AG08-2
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OGC
legal input

From: Catherine Holzle
To: Diane Dandois, Glenda Jackson, James Turdici, J...
Date: Fri, May 21, 1999 2:57 PM
Subject: Input for final fee rule

Our insert for the "legal issues" portion of the fee rule is attached. Please let us know if there are any questions.

CC: JRG, TBR

Discussed prior info with Catherine Holzle.
DD

Legal Issues

The commenters attempted to present a balanced view of the proposed fee schedule, and even applauded the NRC's "considerable effort over the past year to reduce inefficiencies through strategic planning and reorganizations." Nonetheless, it is abundantly clear that most commenters believe that the NRC has a long way to go to reach a truly fair and equitable system of fee allocation. Several commenters asserted that NRC lacks the legal authority to set fees in accordance with the proposed fee schedule, challenging the agency's interpretation of the statutes underpinning NRC's fee collection proposal. These same questions have been raised since the inception of the 100 percent fee collection requirement in 1991. The Commission has consistently interpreted its statutory mandate, but in the face of continuing complaints, the Commission will again address the concerns raised by commenters.

Comment:

Comments submitted by or on behalf of commercial nuclear power reactors express serious concern over inequities caused by the statutory mandate that NRC collect an annual charge from licensees aggregating approximately 100 percent of the budget authority for the fiscal year, less fees collected under Part 170 and any amount appropriated from the Nuclear Waste Fund or the General Treasury. These commenters are particularly distressed at having to absorb charges in their annual fees for activities that do not benefit them, including international activities, Agreement State oversight and regulatory support, activities for other federal agencies, and fee reductions or exemptions for small entities and nonprofit educational institutions. One commenter, speaking on behalf of several commercial power reactors, questioned the NRC's legal and constitutional authority to impose these charges. It did not believe the 100 percent budget recovery requirement could be reconciled with the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508 ("OBRA-90"), which requires that annual fees bear a reasonable relationship to the cost of regulatory services and be fairly and equitably allocated among licensees.

Commenters consider that eventual relief for this problem lies in obtaining legislative changes to OBRA-90 to relax the 100 percent budget recovery requirement, so that certain costs can be removed from the fee base. They remain hopeful, in spite of awareness that the Clinton Administration does not support such relaxation. In some cases, however, commenters perceive that the NRC has alternatives it is not utilizing, such as charging the other federal agencies and Agreement States for services provided. In addition, they insist that the NRC should recover these types of costs through General Treasury funds appropriated by Congress. In their view, when all else fails, the NRC must simply discontinue the "unfunded" program, rather than pass along these costs to the licensees, particularly in today's era of utility deregulation, when reactors have reduced ability to pass through costs.

One commenter maintained that the NRC has the authority to charge other Federal agencies Part 170 fees. Another commenter went so far as to say that the NRC is not at liberty to relieve anyone from paying fees for associated services, i.e., to grant exemptions from user

fees, because under OBRA-90, Congress directed NRC to recover its costs by collecting fees from "any person who receives a service or thing of value." This commenter maintained that there was no exemption authority for this requirement. It then relied on the definition of "person" under the Atomic Energy Act to argue, not only that the NRC has authority to impose charges for these types of activities, but that it is compelled to charge the recipients for these. Thus, it would have the NRC recover Agreement State oversight and support costs through fees assessed on the Agreement States or their licensees. The commenter also stated that costs of international activities should be recovered through fees imposed on the Department of State. Other Federal agency licensing and inspection charges similarly should be assessed against the regulated federal agency. Moreover, small entities and nonprofit educational institutions should not be relieved of fees for the costs associated with them; either a general fund appropriation should be sought to recover those expenses or they should pay their own costs. Other commenters also advocated this approach.

In support of these arguments, commenters charge that OBRA-90 does not permit charges to licensees for programs not directly related to the licensees charged, that the surcharge is unlawful, unfair, arbitrary and discriminatory, and that it is unconstitutional in that it denies reactor licensees equal protection under the due process clause of the Constitution and constitutes an unfair taking of property without just compensation. They believe, uniformly, that the surcharge bears no relation to services or benefits to the licensees against whom it is assessed and that these costs should be recovered from the beneficiaries. Commenters cite the reduced ability of reactor licensees to pass through costs to their ultimate customers in an era of utility deregulation and reassert their view that power reactor licensees only should be assessed for programs of direct relevance to them.

Response:

OBRA-90 requires that the sum total of annual charges NRC collects from its licensees equal approximately 100 percent of NRC total budget authority for each fiscal year, less fees assessed under the Independent Offices Appropriations Act of 1951, 31 USC 9701 ("IOAA") and amounts appropriated to NRC from the Nuclear Waste Fund. The NRC is expected to establish a schedule of annual charges that fairly and equitably allocates this amount among licensees and reasonably reflects the costs of providing services to licensees or classes of licensees, **to the maximum extent practicable** (emphasis supplied). This cannot be implemented in a vacuum. It means the NRC annually must promulgate a fee schedule that is as fair and equitable as can be achieved, given the other constraints with which it is faced. The NRC does not have discretion to assess less than this amount, as several commenters suggested, so the difference must be made up from the licensees, after all other eligible charges are assessed.

In fact, the Commission concluded in the Statement of Considerations for the 1991 final fee rule that the Congressional intent behind the requirement to collect "approximately 100 percent" of its budget was for the NRC to identify and allocate as close as possible to 100 percent of its budget authority to the various classes of NRC licensees, but not to authorize exclusions from the fee base, insofar as it would set out to recover something less than the full 100 percent. The NRC historically has interpreted this requirement as referring to the inherent uncertainties in estimating and collecting fees, such that additional fees would not need to be collected in case of shortfall, nor refunds necessarily made in case of overcollection. See 56 Fed. Reg. 31472 (1991).

Moreover, the Conference Report for OBRA-90 specifically acknowledged the fact that there would be certain "expenses that cannot be attributed either to an individual licensee or a class of licensees." The NRC is expected to

> fairly and equitably recover these expenses from its licensees through the annual charge even though these expenses cannot be attributable to individual licensees or classes of licensees. These expenses may be recovered from such licensees as the Commission, in its discretion, determines can fairly, equitably, and practicably contribute to their payment.

H.R. Conf. Rep. No. 101-964, at 963, reprinted in 1990 U.S.C.C.A.N. 2374. Thus, Congress has directed that licensees, of necessity, will have to foot the bill for some of the expenses that are not generated by efforts directly on their behalf, regrettable as that may be. While every effort is made to impose such costs equitably, there is one controlling requirement which is inflexible: the NRC must set its schedule so that it can recoup 100 percent of its budget authority, less the amounts it properly may recover from other areas, such as charges for services (IOAA fees) and Nuclear Waste Fund Appropriations. Since the inception of the 100 percent budget recovery requirement, in order to meet that mandate, the NRC has been forced to spread the charges for certain other types of activities that, while not necessarily benefitting the licensees charged, left no other means to be recovered. This includes functions such as work for other Federal agencies, Agreement State oversight and international activities. It is understandable that licensees who absorb the impact of these charges will object to them and wish to be relieved of them, but it overlooks an important qualifier in the standard: namely, "to the maximum extent practicable." That is, when Congress enacted this admittedly rigorous requirement, it was aware of the fact that there would be certain costs that would not be susceptible to recovery as the others were. It still has not relieved the NRC from the onus of the collection requirement. Certain expenses cannot be attributed to individual licensee or class of licensees but may be recovered from licensees who can fairly, equitably and practicably contribute to payment.

With respect to the specific costs in question, the NRC can readily explain why these costs are spread to agency licensees as part of a fee "surcharge." Briefly, the NRC lacks the legal authority to assess IOAA charges against Federal agencies (other than the Tennessee Valley Authority). The IOAA states, in pertinent part, "[E]ach service or thing of value provided by an agency . . . to a person (except a person on official business of the United States Government) is to be self-sustaining to the extent possible." A "person on official business of the United States Government" has been construed to mean a Federal agency. This construction indicates that the NRC requires separate Congressional authorization in order to override this provision and lawfully impose fees on other Federal agencies. For example, in light of this language, section 161w. of the Atomic Energy Act was enacted in 1972 to allow the NRC to impose Part 170 fees on the Tennessee Valley Authority. Section 161w. was further amended in 1992 to include the United States Enrichment Corporation, prior to its privatization. Had the NRC's statutory mandate included the authority to impose fees on all Federal agencies, this legislation would have been unnecessary. The NRC submitted to Congress, as a provision in its proposed FY 2000 authorization bill, an amendment to section 161w. which would provide the authority to impose Part 170 fees on all Federal agencies.

The NRC similarly lacks the authority to impose annual fees on the Agreement States and their licensees because OBRA-90 permits the assessment of annual fees only on NRC licensees. The Agreement States and their licensees are not "NRC licensees." The NRC also made policy decisions not to assess fees on non-profit educational institutions and to limit the fees assessed on small businesses, in order to further the public good. Under the circumstances it can come as no suprise that a substantial portion of these costs are recovered through annual fees imposed on power reactors. A large percentage of the NRC's budget is devoted to the regulation of power reactors and, accordingly, a large portion of the annual fee must be borne by these licensees.

The commenters suggested that, in the absence of such legislation, the NRC should not perform the activities encompassed within the annual fee surcharge. The Commission is not prepared to eliminate many of its important functions that help assure the public health and safety and the common defense and security without a clear statutory directive from the Congress to do so. Thus, a legislative solution is required to eliminate the concerns raised by the commenters. Over the years, the NRC has had limited success in obtaining fee legislation that would reduce the burdens on its licensees by having some or all of NRC expenses in these areas obtained through appropriations from the General Treasury. In sum, the Commission believes that the fee schedules it is promulgating today satisfy all legal requirements and do not deprive any licensee of its constitutional rights.

Comment:

One commenter said that the basis for annual fees for operating reactors should be megawatt generation capability instead of the proposed fixed flat annual fee. This commenter argued that the proposed fee structure placed a disproportionate burden on the ratepayers of utilities with small reactors and resulted in a competitive disadvantage to those reactors.

Response:

OBRA-90 requires that annual fees have a reasonable relationship to the expenditure of Commission resources. No available data demonstrates that the Commission expends fewer resources on reactors with lower generation capacity than it does on facilities with greater generation capability. Furthermore, Commission services are not allocated on the basis of megawatt generation capability. Because there is no relationship between generic costs and generation capacity, there is no legal basis for charging annual fees based on megawatt generation capability.

Comment:

One commenter said that the NRC should designate as small entities, for reduced fee purposes, all those companies with small business certification under the U.S. Small Business

Administration's (SBA) Small Disadvantaged Business program, commonly known as the 8(a) Program. The NRC should then refund the higher fees collected for the last two years from all 8(a) firms. The commenter further requested that the NRC change its definition of small entity for Environmental Remediation Service companies to conform to the SBA's revised size standards, which now categorize such companies with fewer than 500 employees as "small entities."

Response:

On April 11, 1995, the NRC promulgated a final rule after notice and comment rulemaking that established the small entity classification for those companies providing services having no more than $5 million in average annual gross revenues over its last three completed fiscal years, or, for manufacturing concerns, an average of 500 employees during the preceding 12-month period. 10 CFR 2.810. The NRC promulgated this rule pursuant to Section 3(a)(2) of the Small Business Act, which permits federal agencies to establish size standards via notice and comment rulemaking, subject to the approval of the SBA Administrator. The NRC rule, which the SBA approved, established a generic size standard for small businesses because NRC's regulatory scheme is not well suited to setting standards for each component of the regulated nuclear industry. Unlike the NRC, the SBA's Standard Industrial Classification System (SIC) establishes size standards based on types of economic activity or industry. Seven months after the NRC amended its size standards through notice and comment rulemaking, the SBA published proposed amendments to its own SIC code standards. Among other things, these amendments added SIC Code 8744, Environmental Remediation Services.

The Commission is currently considering the issue raised by this commenter regarding its designation of small entities for reduced fee purposes. However, because section 3 (a)(2) of the Small Business Act requires that size standards be promulgated through notice and comment rulemaking, the NRC cannot amend its size standards to conform to those of the SBA in this rulemaking. Simply put, the NRC would first need to develop a proposal and solicit public comment on it before making a decision to amend its size standards. In the meantime, however, individual licensees may file for an exemption from fees pursuant to ~~10 CFR 170.11~~ (b).

171.

Comment:

A few commenters indicated that the NRC has not provided sufficient information on which to evaluate the fees to be assessed for FY 1999. One commenter stated that the NRC violated the Administrative Procedure Act (APA) by failing to provide an explanation of how it arrived at its final determination of the annual fees.

Response:

The NRC believes it has provided sufficient information concerning its proposed fee schedule to allow effective evaluation and constructive comment on the proposed rule. In Part II of the Statement of Consideration supporting the proposed rule, the NRC provided a detailed

explanation of the FY 1999 budgeted costs for the various classes of licensees being assessed fees. In addition, the NRC workpapers pertinent to the development of the fees to be assessed were placed in the Public Document Room (PDR) on April 1, 1999, the first day of the public comment period. The workpapers provide additional information concerning the development and calculation of the fees, including NRC's FY 1999 budgeted resources at the subactivity level for the agency's major programs. The NRC has also made available in the PDR NUREG 1100, Vol. 4, "Budget Estimates for Fiscal Year 1999" (Feb. 1998), which discusses in detail NRC's budget for FY 1999. In addition, NRC staff always makes itself available either to meet with interested parties in person, or respond to telephone inquiries to explain its fee schedules.