we and other universities are involved. After a thorough review of the Federal Register announcement, we draw four basic conclusions:

- A. Current NRC fee policy is not in accordance with the Atomic Energy Act of 1954 as amended.
- B. Federal laws addressing NRC licensee fees are fundamentally flawed with mutually exclusive constraints.
- C. There is a sound legal basis for exempting university programs from NRC license fees.
- D. There is a need for immediate action by Congress and the NRC.

Each of these issues is discussed and supported in the following paragraphs:

- A. Current NRC Fee Policy is Not in Accordance with the Atomic Energy Act of 1954 as Amended

Section 104.c of Chapter 10 of the Atomic Energy Act of 1954 states, "The Commission is directed to impose only such minimum amount of regulation of the licensee as the Commission finds will permit the Commission to fulfill its obligations under this Act to promote the common defense and security and to protect the health and safety of the public and will permit the conduct of widespread and diverse research and development."

We understand that recent action by the Commission has amended 10 CFR so as to no longer exempt educational institutions from licensee fees; the official notice had not yet appeared in the Federal Register at the time these comments were prepared. The annual fee for a research reactor alone is expected to be \$65,000 per year. With material licenses and other license activity, we expect a program like that at Penn State to cost between \$100,000 and \$150,000 annually. Our base cost for reactor operation is

between \$250,000 and \$300,000 per year. When the costs of regulatory services reaches 50 percent of the remaining operating costs, the requirement for "minimum amount of regulation" is clearly exceeded.

In 1991, the national organization of Test, Research, and Training Reactor (TRTR) managers initiated a study of the fiscal support and expenses of university research reactors. The study was chaired by Dr. Voth, one of the authors of this letter. Of the 37 university reactors in operation, 15 had annual operating costs of less than the \$65,000 license fee. Imposition of licensee fees in excess of current operating costs will certainly result in the permanent shutdown of many reactor facilities and severe curtailment of research and educational activities in the remainder. This is a clear contradiction with the Atomic Energy Act requirement to "permit the conduct of widespread and diverse research and development."

B. Federal Laws Addressing NRC License Fees are Fundamentally Flawed with Mutually Exclusive Constraints

The Omnibus Budget Reconciliation Act of 1990 requires that NRC assessed fees provide 100 percent recovery of its budget authority less the amount appropriated from the Department of Energy administered Nuclear Waste Fund. Furthermore, the Energy Policy Act of 1992 exempts from fees certain federally owned research reactors used primarily for educational purposes. The Federal Register referenced also cites examples of license activities not subject to fee assessment under the Independent Offices Appropriation Act. The Federal Register requests commenters to address "what specific legislative or NRC policy changes are needed to eliminate any unfair burden?" Clearly when constrained by law to recover 100 percent of costs from less than 100 percent of the licensees, the remaining licensees must carry an unfair burden.

We strongly endorse Legislative Option Number 1 cited in the Federal Register. That is, modify the Omnibus Budget Reconciliation Act of 1990 to remove the exempted activities from the fee base.

C. There is a Sound Legal Basis for Exempting University Programs from NRC License Fees

There are two parts to this issue. First, the Regulatory Flexibility Act of 1980 calls for agencies to consider the impact of their actions on small entities. Second, the Energy Policy Act of 1992 exempted federally owned research reactors used primarily for educational purposes. University research reactors exist based solely on their contributions to research activities, meeting the criteria of a small entity as a facility even though the entire university may not qualify as a small entity. As shown in item A above, imposition of NRC license fees will certainly result in numerous university reactor closings and curtailment in research productivity among others. When applying the impact test of the Regulatory Flexibility Act, the intent of the Energy Policy Act should be considered.

University research reactors have many elements common to the federally owned research reactors. Most university reactors were constructed with the encouragement of the federal government under the Atoms for Peace program. University research reactors were built primarily with federal funds through AEC, DOE and NSF. All university research reactor fuel is owned by the federal government. A major portion of research conducted at university reactors is in support of federal programs. A recent study by the National Academy of Sciences shows that the largest category of

employers of nuclear engineering graduates, the major users of university reactors for educational training, is the federal government. While not being federally owned, university research reactors obviously meet many of the other criteria of federal facilities.

When the Energy Policy Act of 1992 was written, university reactors were exempted from fees consistent with the Regulatory Flexibility Act of 1980. There was no reason to specifically address university reactors under the Energy Policy Act as was the case for federally owned research reactors with a mission identical to university reactors. This action shows the intent of Congress that all educational training and research reactors should be exempt from fees. We believe it was improper for the Commission to remove the exemption of fees for university reactors without a concurrent opportunity for Congress to consider amending the Energy Policy Act to specifically exempt university research reactors along with federally owned facilities used primarily for educational training and research purposes.

Independent of Congressional action, we believe that educational institutions provide externalized benefits to society as a whole on which the NRC can base a blanket exemption of fees as noted in the Appeals Court decision in *Allied-Signal, Inc. vs. U.S. NRC*. The following paragraphs elaborate on these benefits.

University research reactors provide a broad range of benefits with future payoffs that cannot be allocated to specific individuals, corporations, or institutions. This research, which is heavily subsidized by the university, serves the national good both for the research results and the graduate student training it provides. It is not in the national interest to penalize universities with license fees which encourage the universities to shut down these facilities.

University reactors constitute a very important element of nuclear engineering education at both undergraduate and graduate levels. In addition, significant and unique contributions have been made to basic research using university reactors as a neutron source for a broad range of experiments in radiological sciences, medicine, materials science, archeology, zoology, and many others. Their importance to teaching programs in universities across the U.S. has been widely recognized by both faculty and students. A major study by the National Academy of Sciences in 1988 (*University Research Reactors in the United States-Their Role and Value*) supports the value of these facilities in many disciplines. Also, nuclear utilities, federal agencies (including NRC) and nuclear industry as a whole have recognized university reactors as a valuable tool in preparing well trained nuclear engineers, radiological engineers, health physicists, and others. This educational support applies not only for nuclear and radiological education, but for a wide variety of other academic areas from anthropology to zoology. At Penn State, the reactor and associated laboratories are used for reactor control experiments, for determining pipe wall thickness using gamma backscatter, for study of cold neutron source materials in support of the national laboratories and for assisting anthropologists in determining trade routes and dietary habits of pre-historic civilizations, to mention only a few applications.

University reactors also serve as broad-based educational facilities for the public. Members of the public from high school students to senior citizens are introduced to the uses of nuclear energy in a broad array of applications from producing electricity in central station nuclear power plants to generating isotopes for use in agricultural research, medical therapy, and others. At Penn State over 2000 citizens receive tours each year and 500 high school students and teachers conduct experiments with the

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reactor and associated laboratories. Numerous IAEA fellows from around the world have been trained here as well.

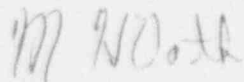
D. There is a Need for Immediate Action by Congress and the NRC

We believe action taken by the Commission last month was inappropriately noticed for comment and that no further action should be implemented until items A through C above are addressed. An April 19, 1993 notice was sent to NRC licensees by Ronald M. Scraggins, Deputy Chief Financial Officer/Controller. A notice of proposed rulemaking was attached. The cover letter identified three "major changes proposed to Parts 170 and 171" with no mention of a change in the provisions exempting educational institutions, 170.11 (a) (4) and 171.11 (a). Pages 82 through 144 of the notice of proposed rulemaking present 11 specific proposed revisions to Parts 170 and 171. There is no proposed change to 170.11 (a) (4) and the only proposed change to 171.11 (a) is to re-number that section. Page 49 makes the summary statement, "Earlier in this notice, the NRC discussed its proposal to continue exempting nonprofit educational institutions from annual fees for FY93." It not only appeared unnecessary, but inappropriate as well, to comment on exemption provisions that were not proposed for revision. Along with many other universities and the TRTR organization, we felt the appropriate time for comment on that matter was the concurrent 90 day comment period that expires July 19, 1993. We therefore request that the Commission delete from the record the action taken on this matter during June 1993 and re-address the matter after expiration of the latter comment period.

We believe that for the reasons set forth in Item C above, it is the intent of Congress that nonprofit educational institution licensees should be exempt from fees. We further believe that there currently exists a regulatory basis for this in the overall benefits provided to society as a whole, as suggested by the courts. We endorse Legislative Option Number 1 from the notice, as discussed in Item B above, as an expedient means of resolving this issue. We believe the case-by-case exemption process which is presumably forthcoming based on the June 1993 Commissioners' decision should be abandoned based on the unreasonable demand for non-productive time it will place on the NRC staff and especially on university reactor staffs.

We appreciate this opportunity to comment on these matters and will gladly respond to questions you may have regarding our comments.

Sincerely yours,



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