



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

PDR-016

January 5, 1982

Mr. Robert Alexander
OCRE Interim Representative
2030 Portsmouth Street #2
Houston, TX 77098

IN RESPONSE REFER
TO FOIA-81-A-19
(FOIA-81-436)



Dear Mr. Alexander:

This is in response to your letter of November 26, 1981 in which you appealed, on behalf of the Ohio Citizens for Responsible Energy (OCRE), Mr. Felton's letter of November 20, 1981 denying your fee waiver request.

Acting on your appeal, I have carefully reviewed the record in this case and have concluded that the initial denial of your fee waiver request should be reversed as it applies to documents required to participate in NRC licensing proceedings. Your request for waiver of fees is, therefore, granted in part and denied in part, for the following reasons.

In your letter you state that "OCRE agrees that the compelling reason test is proper", but you disagree that OCRE did not meet the test. Section 9.14a(g) of NRC's regulations provides:

The NRC will not waive the reproduction costs for documents located or made available in the NRC Public Document Room or a local public document room in the absence of a compelling reason to do so.

The statement of considerations published in the Federal Register at the time the fee waiver provisions were adopted in March 1979 (copy enclosed) states:

Under the circumstances when access to records can be provided to a requester at a PDR or LPDR, to also waive reproduction costs would result in a private benefit only to the requester. This practice has now been incorporated into the regulations by adding a sentence to §9.10(a) of the effective rule that provides that copies of documents disclosed in response to FOIA requests will normally be placed in the NRC PDR or local PDR, and by providing in §9.14a(g) that the NRC will not waive reproduction costs for documents located in the PDR or LPDR in the absence of a compelling reason to do so. A "compelling reason" could be, for example, if the requester were both indigent and required the documents for intervention in an NRC licensing proceeding.

You state in your letter that OCRE "could easily acquire (copy) those documents found at the Perry LPDR", but that reproduction fees should be waived for records not located at the Perry LPDR and which are located only at the Public Document Room in Washington, D.C. All documents relating to the Perry plant are located in the Perry LPDR. The records you have requested, and which are not located at the Perry LPDR, relate primarily to other nuclear power plants. The issue then is whether these documents are required for intervention in an NRC licensing proceeding. If they are required, and if the requester is indigent, NRC regulations provide that reproduction fees may be waived. However, the only reasonable method by which the NRC can know if the documents are required is if they relate to some contention in a licensing proceeding which has been accepted by the licensing board. To say, as you suggest in item 1 of your letter, that fees should be waived if it will help OCRE frame a contention to be offered to the board would be unmanageable since, conceivably, all of the documents located in the Public Document Room could, in some manner, help OCRE frame a contention, even though that contention may not be at all relevant to the Perry proceeding. Thus, while NRC agrees that the issue of relevance is not germane to a request for records under the Freedom of Information Act, it is germane in deciding whether the NRC should waive reproduction fees.

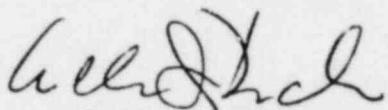
In item 2 of your letter, and in your letter of October 26, 1981, you argue that the NRC should waive fees because OCRE is a "bootstrap" operation consisting primarily of college students with limited resources. As noted above, indigency, or the inability to pay, is only one-half of the test. However, in view of OCRE's assertions concerning its financial status, NRC agrees to waive 75 percent of the reproduction costs of any documents which are relevant to a contention which has been admitted by the licensing board in the Perry proceeding. Precedent for this action has been established for another group of intervenors, similar to yours, in the Allens Creek proceeding.

Finally, you assert that the NRC should be estopped from charging fees because the NRC did not charge fees on your FOIA requests dated September 5 and 28, 1981. The NRC has a very liberal fee policy, and seeks to accommodate requesters to the extent it can. In this regard, the NRC has not charged fees on any of your five previous requests, or the three requests made by Jeff Alexander on behalf of OCRE, regardless of the fact that there was no showing of relevance of the documents to the proceeding. Estoppel, however, implies reliance on NRC's actions to the detriment of the requester. Here there is no detriment, and OCRE is in no worse position than it otherwise would have been had NRC charged reproduction fees from the beginning. Rather, the issue is simply the extent to which public funds should be used for essentially private benefit.

In view of my decision on this matter, OCRE should, in any future request that it may make, indicate how the requested documents are relevant to contentions accepted in the Perry proceeding. For ease of reference, OCRE should specify in its letter the contention number and the date of the Board's order accepting the contention. In the interim, as requested by your letter, the FOIA Branch is assembling the documents you requested, and will forward them to you shortly. If you wish, you may also make the above showing for any documents listed in your October 26 letter, and NRC will issue you a credit or a refund covering the cost of any documents found to be relevant to the Perry proceeding.

This is a final agency action. As set forth in the Freedom of Information Act (5 U.S.C. 552(a)(4)(B)), judicial review of this decision is available in a district court of the United States in either the district in which you reside, have your principal place of business, or in the District of Columbia.

Sincerely,



William J. Dircks
Executive Director for Operations

Enclosure: As stated