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A Duke Energy Company

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July 9, 1998

The Honorable Shirley A. Jackson, Chairman  
The Honorable Nils Diaz  
The Honorable Edward McGaffigan

Dear Chairman Jackson:

Duke Energy Company ("Duke") hereby requests the Nuclear Regulatory Commission ("NRC" or "Commission") reconsider and grant Duke's request for an exemption from a duplicative license fee under 10 C.F.R. §171.11(d) for the storage of spent nuclear fuel at the Oconee Nuclear Station ("Oconee"). Duke currently has a specific license for an Independent Spent Fuel Storage Installation ("ISFSI") at Oconee and has proposed to expand the storage capacity of that ISFSI by use of the general license in 10 C.F.R. Part 72, Subpart K. By its terms, 10 C.F.R. §171.16(a)(5) would require Duke's payment of a duplicate license fee for use of a general license to conduct the same activities that are currently conducted under the specific license for the ISFSI. Accordingly, by letter dated December 18, 1997, Duke requested an exemption from the requirements of §171.16(a)(5). In this request, Duke demonstrated that its situation satisfied the requirements for exemption set out in 10 C.F.R. §171.11(d). Nevertheless, Duke's request was denied by the Chief Financial Officer ("CFO") in his letter dated May 8, 1998. In his letter denying Duke's request, the CFO stated:

"After carefully examining the facts, I have concluded that it would not be appropriate to grant an exemption from the annual fee requirements for the general license. NRC's user fee regulations in 10 C.F.R. Parts 170 and 171 are based on the fundamental principle that a separate fee is imposed for each license held, regardless of the similarity of the licenses. An exemption from this bedrock principle will only be granted in extraordinary cases."

"Extraordinary" was precisely the nature of the circumstances described by Duke in its request for an exemption. Thus, even under this standard, the origin of which remains unclear, Duke's request should have been granted. Instead, the CFO elected to apply a standard that is not supported by the applicable regulations, statutes, or relevant case law, and concluded, without support, that Duke did not meet such standard. The CFO's application of a standard of his own creation rather than that contained in the NRC's regulations, and his disregard of express Congressional direction and clearly applicable case law, has broad policy implications reaching far beyond the technical management of the NRC's budget and warrants reconsideration by the Commission.<sup>1/</sup>

<sup>1/</sup>As discussed, this request for reconsideration has been directed to the Commission because the

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As more fully described in the Attachment to this letter, the appropriate standard to be applied in considering requests for exemptions from duplicate annual fees is set out in 10 C.F.R. §171.11(d). Duke has met this standard in its request for an exemption. Duke has demonstrated that the imposition of the duplicate annual fee "will result in a significantly disproportionate allocation of costs" to Duke and is "not based on a fair and equitable allocation of NRC costs," either of which is sufficient under 10 C.F.R. §171.11(d) to warrant the grant of an exemption by the NRC. Moreover, Duke has demonstrated that its exemption request meets the standard established by the Court in *Allied-Signal, Inc. v. U.S. NRC*, 988 F.2d 146 (D.C. Cir. 1993) in that the burdens placed on the NRC as a result of Duke's use of the referenced general license are *de minimis*, while the corresponding double burden on Duke arising out of the imposition of a duplicate annual license fee is substantial, especially when extended over a period of years. Significantly, the CFO failed to indicate that the NRC incurs any additional burdens as a result of Duke's use of the general license. Finally, Duke's request for an exemption is consistent with Congress' direction to the NRC in the Nuclear Waste Policy Act of 1982, as amended, (NWPA) to eliminate, to the maximum extent practicable, the need for specific NRC authorization for on-site storage of spent fuel. The NRC adhered to such Congressional direction by creating the opportunity for licensees to avail themselves of the general license. The CFO's refusal to grant Duke's exemption request and his suggestion that Duke seek instead to amend its site-specific ISFSI license denies Duke a reasonable opportunity to avail itself of the general license. Accordingly, the CFO's decision is inconsistent with the public policy as clearly articulated by the Congress and implemented by the NRC against the need for site-specific approvals for spent fuel storage, such as the proposed license amendment..

Duke's unique circumstances leading to the request for an exemption are the result of an accident of history, given the need to obtain dry storage capability at Oconee prior to the availability of a general license and the use of virtually identical dry storage technologies under both specific and general licenses. This unusual confluence of historical and technological circumstances, the public policy implications, and the striking contrast between the *de minimis* additional burden on the NRC if Duke operates under both the specific and general licenses and the substantial burden on Duke if forced to pay a duplicate license fee for many years in the

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CFO has interpreted license fee requirements with respect to matters that go beyond his authority to establish, maintain and oversee the implementation of license fee policies and regulations. 10 C.F.R. Section 1.31(j), 63 Fed. Reg. 15740 (April 1, 1998) The CFO's decision also affects Commission policy on the availability of the general license for the on-site storage of spent fuel. Therefore, although the CFO reports directly to the Chairman, such broader policy concerns should be reviewed by the entire Commission, in accordance with Reorganization Plan No. 1 of 1980, as amended. 126 Cong. Rec. 4557 (H. Doc. No. 96-307) (May 5, 1980). If the Commission should determine that such reconsideration lies solely before the Chairman, then Duke requests that, in the alternative, this request for reconsideration should be considered as a request to the Chairman, in the exercise of her supervisory authority over the CFO.

future, warrant reconsideration of the CFO's decision and the grant by the NRC of Duke's request for exemption.

Questions regarding this matter should be directed to J.E. Burchfield, Jr. at (864) 885-3292.

Very truly yours,

A handwritten signature in dark ink, appearing to read "W. R. McCollum, Jr.", written in a cursive style.

W. R. McCollum, Jr.  
Vice President, Oconee Nuclear Site

## Attachment

### DUKE ENERGY CORPORATION REQUEST FOR RECONSIDERATION OF ITS REQUEST FOR EXEMPTION FROM THE DUPLICATIVE FEE REQUIREMENTS IN 10 C.F.R. § 171.16

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Pursuant to 10 C.F.R. Section 171.11(d) and the Nuclear Regulatory Commission's ("NRC" or "Commission") inherent authority to supervise all proceedings before the NRC, Duke Energy Corporation ("Duke") hereby requests the Commission to reconsider and grant Duke's request for an exemption from annual fee requirements of approximately \$ 283,000 under 10 C.F.R. Part 171.<sup>1/</sup> Duke's proposed use of the general license in 10 C.F.R. Part 72, Subpart K to expand the storage capacity of the Oconee Nuclear Station's Independent Spent Fuel Storage Installation ("ISFSI") will trigger the imposition of substantial and duplicative annual fees by the NRC.

Under the circumstances presented in Duke's application, the imposition of this additional annual fee is not based on a fair and equitable allocation of the NRC costs, nor is it consistent with Congress' direction to the NRC in the Nuclear Waste Policy Act, as amended ("NWPA"). Duke already pays an annual license fee to the NRC for the Oconee ISFSI. Duke's proposed expansion of the storage capacity of the ISFSI would authorize Oconee to continue to conduct virtually the same spent fuel storage activities that it now conducts under the specific ISFSI license.

Nevertheless, the Chief Financial Officer ("CFO") denied Duke's exemption request by letter dated May 9, 1998. The CFO suggested that Duke should instead seek to amend its license for the ISFSI. This alternative also is likely to be costly now and in the future. Therefore, only by granting Duke's exemption request will the Commission avoid an unfair and inequitable allocation of NRC costs and effect public policy as articulated by Congress.

Reconsideration of Duke's exemption request is supported by several factors. First, Duke's request showed that the appropriateness of an exemption for Oconee arose from unique historical circumstances surrounding the licensing of the Oconee ISFSI. As a result,

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<sup>1/</sup> This request for reconsideration has been directed to the Commission because the CFO has interpreted license fee requirements with respect to matters that go beyond his authority to establish, maintain and oversee the implementation of license fee policies and regulations. 10 C.F.R. Section 1.31(j), 63 Fed. Reg. 15740 (April 1, 1998). The CFO's decision has discouraged Duke from obtaining a general license by declining to remove a duplicative license fee. As such, the CFO's decision also affects Commission policy on the availability of the general license for the on-site storage of spent fuel. Therefore, although the CFO reports directly to the Chairman, such broader policy concerns should be reviewed by the entire Commission, in accordance with Reorganization Plan No. 1 of 1980, as amended. 126 Cong. Rec. 4557 (H. Doc. No. 96-307) (May 5, 1980). Should the Commission determine that such reconsideration lies solely before the Chairman, Duke requests in the alternative that this request for reconsideration be considered as a request to the Chairman, in the exercise of her supervisory authority over the CFO.

Duke is the only licensee that would be required to pay a duplicative license fee for a general license under these circumstances. Given this unusual situation, the imposition of a duplicative license fee would be an unfair and inequitable allocation of costs within the meaning of Section 171.11(d). The decision of the CFO did not properly consider this factor.

Additionally, the imposition of a duplicative annual fee for the use of the Part 72 general license would create a substantial disincentive to Duke's use of that general license, and instead, effectively force Duke to seek an amendment to its current specific Part 72 ISFSI license. This result is inconsistent with Congressional direction in the NWPA that the NRC eliminate, to the maximum extent practicable, the need for site-specific NRC authorization for the on-site storage of spent fuel. Similarly, this result is inconsistent with the Commission's own policy, which implemented the Congressional mandate by adopting a general license for the on-site storage of spent fuel. 10 C.F.R. Part 72, Subpart K.<sup>2/</sup>

Moreover, the CFO's denial of Duke's request also merits reconsideration because it is similar to the exemption denial that was reversed in *Allied-Signal, Inc. v. U.S. NRC*, 988 F.2d 140 (D.C.Cir. 1993). Here, as in that case, the inequities that would stem from the NRC's imposition of a duplicative fee were not adequately discussed. When they are considered, it is clear that Duke's duplicative license fees would be substantial if no exemption is granted. By contrast, the additional regulatory costs to the NRC would be *de minimis*. Reconsideration of this exemption would avoid a significantly disproportionate allocation of NRC costs to Duke, for the reasons discussed in *Allied Signal*. In sum, consistency with these Congressional and Commission policies, and with applicable judicial precedent, is essential to any determination of the fair and equitable allocation of NRC costs, and can best be attained by a grant of the exemption request.

The CFO's decision affects Commission policy in areas beyond the management of the NRC's budget, because the denial of that request raises a substantial barrier to Duke's ability to use the simplified general license adopted by the Commission for the on-site storage of spent fuel pursuant to the direction of Congress. Accordingly, Duke concludes that this request for reconsideration raises fundamental issues of policy that can be resolved only by the Commission. Duke also believes that when the duplicative nature of the fee is fully considered, the exemption will be found to be warranted. For all these reasons, Duke concludes that it has met the exemption criteria in 10 C.F.R. § 171.11(d) and that an exemption should be granted.

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<sup>2/</sup> NRC Final Rule on the Storage of Spent Fuel in NRC-Approved Casks at Power Reactor Sites, 55 Fed. Reg. 29181 (July 18, 1990) ("Final Rule").

## I. BACKGROUND

### A. Current Storage of Spent Fuel at Oconee

Duke currently stores Oconee spent nuclear fuel in an ISFSI authorized by an NRC Part 72 specific license (SNM-2503) issued in January 1990. Duke obtained this specific license because, at the time, it was the only regulatory option available for the on-site dry storage of spent fuel. The general license in 10 C.F.R. Part 72 was not available until Part 72 was amended by the Commission in July 1990. Since the site-specific license was issued, Duke has paid the annual license fee for the ISFSI under 10 C.F.R. Part 171. During FY 1997, the annual fee was \$283,000.

Duke's specific license authorizes the storage of up to 88 modules of spent fuel in the NUHOMS-24P storage system. This storage system was chosen because it was compatible with Oconee's spent fuel and was authorized by the NRC in a Topical Report issued in April 1989. The storage system is comprised of the following components:

- \* a welded stainless steel dry storage container ("DSC") which has the capacity for 24 irradiated fuel assemblies
- \* concrete Horizontal Storage Modules ("HSM") which house the loaded DSCs
- \* a Transfer Cask which is used to transfer and protect the loaded DSC while it is in transit from the Spent Fuel Building to the ISFSI
- \* auxiliary transfer equipment that is used to move the loaded transfer cask from the Spent Fuel Building to the ISFSI location

Forty HSMs are currently loaded. Heat dissipation by each HSM is limited by its design to 0.66kW per fuel assembly. Higher heat dissipation rates, up to 1.0 kW per fuel assembly, have been determined to be needed for the storage of additional spent fuel.

### B. Proposal to Expand the ISFSI at Oconee

Because higher heat dissipation rates are needed for the storage of additional spent fuel at Oconee, an alternative to the current NUHOMS-24P system was sought. The

Standardized NUHOMS 24-P was selected because it not only provided the necessary additional heat dissipation, but also is otherwise virtually identical to the existing site-specific system. The DSC is exactly the same. This permits use of the loading and transfer equipment already on site. Only the HSM has been altered to increase the rate of heat dissipation. This alternative has required a slight change in the loading procedure to accommodate the different door design. Placement of the modified HSM in the ISFSI is virtually unchanged and will use the remaining unused licensed space.

From the regulatory perspective, Duke found the standardized NUHOMS-24P attractive because it had already received a Certificate of Compliance from the NRC. This meant that Duke could take advantage of the general license which had been issued by the NRC to simplify the licensing of on-site storage of spent fuel. In particular, Duke could use the Standardized NUHOMS system after the site had completed the straightforward technical reviews that determine compatibility of the system for the site. By contrast, the alternative of amending Oconee's existing Part 72 specific license to add this new storage system would have involved duplication of all those technical reviews plus a significant investment of licensee time, expense, and resources necessary to prepare and submit a license amendment. In addition to such cost considerations, a request for an amendment to the Part 72 specific license is also less attractive because it takes substantially longer to obtain.

**C. CFO's Denial of Duke's Request for Exemption from a Duplicative Fee**

In electing to use the general license in 10 C.F.R. Part 72, Subpart K, Duke considered the possibility that the NRC would impose a duplicative license fee because Oconee would have two licenses for the same spent fuel storage activity. Fees assessed under 10 C.F.R. Part 171 are subject to the general principle that a fee will be assessed for each type of license held.<sup>3/</sup> In Oconee's situation, this would result in the imposition of duplicate fees for Part 72 activities, despite the similarity of the spent fuel storage systems used under both licenses and the virtually identical nature of the storage activities conducted under both licenses.

To avoid this unnecessary, duplicative license fee, on December 18, 1997, Duke

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<sup>3/</sup> 10 C.F.R. § 171.16(a)(5) provides that person(s) who conduct activities authorized under 10 CFR part 72 for independent storage of spent fuel and high level waste shall "pay an annual fee for each license, certificate, approval or registration the person(s) hold on the date the license fee is due. If a person holds more than one license, certificate, registration, or approval, the annual fee will be the cumulative fees applicable to the licensee's certificates, registrations or approvals held by that person."

requested an exemption from a literal application of the fee requirement in 10 C.F.R. § 171.16(a)(5) for the on-site storage of spent nuclear fuel at Oconee. Duke provided clear reasons why the imposition of such an additional fee would not be based on a fair and equitable allocation of NRC costs for the purposes of an exemption under 10 C.F.R. § 171.11(d). In particular, Duke observed that the additional license fee would reflect a manifestly unfair and inequitable allocation of NRC costs because Duke would be performing the same activity -- the on-site storage of spent fuel-- in similar casks and with common transfer equipment at the Oconee ISFSI under both licenses. Thus, any additional regulatory costs to the NRC would be *de minimis*. By contrast, Duke knows of no other licensee that stores spent fuel at one site, in more than one type of cask, no matter how different the types of casks, and is required to pay more than one license fee. It is only the historical circumstances described above that would lead Duke to have two licenses, and pay two substantial license fees for conducting the same activities under both licenses.

Duke also noted the clear parallel between its situation and that in the *Allied-Signal* case. In both cases, it was only historical chance that led to the need for two licenses. In both cases, the "double burden" on the licensee clearly outweighed the *de minimis* additional burden on the NRC for the purposes of meeting the standard set out in 10 C.F.R. § 171.11(d). A duplicative annual license fee of over a quarter-million dollars is clearly burdensome on Duke. The additional burden on the NRC is *de minimis* because Duke would continue to conduct essentially the same activities that it conducts now at Oconee under the site-specific license for which it pays the annual fee. Any additional NRC surveillance costs would be covered by the fees under 10 C.F.R. Part 170. Accordingly, Duke concluded that because it had shown that the exemption criteria were satisfied, an exemption from the duplicative fee was warranted.

On May 8, 1998, Duke's exemption request was denied by the NRC's CFO. He confirmed that Duke's proposal for expanding the capacity for storing spent fuel at the Oconee ISFSI would result in duplicative annual fees. His reason for denying the request was his reliance on what he characterized as the "bedrock principle" that exemptions will be granted only in "extraordinary cases." The CFO found that Duke had not presented any extraordinary circumstances because Duke had voluntarily chosen to use two different types of casks. Moreover, the CFO noted that, as a result of Duke's decision, the NRC would incur the generic costs of two ISFSIs, just as it would incur the generic costs had two reactors been built at the same site. As an alternative, the CFO suggested that Duke could seek a site-specific license amendment for its already licensed ISFSI. The CFO suggested that the costs of such an amendment should be low because a Certificate of Compliance already has been issued by the NRC for the Standard NUHOMS cask that Duke proposed to use.

## II. NRC CRITERIA FOR A FEE EXEMPTION

10 C.F.R. § 171.11(d) authorizes the Commission to grant fee exemptions to material licensees as follows:

The Commission may grant a materials licensee an exemption from the annual fee if it determines that the annual fee is not based on a fair and equitable allocation of the NRC costs. The following factors must be fulfilled as determined by the Commission for an exemption to be granted:

1. There are data specifically indicating that the assessment of the annual fee will result in a significantly disproportionate allocation of costs to the licensee, or class of licensees; or
2. There is clear and convincing evidence that the budgeted generic costs attributable to the class of licensees are neither directly or indirectly related to the specific class of licensee nor explicitly allocated to the licensee by Commission policy decisions; or
3. Any other relevant matter that the licensee believes shows that the annual fee was not based on a fair and equitable allocation of NRC costs.

In the *Allied-Signal* case, the Court stated that each of these three factors "seem to be best understood as independent considerations which can support an exemption." 988 F. 2d at 154, n.5. Therefore, if any of these factors is satisfied, an exemption should be granted.

The Court in *Allied-Signal* also held the NRC to its own criteria for an exemption, stating that "The Commission's own criteria call for an exemption if the licensee can show that "the assessment of the annual fee w[ould] result in a significantly disproportionate allocation of costs to the licensee." (988 F. 2d at 153). Moreover, in determining whether the allocation of fees is significantly disproportional, the Court relied on the 1990 Omnibus Reconciliation Act ("OBRA"), in which the Congress directed that

Fees must be apportioned "fairly and equitably" and that "[t]o the maximum extent practicable...charges shall have a reasonable relationship to the cost of providing regulatory services." [citations omitted] (988 F. 2d at 153).

The Court applied this test by comparing the additional cost to the licensee of holding two licenses with the additional cost to the NRC of regulating the licensed activities. The Court held that where the burdens on the NRC were *de minimis* as compared with the burdens on the licensee, an exemption request had amply overcome the hurdle established by 10 C.F.R. § 171.11(d). (988 F. 2d at 154).

### **III. DUKE'S EXEMPTION REQUEST SATISFIES 10 CFR§ 171.11(d) CRITERIA**

#### **A. Assessment of this Annual Fee Will Result in a Significantly Disproportionate Allocation of Costs to Duke as a Member of the Class of Licensees which Store Spent Fuel in ISFSIs**

As discussed in Duke's application for a fee exemption, the NRC's imposition of a duplicative Part 171 annual user fee in connection with Duke's use of the Part 72 general license for the proposed expansion of the Oconee ISFSI would constitute a significantly disproportionate -- and thus inequitable -- allocation of NRC costs on Duke. For purely historical reasons, Duke would be required to pay two substantial fees for conducting the same licensed activity that other NRC reactor licensees conduct under a single Part 72 license (even where several types of casks may be used at a single site). The two Part 72 licenses (which involve spent fuel storage using very similar casks, and the sharing of cask handling facilities) would not result in a significant increase in the NRC's current budget allocations for Duke's ISFSI at Oconee. Moreover, the generic costs to the NRC for the Standardized NUHOMS cask have already been covered by the vendor who obtained the Certificate of Compliance. Accordingly, a second license fee will result in a significant financial burden to Duke as a member of the class of licensees which store spent fuel in an ISFSI. These unnecessary and duplicative costs, which are substantial in amount, will discourage Duke from obtaining a general license, contrary to Congressional direction and Commission policy.

Instead of addressing the substantial difference in costs to the NRC and to Duke for a general license, as required by the analysis in *Allied-Signal*, the CFO's denial of Duke's request simply relied on the general policy of "a fee for every license," and the perceived absence of "extraordinary circumstances." Such reliance on a general policy has been rejected as

inadequate by the Court in *Allied-Signal*. An equitable balance of costs between the licensee and the NRC must be considered by the NRC in determining whether a fee exemption should be granted. In his decision, the CFO failed to identify specific additional costs to the NRC attributable to the granting of the exemption. By contrast, Duke has identified substantial additional licensing costs that will flow from the denial of the exemption. Thus, the CFO's denial of Duke's exemption request is inconsistent with the NRC's fee rule as interpreted by the Court in the *Allied-Signal* case, and merits reconsideration by the Commission.

Moreover, extraordinary circumstances are not part of the Commission's criteria for determining whether to grant an exemption from a license fee.<sup>4</sup> As the Court held in *Allied-Signal*, it is only the exemption criteria in 10 C.F.R. § 171.11(d) that are to be considered by the NRC in determining whether to grant an exemption under Part 171. (See 988 F. 2d at 153.) In any event, exceptional circumstances exist in this case. As discussed below (subsection III. B), the grant of an exemption would remove a substantial impediment to Duke's ability to use a general license, consistent with the clear direction by the Congress and the Commission's Final Rule which implemented such direction.

The failure to make the necessary detailed, comparative cost analysis is not cured by the CFO's analogy to the construction of a second reactor at the same site. That this analogy is imperfect is clear. Thus, we do not elaborate on the obvious differences in cost to the NRC between regulating the construction of a reactor, on the one hand, and the enlargement of a passive ISFSI by the addition of NRC certified casks, on the other. Duke believes that any additional costs to the NRC in this case are clearly *de minimis*, given the similarity between current licensed activities and activities proposed to be conducted under the general license. Therefore, contrary to OBRA, a duplicative license fee will not bear a reasonable relationship to the NRC's costs of providing regulatory services.

When the equitable balance of costs is considered here, it is clear that the substantial duplicative costs to Duke far outweigh any allocation of regulatory costs to the NRC. The regulatory costs for licensing the cask have already been paid by the vendor who obtained the Certificate of Compliance. Other administrative and generic costs to the NRC will be

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<sup>4</sup>/ Extraordinary circumstances are relevant to the timing of an exemption request. Duke believes that it has met this test because it requested an exemption promptly after determining that it would seek to expand the storage capacity at its ISFSI by taking advantage of the Standard NUHOMS-24P system and the Part 72 general license. Duke would have had no occasion to request an exemption from a fee for a general license before deciding to avail itself of such a license.

minimal because Duke will continue to conduct essentially the same activities that it conducts now under the specific ISFSI license. As a result, the regulation of the use of the new casks will essentially be covered by the ongoing NRC regulation of the ISFSI. This analysis shows that in Duke's case, as in *Allied-Signal*, the substantial costs to the licensee are far greater than the *de minimis* costs to the NRC. Accordingly, as in *Allied-Signal*, Duke has met the standard set out in 10 C.F.R. § 171.11(d) for the grant of an exemption from a duplicative license fee.

The alternative of obtaining a license amendment, as suggested by the CFO, would also result in an unfair and inequitable allocation of costs, although these costs likely would be lower. Experience indicates that a license amendment would be costly to Duke - both initially and to the extent additional license amendment costs are incurred to implement future technical enhancements to the standardized system - costs that would not be incurred under a general license. A license amendment in this case simply exalts form over substance in that, for the NRC's purposes, the result is the same. However, for Duke, the license amendment approach would unnecessarily and substantially increase the cost of the addition to the ISFSI. Duke knows of no other case where a licensee has been required to obtain a costly license amendment under the circumstances where it has proposed to rely on a general license. The costs of a license amendment to Duke would, therefore, also be an unfair and inequitable allocation of NRC costs. Accordingly, the CFO's suggested alternative would needlessly subject Duke to the significant cost of seeking amendments to its specific license, both now and for the implementation of future technical enhancements to the ISFSI and, thus, further supports the grant of a fee exemption.

**B. "Other Relevant Matters" Show That a Duplicative Fee Allocation Is Neither Fair Nor Equitable for the Purposes of 10 C.F.R. § 171.11(d)(3)**

Reconsideration and approval of Duke's requested exemption would further the established public policy of facilitating the on-site storage of spent fuel. When Congress enacted the NWPA in 1982, it recognized that the on-site storage of spent fuel was an integral part of the overall program to eventually dispose of spent fuel in a repository. To facilitate the public interest in the safe on-site storage of spent fuel until it could be permanently disposed of, Congress directed the NRC to simplify its licensing process for the on-site storage of spent fuel. In particular, the NRC was directed to promulgate a rule establishing a licensing procedure that was to eliminate, to the maximum extent practicable, the need for NRC site-specific approvals of

spent fuel storage.<sup>5/</sup> Congress adopted these provisions to remove licensing and other obstacles to the ability of reactor licensees to expand their on-site capacity for the storage of spent fuel.<sup>6/</sup>

The NRC responded to this Congressional directive by amending 10 C.F.R. Part 72 to create a general license that reactor licensees could use as authority to store spent fuel on-site. In amending Part 72, the Commission explicitly acknowledged that it was acting to provide for the storage of spent fuel at reactor sites without the need for additional site-specific Commission approvals, as directed by the NWPA. 55 Fed. Reg. 29181, 29182. A grant of Duke's exemption request would implement this Commission policy because it would permit Duke to avail itself of this general license without a substantial, recurring financial penalty.

Duke has proposed to take advantage of existing public policy by relying on the Part 72 general license that has been issued for a cask which is similar to the casks that are already on-site and licensed at the Oconee ISFSI. Clearly, the CFO's decision to require Duke to pay a duplicative fee to use the general license undermines and prejudices Duke's ability to benefit from this Congressionally-mandated policy. To force Duke to pay such a fee because of its unique history of licensing an ISFSI would create a disincentive that is inconsistent with the public policy concerns discussed above. Therefore, the imposition of those costs would be unfair and inequitable.<sup>7/</sup>

This disincentive to use the Part 72 general license has been further compounded by the CFO's suggestion that Duke should apply for a site-specific license amendment. As the Commission is well-aware, a license amendment is the quintessential example of site-specific NRC approval. Therefore, such an amendment request would completely contradict both Congress's explicit mandate that the NRC minimize the need for site-specific NRC approval of spent fuel storage, and the NRC's rule implementing that Congressional mandate. To attain consistency with these clear expressions of public policy, Duke should not be required to bear the substantial costs of applying for a site-specific license amendment. Because amendment fees

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<sup>5/</sup> H. Rep. No. 97-491 (Part I), 97th Cong. 2d Sess., (1982), *reprinted in* 1982 U.S.C.A.N. 3792, 3828.

<sup>6/</sup> *Id.* at 3804.

<sup>7/</sup> The grant of an exemption from the fee requirement is not the kind of site-specific licensing action which the Congress and the Commission sought to avoid with respect to the on-site storage of spent fuel. In any event, the NRC's hesitation to issue exemptions should not supersede clear directions from Congress to avoid site-specific decisions in this very kind of situation.

would simply be in lieu of the licensing fees for a general license, they too would be an unfair and inequitable duplicative fee, for the same public policy reasons previously discussed.

#### IV. CONCLUSION

In summary, the applicable law and public policy overwhelmingly support the Commission's grant of Duke's request for an exemption from a duplicative license fee. Duke has demonstrated that its extraordinary circumstances even satisfy the standard articulated by the CFO for fee exemptions - a standard which Duke has shown is not supported by applicable law. The more than a quarter-million dollars a year in duplicative license fees for a general license are clearly unfair and inequitable when measured against the *de minimis* costs for the NRC's regulation of spent fuel storage activities which Oconee already conducts on-site. Only an accident of history and a literal interpretation of the license fee requirements—a literal interpretation that has been rejected by the Courts in circumstances strikingly comparable to those present here—has led to a denial of Duke's request. These bases cannot reasonably support a requirement to pay substantial, duplicative, annual fees, especially where such payments would clearly thwart Duke's ability to avail itself of the general license which the NRC made available in response to public policy established by the Congress.

For similar reasons, the suggested license amendment for Oconee's ISFSI license is not a reasonable alternative. It, too, could subject Duke to a significant, unnecessary expense. The CFO's surmise that a license amendment would not be costly ignores the substantial costs that Duke would incur for preparation and support of an amendment, the real potential for additional amendments as Duke implements future technical enhancements of the NUHOMS system, and the potential for a protracted licensing process, even for changes such as this with no safety significance. From a public policy standpoint, such a license amendment would be diametrically opposed to Congress's crystal clear direction to the NRC to minimize the need for site-specific licensing actions to authorize the expanded storage of spent fuel at reactor sites. Thus, the CFO's suggestion contradicts clear Congressional directions for the sake of exalting form over substance because the same result can be obtained by an exemption which is clearly within the Commission's power to grant and which implements established Commission policy.

For all of these reasons, the Commission should reconsider and grant Duke's request for an exemption from the duplicative fee in 10 C.F.R. Part 171 for a general license for the proposed expansion of the already licensed ISFSI at Oconee.