Academic Component Institutions:
The University of Texas at Arlington
The University of Texas at Austin
The University of Texas at Brownsville
The University of Texas at Dallas
The University of Texas at El Paso
The University of Texas-Pan American
The University of Texas of the Permian Basin
The University of Texas at San Antonio
The University of Texas System Center for Texas Cultures at San Antonio
The University of Texas at Tyler

Health Component Institutions:
The University of Texas Southwestern Medical Center at Dallas
The University of Texas Medical Branch at Galveston
The University of Texas Health Science Center at Houston
The University of Texas Health Science Center at San Antonio
The University of Texas M.D. Anderson Cancer Center
The University of Texas Health Center at Tyler

THE UNIVERSITY OF TEXAS SYSTEM
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August 10, 1993

J. Robert Giddings
Attorney

AIRBORNE EXPRESS

Honorable Samuel J. Chilk, Secretary
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, Maryland 20852

RE: ***NRC Fee Policy; Nonprofit Educational Institution Exemption RIN 3150-AE54; and Request for Exemption Pursuant to the Provisions of 10 C.F.R. PARTS 170.11(b) and 171.11(b)***

Dear Mr. Secretary and Distinguished Members of the Commission:

The University of Texas System, acting on behalf of The University of Texas at Austin, respectfully submits the following comments on RIN 3150-AE54 in response to the invitation for comments published in the Federal Register on April 19, 1993 (58 Fed. Reg. 21116) and July 22, 1993 (58 Fed. Reg. 39174).

On July 20, 1993, during the middle of the comment period on the NRC fee policy referenced above, the Commission published in the Federal Register, at 58 Fed. Reg. 38666, its Final Rule, modifying the provisions of 10 C.F.R. Parts 170 and 171 to revise its existing fee schedules and retroactively eliminate the current exemption for nonprofit educational institutions from the payment of licensing, inspection, and annual fees.

On April 23, 1993, at 58 Fed. Reg. 21664, the Commission first proposed the elimination of the exemption for nonprofit educational institutions. The Commission did not propose retroactive action and stated that it proposes to continue to exempt nonprofit educational institutions from fees for the years 1991, 1992, and 1993. The stated reason for the Commission's decision to retroactively revoke the exemption was a desire to comply with the decision of the U.S. Court of Appeals for the District of Columbia in Allied - Signal, Inc. v. U.S. Nuclear Regulatory Commission, 988 F.2d 146 (D.C. Cir. 1993).

In Allied - Signal, the Court of Appeals questioned the Commission's rationale that educational institutions are unable to "pass through" the costs of annual fees to their customers. In response to this Court opinion, the Commission acknowledged in the Federal Register that it did not have the administrative resources to assess the "pass-through" capability of the NRC's 6800 licensees and that it was going to abandon the "pass-through" analysis. By overlooking the fact that nonprofit educational institutions have no real "customers" since the nuclear reactors are used solely for educational purposes, such as research and teaching, the Commission apparently feels compelled to throw the baby out with the bath water by eliminating both the pass-through rationale as well as the exemption itself.

This result is not required for the Commission to comply with the Court of Appeal's decision in Allied - Signal. Although the Court of Appeals questioned the use of the "pass-through" rationale to justify the exemption for nonprofit educational institutions from the payment of fees, the Court went on to invite the Commission to propose a new or alternative rationale for the exemption, stating that "an inadequately supported rule, however, need not necessarily be vacated". The Court even suggested two different arguments to support the exemption: "that educational research provides an important benefit to the nuclear industry and the public at large and should not be discouraged" or the Commission's focus is upon education "with the idea that education yields exceptionally large externalized benefits that cannot be captured in tuition or other market prices". 988 F.2d 146 at 150, 151.

It is interesting that the Commission, in its Background comments on April 23, 1993, (58 Fed. Reg. 21664) advanced the very arguments that were solicited by the Court of Appeals in Allied-Signal to support and defend the exemption:

> "policy interest in supporting nuclear-related education";
>
> "Commission continues to believe that educational research provides an important benefit to the nuclear industry and the public at large and should not be discouraged";
>
> "a vibrant nuclear education sector also is important as a source of talent and ideas for the NRC itself and for the whole government";
>
> "this longstanding exemption ... facilitates academic research and educational use of licensed materials, which both furthers understanding of important research questions and provides training in nuclear science";

"imposition of fees would lead in many cases to severe cutbacks in and shutdowns of these programs. This in turn would lead to shortages of scientific personnel trained in the use of radioactivity in such areas as reactor safety, with detrimental effects suffered not only by nuclear science but by society at large".

However, three months later, in the Responses To Comments published in the Federal Register (58 Fed. Reg. 38667-38669) on July 20, 1993, the Commission changed its position on the nonprofit educational exemption. Although the Commission had proposed continuing the exemption solely on the grounds that nuclear-related education provides a benefit both to the nuclear industry and society at large, the comments on July 20, 1993 stated that the Commission was disappointed in the responses from the higher education community. According to the Commission, these responses failed to adequately or satisfactorily address the question of whether educational activities yield exceptionally large externalized benefits to society. To justify its new position on the nonprofit educational exemption, the Commission states that "the mere observation that education benefits society is not alone enough to support a generic exemption" and "the Commission lacks an adequate administrative record on which to base a continued generic exemption of all nonprofit educational institutions".

In support of the continuation of the nonprofit educational exemption, The University of Texas would point out to the Commission that the economic competitiveness of the United States is sustained by being at the forefront of technology. The nation's universities, educate the scientists and engineers who become the new leaders in advancing technology in the United States. These same universities provide new knowledge, through research, and it is this new knowledge that advances technology. The recent action of the Commission in deciding to discontinue the exemption from fees for nonprofit educational institutions threatens the viability of one of these technology areas: nuclear science and engineering.

Over the past twenty years, many university research reactors in the United States have been shut down and many of the nuclear science and engineering academic programs have been eliminated due to the high cost of these programs. The added burden of the large fees charged by the Commission (approximately $130,000 for The University of Texas at Austin for fiscal 93 and 94) will eliminate most of the remaining nuclear science and engineering programs. Those university reactor facilities whose operating budgets are small when compared to the NRC fees are often very important because they are the focus for many of the academic nuclear science and engineering programs.

The University of Texas at Austin recently built a new reactor facility and a new reactor to strengthen the instructional and research opportunities in nuclear science and engineering. On January 17, 1992, the University of Texas received a license to operate

> "imposition of fees would lead in many cases to severe cutbacks in and shutdowns of these programs. This in turn would lead to shortages of scientific personnel trained in the use of radioactivity in such areas as reactor safety, with detrimental effects suffered not only by nuclear science but by society at large".

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the new reactor, a 1 - MW TRIGA which is exceptionally well suited to carry out a balanced program of education and research. The new reactor is the basis for two undergraduate courses (Reactor Operations and Control, and Nuclear Instrumentation and Methods) and for two graduate courses (Nuclear Engineering Laboratory and Nuclear Analytical Techniques) and is also used to a limited extent in two other courses. Two new nuclear engineering faculty members and four additional professional staff personnel were hired in support of the academic program for the new reactor facility.

At the present time, the Federal government is funding the following research projects at The University of Texas at Austin reactor facility:

1. "Instrumentation for The University of Texas Reactor"
   Dr. Bernard W. Wehring, Principal Investigator
   U.S. Dept. of Energy
   9/1/90 - 8/31/94 $100,584

2. "An Expert System to Enhance Software Reliability"
   Drs. Thomas L. Bauer and Bernard W. Wehring, Co PIs
   U.S. Nuclear Regulatory Commission
   9/30/91 - 12/30/94 $99,998

3. "Study of Neutron Focusing at the Texas Cold Neutron Source"
   Drs. Bernard W. Wehring and Kenan Unlu, Co PIs
   Special Research Grant: Nuclear Engineering
   U.S. Dept. of Energy
   4/15/92 - 4/14/94 $201,449

In addition, three research projects were initiated with funds from the State of Texas and are being continued with State and user monies:

1. Neutron Activation Analysis, a sensitive method used to measure trace amounts of many elements in environmental and industrial samples.

2. Neutron Depth Profiling, a nuclear technique used in research supporting the microelectronics industry.

3. Development of the Texas Cold Neutron Source, a unique facility used for nuclear physics and materials science research.

The University of Texas at Austin recently made a large financial commitment to an academic program that is focused upon nuclear engineering and research. A continuation of the exemption for nonprofit educational institutions from NRC fees is critical for the survival of the university's reactor-based education and research programs. These programs, and similar programs nationwide, represent a substantial national resource for maintaining and expanding the national knowledge base and benefit both the energy infrastructure of the country and the national defense. The immediate impact on The University of Texas at Austin of the elimination of the exemption will be an increase in annual operating costs for which no State appropriations or University funds can be obtained. Consequently, the scope of the University's nuclear education and training program will need to be reduced.

In the alternative, should the Commission eliminate the blanket exemption for nonprofit educational institutions previously contained in the provisions of 10 C.F.R. Part 170, Section 170.11(a)(4) and Part 171, Section 171(11)(a), the University of Texas at Austin respectfully requests that the Commission consider the arguments and reasoning contained in these comments as an application for an exemption in the public interest as provided by 10 C.F.R. Parts 170 and 171, Sections 170.11(b) and 171.11(b).

The current provisions of 10 C.F.R. Part 170, Section 170.11(b) specifically authorize the Commission to grant exemptions from fees "as it determines are authorized by law and are otherwise in the public interest". Similar language appears at 10 C.F.R. Part 171, Section 171.11(b). The University of Texas at Austin submits that it has demonstrated that such an individual exemption would be justified under the public interest standard, that severe financial hardship to the existing nuclear education and training program will result from the imposition of the newly imposed fees, and that the significant externalized benefits criteria sought by the Commission is met by the public policy interest in supporting nuclear science and nuclear - related education. The University of Texas at Austin reserves the right to supplement its application for an exemption prior to the November 17, 1993 deadline.

Very truly yours,

Robert Giddings

JRG:

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Ms. Patricia Ohlendorf
Dr. Bernard Wehring
Dr. James P. Duncan
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