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POLICY ISSUE NOTATION VOTE

October 26, 2005

SECY-05-0194

FOR: The Commissioners

FROM: Jesse L. Funches
Chief Financial Officer

SUBJECT: FY 2006 PROPOSED FEE RULE

PURPOSE:

This paper requests three policy decisions for the Fiscal Year (FY) 2006 proposed fee rule.

SUMMARY:

This paper requests approval to proceed with the following policy decisions for the FY 2006 proposed fee rule: (1) charging 10 CFR Part 170 fees to Federal agencies, (2) recovering generic transportation costs as part of other existing annual fees, and (3) discussing the removal of generic homeland security activities from the fee base in FY 2007. It also identifies administrative and other minor changes the staff plans to include in the proposed rule, and presents the schedule and plan for proceeding with the proposed fee rule based on the FY 2006 budget request.

BACKGROUND:

The Omnibus Budget Reconciliation Act of 1990 (OBRA-90), as amended, requires that the NRC recover 90 percent of its budget authority¹ each year prior to the end of the fiscal year. To meet the requirements of OBRA-90, each year the NRC publishes a rule that establishes two types of fees: (1) fees for specific services under 10 CFR Part 170 to recover special benefits to identifiable applicants and licensees, and (2) annual fees under 10 CFR Part 171 to recover generic and other regulatory costs not otherwise recovered under Part 170.

CONTACT: Tammy Croote, OCFO/DFM
301-415-6041
txc1@nrc.gov

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Freedom of Information Act (5 U.S.C. 552)
Exemption number ²
Nuclear Regulatory Commission Review
required before public release
Tammy D. Croote, NRC/OCFO/DFM

¹ The 90 percent is applied to the NRC's budget authority not otherwise off the fee base (e.g., sums appropriated from the High Level Waste Fund or for activities related to NRC's Waste Incidental to Reprocessing responsibilities under the Ronald W. Reagan Defense Authorization Act of 2005).

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To ensure the fee rule is published timely, the staff identifies to the Commission policy issues to be addressed in the fee rule prior to completion of the proposed rule each year.

DISCUSSION:

This paper requests three policy decisions for the FY 2006 fee rule, as discussed below. In addition, Attachment 1 provides a list of administrative and other minor changes the staff plans to include in the proposed rule.

1. *Charging Part 170 Fees to Federal Agencies*

Under the Energy Policy Act of 2005 (P.L. 109-58, Section 623), the NRC was granted authority to assess fees for specific services provided to any Federal government agency which applies to the NRC for, or is issued by the NRC, a license or certificate.² (The NRC has sought this legislative change for some time, and last submitted this legislative proposal to Congress on March 30, 2005.) The NRC currently recovers the costs of licensee-specific activities for non-Federal licensees, applicants, and certificate holders under Part 170, but was unable to assess these fees to Federal agencies [other than the Tennessee Valley Authority (TVA) and the U.S. Enrichment Corporation (USEC)] until the Energy Policy Act.

Because activities such as processing license applications provide a specific benefit to the recipient, I believe it is fair and appropriate to implement this new authority and thereby recover the costs of providing specific services to Federal agencies through Part 170 fees. I have notified Federal agencies in writing that have an NRC license or certificate that we plan to implement this new authority in the FY 2006 fee rule, so that they may include this cost in their budgets.

However, I recommend that this policy not apply to Federally-owned test and research reactors that meet the fee exemption criteria set forth in Section 2903 of the Energy Policy Act of 1992 (P.L. 102-486).³ As implemented by 10 CFR 171.11(a)(2), Federally-owned test and research reactors that meet the statutory criteria are already exempt from paying annual fees. At the time Congress enacted this fee exemption, however, Federally-owned reactors (other than TVA and USEC) were not subject to Part 170 fees. Therefore, the exemption criteria set forth in the Energy Policy Act of 1992 did not specifically address Part 170 fees. Now that NRC has the authority to charge Part 170 fees to Federally-owned reactors, I believe that it is appropriate as

² This statutory provision can not be legally applied to activities for Federal agencies that are not NRC licensees, certificate holders, or applicants [e.g., activities to support the Department of Energy (DOE) in its decommissioning of the West Valley site in N.Y.].

³ These criteria relate to factors such as thermal power level and whether the reactor contains a liquid fuel loading. Three Federally-owned research reactors currently meet this criteria (at the Veteran's Administration Medical Center in Omaha, Nebraska, the U.S. Geological Survey in Denver, Colorado, and the Armed Forces Radiobiological Institute in Bethesda, Maryland).

a matter of policy to apply the same criteria to Federally-owned test and research reactors, and exempt those meeting the criteria from Part 170 fees.

2. *Recovering Generic Transportation Costs*

I recommend that generic transportation costs be recovered as part of existing annual fees for license fee classes, rather than through a separate annual fee for Part 71 Quality Assurance (QA) program approval holders (as is the current practice). This change would enhance the equity of NRC's fees, increase the consistency of Parts 71 and 72 fee recovery, and decrease the administrative burden associated with a separate transportation annual fee.

All NRC licensees must perform some activities related to the transportation of radioactive material as a necessary part of their licensed activities. This transportation is authorized by their NRC license (under Parts 30, 40, 50, 70, etc.).⁴ For example, all licensees receive licensed material at their site, and ship products and waste materials. Because the NRC does not issue separate licenses under Part 71 for transportation activities, the NRC currently recovers the cost of all 'generic' transportation activities (i.e., those activities that are not licensee-specific, and therefore not recovered through Part 170 fees) through annual fees for quality assurance (QA) program approvals.⁵ QA program approvals are required for entities holding NRC approved Certificates of Compliance (CoCs) for transportation packages and for licensees that ship large (Type B) quantities of radioactive material or fissile material. NRC licensees must also use an approved CoC to transport.

The NRC currently charges annual fees for the two types of QA program approvals it issues: (1) use (approximately 80 programs), and (2) use and fabrication (approximately 40 programs). However, the resources for generic transportation activities—which are all recovered through these two annual fees—support many other transportation-related NRC approvals and services, including the issuance of CoCs, route approvals, and evaluations of transportation devices and security plans. (The NRC charges Part 170 fees for these specific services, but not annual fees for various reasons.)

One reason, in particular, this approach raises fairness concerns is that a company is required to have only one QA program approval regardless of the number of CoCs it holds. This means companies pay the same annual fee regardless of whether they own one or many CoCs. As industry consolidation has increased over the past decade and the NRC has issued fewer QA program approvals, this equity concern has increased.

⁴ 10 CFR 71.17 establishes a general license that authorizes NRC licensees to make shipments using packages with an approved Certificate of Compliance, without further approval.

⁵ Resources and fees for DOE transportation activities are not included in this discussion, as I am not recommending a change to the method for calculating DOE's transportation annual fee.

I believe generic transportation resources would be recovered more equitably if these costs were included in the existing annual fees for NRC licenses for Parts 30, 40, 50, 70, etc. The resources associated with generic transportation activities (\$3.2 million in FY 2005) would be distributed to the license fee classes based on the number of CoCs benefitting (used by) that fee class, as a proxy for the generic transportation resources expended for each fee class. In this way, the annual fee for a license would include the estimated share of transportation resources needed to support that license, similar to the recovery of other types of generic resources such as rulemakings and risk assessments.

Under this new approach, reactors would pay approximately 37 percent of these costs, materials users approximately 33 percent, fuel facilities approximately 20 percent, spent fuel/reactor decommissioning licensees approximately eight percent, and test and research reactors approximately two percent. Had NRC employed this approach to calculate annual fees in FY 2005, the total annual fee recovery for reactors, materials users, fuel facilities, spent fuel storage/reactor decommissioning licensees, and test and research reactors would have been higher by 0.4 percent, 4.0 percent, 2.6 percent, 1.4 percent, and 25.3 percent,⁶ respectively.

This new approach would also increase the consistency of Parts 71 and 72 fee recovery. Part 72 QA programs are approved as part of the CoC approval process, and an annual fee is not assessed for either this QA approval or the CoC. The generic costs associated with spent fuel storage are recovered as part of the annual fee assessed to operating power reactors, decommissioning power reactors, and independent spent fuel storage installation licensees who do not hold a Part 50 license.

Finally, an additional benefit of this approach is that it would decrease administrative burden by eliminating a required systems interface for fee billing purposes, as well as reduce the number of NRC bills and accounts receivable transactions.

3. *Removing Generic Homeland Security Activities from the Fee Base in FY 2007*

The Energy Policy Act of 2005 removes certain homeland security activities from the fee base beginning in FY 2007. Section 637 states that the NRC will NOT recover in fees:

“(iv) amounts appropriated to the Commission for homeland security activities of the Commission for the fiscal year, except for the costs of fingerprinting and background checks required by section 149 of the Atomic Energy Act of 1954 (42 U.S.C. 2169) and the costs of conducting security inspections.”⁷

⁶ This would have increased the FY 2005 annual fee for a test and research reactor from \$59,500 to \$74,600. The FY 2003 and FY 2004 annual fees for test and research reactors were approximately \$63,000.

⁷ Note the reimbursable costs of fingerprinting and background checks are not included in NRC license fees under 10 CFR Parts 170 or 171.

Although this new provision does not take effect until the FY 2007 fee rule, I recommend that this issue be discussed in the preamble of the FY 2006 proposed fee rule to put applicants and licensees on notice regarding how we intend to implement this provision. This would assist them with their budget planning. This discussion would include the NRC's interpretation of the term 'security inspections' to include other licensee-specific activities (such as security plan reviews), consistent with SECY-04-0033, "Fee Relief to Address Fairness and Equity Concerns," dated February 27, 2004 (ML040580729), and its resulting SRM (April 13, 2004, ML041040843). As such, this discussion would explain that all generic homeland security costs will be off the fee base in FY 2007, but that the NRC will continue to bill under Part 170 for specific homeland security-related services provided. This implementation strategy will avoid confusing and inconsistent fee practices, such as charging for the safety and environmental review of a license application, but not the security plan review.

RECOMMENDATION:

Based on the foregoing discussion, I recommend that the Commission approve:

1. charging 10 CFR Part 170 fees to Federal agencies (with the noted exception for Federally-owned research reactors meeting the fee exemption criteria of the Energy Policy Act of 1992);
2. recovering generic transportation costs as part of other existing annual fees; and,
3. discussing the removal of generic homeland security activities from the fee base in FY 2007.

SCHEDULE:

The estimated schedule for the FY 2006 fee rule is included as Attachment 2. The Commission's decisions on the above recommendations will affect the development and timely completion of the FY 2006 fee rule. To meet the attached schedule, the staff requests a Commission decision on the issues raised in this paper by December 6, 2006.

Note the staff is proceeding with the required calculations and related fee rule processes even though the NRC does not presently have a budget appropriation for FY 2006.⁸ The staff is proceeding with the fee calculations and proposed rule based on the NRC's FY 2006 budget request, due to the uncertainty of the appropriations that will ultimately be enacted. Proceeding with the required staff work is necessary to meet the requirements of OBRA-90 to recover most

⁸ The NRC requested a total budget authority of \$701.7 million for FY 2006. The Senate FY 2006 Energy and Water Development Appropriations Bill (E&WD) includes an additional \$41 million for NRC (\$20 million for new reactor licensing and \$21 million for nuclear security and pay raise). The House FY 2006 E&WD Appropriations Bill only includes the \$21 million for nuclear security and pay raise.

of the NRC's budget by the end of the fiscal year. To meet these requirements, the FY 2006 final fee rule must take effect no later than the end of August 2006. This means the proposed rule must be published in the *Federal Register* by late March 2006, and the final rule must be published by late June 2006.⁹

If Congress has not enacted a budget for the NRC by the time the proposed rule is issued, the staff would describe the budget situation in the preamble of the proposed rule. The preamble would also explain that as a result of Congressional action, the fees set forth in the final rule could differ from the proposed fees.

COORDINATION:

The Office of the General Counsel has reviewed this paper and has no legal objections. The Executive Director for Operations has concurred on this paper.

/RA/

Jesse L. Funches
Chief Financial Officer

Attachments:

1. Administrative and Other Minor Changes to FY 2006 Proposed Fee Rule
2. Estimated Schedule - FY 2006 Fee Rule

*CONCURRENCE PAGE FOR COMMISSION PAPER ON FY 2006 PROPOSED FEE RULE FROM
JESSE L. FUNCHES TO THE COMMISSIONERS, DATED OCTOBER 26, 2005*

NOTE: See previous page for text of document

⁹ This license fee rule is considered a major rule under the Congressional Review Act of 1996, thus, the final rule may not take effect until 60 days after publication in the *Federal Register*.

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*See previous concurrence

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ATTACHMENT 1

Administrative and Other Minor Changes to FY 2006 Proposed Fee Rule

1. Using Cost-based Hourly Rates

The OIG, in its report "NRC's License Fee Development Process Needs Improvement," dated December 14, 1999, recommended that NRC use actual cost data to develop and refine the hourly rates established under Part 170. Currently, the NRC uses budget data to develop these hourly rates.

The staff has considered different options to best address this recommendation, and has concluded that reports can now be developed from the NRC's Cost Accounting System that will support the calculation of cost-based hourly rates each year for use in the fee rule. The staff has developed and documented procedures for using cost data to calculate hourly rates, and piloted these procedures using FY 2004 cost data to develop FY 2005 hourly rates. The pilot resulted in an hourly rate of \$223 for both the Nuclear Reactor Safety (reactor) and Nuclear Materials and Waste Safety (materials) programs. The FY 2005 budget-based hourly rates, as currently established under Part 170, are \$205 for the reactor program and \$197 for the materials program. The cost-based rate is higher mostly because actual *direct* hours worked (the denominator of the hourly rate calculation) were lower than assumed in the budget-based hourly rates.

Higher hourly rates will increase Part 170 collections as a result of (a) increased full cost fees for licensing and inspection activities, and (2) increased materials flat fees for license applications. Once implemented, total Part 171 annual fees will decrease by the same amount as the increase in total Part 170 fees. This shift from Part 171 to Part 170 will occur more so for those fee classes with a higher proportion of Part 170 work to Part 171 work activities (e.g., operating reactors, fuel facilities). Had NRC's Part 170 estimated collections for FY 2005 been ten percent higher (the same as the approximate percentage increase in the hourly rates noted above), the NRC's Part 170 fee recovery would have been approximately 32 percent of total collections, rather than 29 percent, an increase of approximately \$16 million. Note that the reduction in annual fees that results from the increase in hourly rates will not occur until FY 2007 due to the effective date of the final fee rule (July 2006) and the timing of NRC's Part 170 billing cycle.

I plan to use cost-based hourly rates beginning with the FY 2006 fee rule in order to ensure that these rates better reflect actual costs incurred, consistent with the guidance in OMB Circular A-25, "User Charges." While the OIG is still assessing this approach to determine whether it adequately addresses their recommendation, their initial feedback is supportive.

2. Eliminating Fee Billing Exception for Uranium Recovery Licensees

The NRC bills licensees annually under Part 171 if their annual fees are less than \$100,000, and quarterly if their annual fees are \$100,000 or more. However, the NRC bills uranium recovery (UR) licensees quarterly regardless of the amount of their annual fee, in accordance

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with 10 CFR 171.19(b). The NRC established this 'exception' policy in 2001 for UR licensees because their annual fees had been fluctuating just above or below \$100,000. Since then, UR fees have been well below \$100,000. Because this billing exception is no longer needed and is administratively burdensome to implement with the current fee billing system, the FY 2006 fee rule will propose the elimination of this exception.

3. *Charging Part 170 Fees for Transportation of Classified Matter*

The FY 2006 fee rule will clarify that NRC will charge 'full cost' Part 170 fees to track and monitor shipments of classified materials (e.g., components of gas centrifuge uranium enrichment facilities). In cases where the transportation of sensitive information is required to perform licensing activities for gas centrifuge uranium enrichment (or any other type) facilities, and the NRC requires these shipments to be tracked and monitored by a system(s) such as those operated by the Departments of Defense or Energy, the licensee should bear these costs because they are incurred solely for the purpose of supporting the license. While this is a new activity, the recovery of these costs through Part 170 fees is consistent with the NRC's existing full cost recovery policy for all licensing activities.

4. *Review of Import/Export 'Flat' Application Fees*

All NRC's flat application fees are reviewed biennially as part of the requirements of the Chief Financial Officers Act of 1990 (P.L. 101-578). Although this is not a 'biennial review' year (i.e., this review is performed on odd years for Part 170 fees), OCFO is working with OIP to review these fees to determine if any changes are warranted this year. This review will include new data that OIP has collected based on its implementation of an OIG recommendation that these fees be based on time and labor data that more directly correlate with the import/export fee categories ("Audit of NRC's Management of Import/Export Authorizations," September 14, 2004).

5. *Adding Government to Government Consent to Item 15.C in the Schedule of Materials Fees in 10 CFR 170.31*

The revisions to 10 CFR Part 110 to implement the export/import provisions of the International Atomic Energy Act's Code of Conduct require the NRC to obtain government to government consent prior to approving certain imports and exports. Item 15.C in 10 CFR 170.31 will be revised to add imports and exports that require government to government consent, since these consents are similar to the effort required to receive assurances from other governments.

6. *Rebaselining Annual Fees*

In SECY-05-0164, "Annual Fee Calculation Method", dated September 15, 2005 (ML052580332), I recommended that the Commission eliminate its requirement that OCFO calculate annual fees two ways each year, and proceed with the presumption in favor of rebaselining annual fees each year. This recommendation was approved in the associated SRM dated October 11, 2005 (ML052840249). This decision will be explained in the FY 2006 proposed fee rule.

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Estimated Schedule - FY 2006 Fee Rule

<u>Action</u>	<u>Date</u>
FY 2006 Proposed Fee Rule Paper to Commission	11/08/05
Commission SRM on FY 2006 Proposed Fee Rule Paper	12/06/05
Complete preliminary fee calculations	12/12/05
Draft proposed rule to offices for review	12/19/05
Office concurrences on proposed rule due, send to EDO	01/13/06
EDO concurrence on proposed rule due	01/20/06
Proposed rule to CFO for signature	01/23/06
Proposed rule to ADM to forward to Federal Register	02/02/06
Publish proposed rule	02/17/06
30-day public comment period ends	03/19/06
Draft final rule to offices for review	04/10/06
Office concurrences on final rule due, send to EDO	04/19/06
EDO concurrence on final rule due	04/25/06
Final rule to CFO for signature	04/26/06
Final rule to Commission for review	05/08/06
Final rule to ADM to forward to Federal Register	05/16/06
Publish final rule	05/31/06
Final rule effective (60 days after publication)	07/30/06

NOTES:

- 1) This is an estimated schedule and subject to change, in particular due to unexpected FY 2006 budget changes.
- 2) This schedule is based on no Commission paper accompanying the final fee rule (i.e., all policy issues are addressed in the "FY 2006 Proposed Fee Rule" paper).

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