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DOCKET NUMBER
PROPOSED RULE PR 170 + 171
(62 FR 8885)

Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

ATTN: Docketing and Service Branch

In the Matter of
Proposed Rule for Revision of Fee Schedules
10 C.F.R. Parts 170 and 171; 62 Fed. Reg. 8885

Dear Sir:

On February 27, 1997, the Nuclear Regulatory Commission ("NRC") published in the Federal Register and requested comments on a proposed rule to revise Parts 170 and 171. 62 Fed. Reg. 8,885 (1997). The rule proposes to increase the fees established in Parts 170 and 171, ostensibly to satisfy the Omnibus Budget Reconciliation Act of 1990 ("OBRA").

In response to this proposed rule, we are submitting these comments on behalf of Vermont Yankee Nuclear Power Corporation. Vermont Yankee operates a commercial nuclear power reactor and will be substantially and adversely affected by the increased fees. As discussed below, the large increase in the annual fee assessed to nuclear power reactors is unjustified by the proposed rule and appears contrary to the provisions of OBRA.

OBRA's Requirements

In enacting the NRC fee provisions of the Omnibus Budget Reconciliation Act of 1990, Congress articulated the parameters and requirements for the development of those fees. First, relating to the user fees in 10 C.F.R. Part 170, Congress instructed that "any person who receives a service or thing of value from the Commission shall pay fees to cover the Commission's costs in providing any such service or thing of value." 42 U.S.C. S 2214(b). There is no exemption authority from this user fee provision. Every person receiving NRC services must pay the full cost of those services through the user fees in Part 170.

Second, relating to the annual fees in Part 171, which must now aggregate approximately 100 percent of the NRC budget less collections under Part 170 and appropriations from the

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Nuclear Waste Fund, Congress instructed the Commission to allocate the aggregate amount "fairly and equitably" among licensees. 42 U.S.C. S 2214(c)(3). Further, "to the maximum extent practicable, the charges shall have a reasonable relationship to the cost of providing regulatory services . . . ." Id.

As indicated by the Conference Committee, Congress established these strictures so that its delegation of authority would be constitutional, in accordance with the Supreme Court decision in Skinner v. Mid-American Pipeline Co., 490 U.S. 212 (1989). See 136 Cong. Rec. H12692 (daily ed. Oct. 16, 1990). The conferees made clear that the annual fee provision was intended to delegate the authority to recover "administrative costs not inuring directly to the benefit of regulated parties." 136 Cong. Rec. at H12692. The conferees instructed the Commission to recover the costs of "individually identifiable services to applicants and holders of NRC licenses" through Part 170, "so that each licensee or applicant pays the full cost to the NRC of all identifiable regulatory services such licensee or applicant receives." Id.

With respect to annual charges for generic costs, the conferees repeated the instruction that the annual charges be fair and equitable and allocated so that "'[t]o the maximum extent practicable, the charges shall have a reasonable relationship to the cost of providing regulatory services' to the licensees." Id. at H12693. The conferees added,

> [T]he conferees intend that the NRC assess the annual charge under the principle that licensees who require the greatest expenditures of the agency's resources should pay the greatest annual charge.

Id. With respect to generic costs that cannot be attributed to particular licensees or classes of licensees, the conferees stated,

> The Commission should assess the charge for these costs as broadly as practicable in order to minimize the burden for these costs on any licensee or class of licensees so as to establish as fair and equitable a system as is feasible.

Id.

Deficiencies in the Proposed Rule

The proposed rule does not follow Congress' instruction to allocate costs so that "to the maximum extent practical" the charges have a reasonable relationship to the cost of providing

regulatory services to the licensees. Neither the proposed rule nor the underlying work papers reflect any Commission consideration of the services that are driving the cost increase. Instead, projecting a shortfall in the Part 170 fees for professional services, the Commission has simply chosen to increase the annual fee under Part 171 by over 8 percent without any examination of the reason for the Part 170 shortfall. This arbitrary increase in the annual fee under Part 171 increases the amount borne by power reactor licensees by nearly $25 million, or approximately $226,000 per reactor. This is hardly "establishing as fair and equitable a system as is feasible," as OBRA requires.

The proposed rule seeks to justify this approach by noting that in its 1995 rulemaking, the NRC stated that it would adjust the annual fees only by the percentage change in the NRC's total budget authority unless there were a substantial change in the total NRC budget authority or the magnitude of the budget allocated to a specific class of licensees. See 60 Fed. Reg. 32218, 32,225 (1995). The currently proposed rule, however, proposes to increase the annual fees for reactors by nearly $25 million. This is clearly a substantial increase in the magnitude of the budget allocated to a specific class of licensees and therefore requires specific justification under the policy established by the Commission in 1995. In any event, the 1995 rule does not, and cannot override Congress' mandate to allocate costs so that they relate to the maximum extent practical to the services being provided to the licensees, and to establish as fair and equitable a system as is feasible. The proposed rule is inconsistent with these mandates.

Further, there is no basis in the rule to presume that the 8.2 percent increase in the annual fees for power reactors has any causal relationship to increases in the costs of regulating reactors. To the contrary, one of the few reasons given in the proposed rule for the shortfall in Part 170 collections (and hence the need to increase the Part 171 annual fees) is the reduction, as a result of Massachusetts becoming an Agreement State, in the number of NRC materials licensees paying fees. 62 Fed. Reg. at 8,887.[1] This strongly suggests that the shortfall in Part 170 collections, and hence the increase in the Part 171 fees, is in fact attributable to the costs of programs unrelated to nuclear power reactors.

Accordingly, the Commission should not proceed with the rule as proposed. Rather, given the magnitude of the fee increase for reactors, the NRC should republish its rule and its work papers to identify specifically and justify the costs that are being charged to reactors. The description and level of justification should be no less than that employed prior to 1995.

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[1] The proposed rule also notes that one reactor (Haddam Neck) has permanently ceased operation and therefore will pay a reduced annual fee in FY 1997. Since the total annual fees for reactors is less than $3 million, Haddam Neck cannot explain the $25 million proposed increase in the annual fees to be charged to reactors.

In light of the substantial increase in the annual fees being charged to reactors, we also believe that the NRC should remove from those fees any costs not attributable to reactors. The 1995 fee, which the NRC is now using as the baseline for the current proposal, included $55 million of NRC costs that either do not directly benefit NRC licensees or provide benefits to non-NRC licensees.[2] 60 Fed. Reg. at 32,224. In fact, reactor licensees were charged nearly 90% of the total NRC costs unattributable to licensees, which resulted in a surcharge on operating reactors of $509,000 in 1995. Id. Presumably, with the large percentage increase included in the currently proposed rule, this (now unidentified) surcharge would become even greater. Power reactor licensees should not be required to subsidize these activities or bear the ever increasing costs of the agency for activities unrelated to the costs of reactors. Since there is no relationship between these charges and reactors, no statutory basis for exempting from Part 170 many of the entities actually incurring these costs, and no rational basis for heaping nearly the entirety of these costs on power reactors, this surcharge violates OBRA, exceeds the Congressional delegation of authority, and is arbitrary and discriminatory. The surcharge, as well as any other costs unrelated to reactor program, should therefore be eliminated from the annual fee for power reactors.

Policy Considerations

Utility rates are traditionally determined prospectively for use in a future period, based typically on the operating expenses of a test year. An expected future increase in operating expenses may be added to the test year revenue requirements only if it is known with sufficient certainty. As a result, utilities' rates now in effect have been determined assuming previously projected levels of fee assessment. Any increased expenses incurred prior to a new rate being put into effect are usually not (absent extraordinary conditions) recoverable retroactively. Ratemaking agencies need not make up past earning deficiencies in a rate case, and most are statutorily prohibited from granting retroactive rate relief.

Thus, substantial, precipitous and unexplained increases in NRC fees may result in utilities losing the opportunity to recover some or all of the payments. Further, to pay for increased fees not being recovered through rates, the utilities would be forced to utilize funds budgeted for other purposes. The NRC should recognize that in many cases, the money diverted will have to come from some other portion of a utility's nuclear budget. In short, at a number of plants, the

[2] The costs are described as including reviews submitted by other government agencies (e.g. DOE), international cooperative safety programs and international safeguards activities, low-level waste disposal generic activities, uranium enrichment generic activities, and costs of nonprofit institutions and small entities. 10 C.F.R. § 171.15(c). The 1995 rulemaking also indicates that these costs include substantial costs for Agreement State oversight and regulatory support, as well as the Site Decommissioning Management Plan applicable to the sites of former material licensees. 60 Fed. Reg. at 32,227. These are not "administrative costs" that Congress intended to recover under the annual fee, but rather direct costs that should be assessed through the Part 170 user fees to the beneficiaries.

precipitous collection of increased fees will likely take away money budgeted for nuclear operations and maintenance. We strongly urge the NRC to consider this potential effect when it proposes such substantial increases in fees.

Conclusion

The NRC has not made a sufficient effort to allocate the costs of regulatory services to tne beneficiaries of the services. Instead, it has shifted costs to power reactor licensees in an arbitrary manner. The proposed scheme is unfair and discriminatory, and is not in keeping with Congress' instructions in the Omnibus Budget Reconciliation Act of 1990. Accordingly, we strongly recommend that the NRC reconsider and revise its proposed rule to create a fee schedule that comports with the statutory requirements.

Sincerely,

David R. Lewis

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