



OFFICE OF THE SECRETARY

UNITED STATES NUCLEAR REGULATORY COMMISSION

WASHINGTON, D.C. 20555

IN RESPONSE, PLEASE REFER TO: M940301B

March 9, 1994

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MEMORANDUM FOR: James M. Taylor
Executive Director for Operations
William C. Parler, General Counsel
Stephen G. Burns, Director
Office of Commission Appellate Adjudication

FROM: *for* Samuel J. Chilk, Secretary *[Signature]*

SUBJECT: STAFF REQUIREMENTS - AFFIRMATION/DISCUSSION AND VOTE, 11:30 A.M., TUESDAY, MARCH 1, 1994, COMMISSIONERS' CONFERENCE ROOM, ONE WHITE FLINT NORTH, ROCKVILLE, MARYLAND (OPEN TO PUBLIC ATTENDANCE)

I. SECY-94-035 - Sacramento Municipal Utility District - Licensing Board's Second Prehearing Conference Order, LBP-93-23

The Commission, by a 4-0 vote, approved an order denying a petition by Sacramento Municipal Utility District (SMUD) for review of the ASLB's decision, (LBP-93-23), admitting a contention filed by the Environmental and Resource Conservation Organization.

In addition the Commission agreed that the staff should provide the Commission with a report on the impact of adopting the Licensing Board's suggestions in regard to providing additional information on other agencies views to be included in the Environmental Assessment (LBP-93-23, slip op. at 73).

(EDO/OGC) (SECY Suspense: 4/18/94)

II. SECY-94-034 - Issuance of Final Rule Reinstating Nonprofit Educational Exemption and Denial of Petition for Rulemaking

The Commission, by a 4-0 vote, approved issuance of a final rule reinstating the exemption from fees for nonprofit educational institutions and denied a petition for rulemaking filed by the American College of Nuclear Physicians and Society of Nuclear Medicine requesting Commission action on a number of user fee issues.

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The attached changes should be incorporated into the Federal Register Notices and they should be reviewed by the Rules Review and Directives Branch, ADM, and returned for signature and publication.

(EDO)

(SECY Suspense: 3/18/94)

Attachments:
As stated

cc: The Chairman
Commissioner Rogers
Commissioner Remick
Commissioner de Planque
OIG
OCA
Office Directors, Regions, ACRS, ACNW, ASLBP (via E-Mail)
PDR - Advance
DCS - P1-24

letters on the issue, fielded numerous phone comments and inquiries, and sent staff members to study the issue by visiting college and university licensees. In the Commission's view, the evidence taken as a whole leans strongly in favor of restoring that exemption, for the reasons described above: that many educational licensees would be forced to halt their research and educational activities due to lack of funds if NRC fee subsidies were withdrawn; that those activities would often not be continued in the private sector, resulting in a serious loss of basic research in numerous areas of study; and that the public good inherent in the production of knowledge made available to all is worthy of Government support. ← INSERT

The Commission has received anecdotal information from some commenters indicating that certain nonprofit research institutions (which do not fall within the definition of nonprofit educational institution as provided in 10 CFR 171.5) and Federally-owned research reactors should receive the same treatment as educational institutions.³ However, the Commission does not believe it has sufficient information on which to base a generic exemption for such research institutions and reactors. Because the proposed rule did not suggest that the educational exemption be expanded in this way, the Commission received a

³Most Federally-owned research reactors were exempted from fees by Congress in earlier legislation. See section 6101(c)(4) of OBRA-90, 42 U.S.C. 2214(c), as amended by the Energy Policy Act of 1992. However, the reactor in question operates at a power level greater than that specified in the legislation for exempt facilities, and therefore does not meet the definition of a "research reactor" for purposes of the statutory exemption.

smaller number of comments than are needed to make an informed decision on this issue. For that reason, the current policy of charging such entities annual and user fees remains in effect. Those nonprofit research institutions and Federally-owned research reactors who believe that they qualify for an exemption from the annual fee based on the public good concept are, of course, free to request one from the Commission. See 10 CFR 171.11. Depending on the outcome of any such requests, the Commission may need to revisit the question of whether to make nonprofit research institutions generically exempt from fees in a future rulemaking.

The Commission also believes that medical licensees should continue to pay annual fees. This is consistent with past Commission practice. Also, contrary to one commenter's belief, the Commission does assess fees to nonprofit educational institutions for licenses authorizing medical treatment using licensed nuclear materials. The Commission does not believe that medical licensees are analogous to nonprofit educational institutions. Their function is not pure research and education, but primarily to provide services to paying customers. - INSERT

While the Commission does not dispute that medicine provides significant benefits to patients, such treatment is both depletable and excludable. The benefits of medicine are therefore a private rather than a public good. By contrast, an educational institution generally disseminates the results of its basic research to all who want it, even going beyond the confines

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Such support would not therefore constitute an unlawful subsidy or promotion of atomic energy.

INSERT p.11:

Contrary to some commenters' assertions, the Commission's fee policy does not result in a competitive advantage for university medical licensees over nonprofit hospitals. Both are charged fees for licenses authorizing medical treatment using licensed nuclear material.¹

¹Similarly, materials licenses held by nonprofit educational institutions which authorize remunerated services or services performed under a Government contract are also subject to fees. See 10 CFR 170.11(a)(4) and 171.11(a)(1) (1993).

Power and Light Company v. United States, 846 F.2d 765 (D.C. Cir. 1988), cert. denied, 490 U.S. 1045 (1989).

10 CFR part 171, which established fees based on the FY 1989 budget, was also legally challenged. As a result of the Supreme Court decision in *Skinner v. Mid-American Pipeline Co.*, 109 S.Ct. 1726 (1989), and the denial of certiorari in *Florida Power and Light*, all of the lawsuits were withdrawn.

The NRC's FY 1991 annual fee rule was largely upheld recently by the D.C. Circuit Court of Appeals in *Allied-Signal v. NRC*, 988 F.2d 146 (D.C. Cir. 1993).

VIII. Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Commission certifies that this final rule as adopted does not have a significant economic impact on a substantial number of small entities. [~~This final rule restores a previous exemption to a specific class of licensees while not imposing a new financial burden on any other class of licensee.~~]

IX. Backfit Analysis

The NRC has determined that the backfit rule, 10 CFR 50.109, does not apply to this final rule and that a backfit analysis is not required for this final rule. The backfit analysis is not required because these amendments do not require the modification

petitions such as the present one, workshops, meetings of the Advisory Committee on the Medical Use of Isotopes, and the Commission. The Commission has seen nothing either in the

petition or comments on the petition that would lead it to change its approach in this area. The Commission would like to emphasize, however, that licensees are always welcome and expected to comment on proposed rulemakings, ⁱⁿ excluding the accompanying cost-benefit analyses, and that such comments, along with the day-to-day interaction between licensees and the agency, in the Commission's view provide an adequate and successful method of keeping each group apprised of the other's concerns.

2. Comment. The Commission received a potpourri of comments on other aspects of the petition. A number of commenters disagreed with the petition, arguing that medical licensees should not receive an exemption, as the costs of such an exemption would be borne by other licensees to whom the additional fees would have no relation, and that every licensee should pay its fair share. Other commenters stated that the fees should be abolished entirely, which would remove the dilemma over granting exemptions. One commenter argued for basing an exemption on the function for which the license is utilized, not the function of the licensed organization. Some commenters argued that fees should be based on factors such as the amount of radioactive sources possessed, the number of procedures performed or the size of the nuclear department within a hospital. Certain commenters suggested expanding the number of exemptions to include Government agencies, along with those licensees which provide products and services to medical and educational