

DOCKET NUMBER
PROPOSED RULE NO. 150, 170 + 171
(66FR 16982)

April 30, 2001



Secretary,
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
ATTN: Rulemaking and Adjudications Staff

Subject: Comments on Federal Register Notice (Part 2, NRC) dated March 28, 2001:
"10 CFR Parts 150, 170, and 171, Revision of Fee Schedules; Fee Recovery for
FY 2001; Proposed Rule"

This letter provides EPRI's comments on the NRC's proposed changes to Part 170, "Fees for Facilities, Materials, Import and Export Licenses, and other Regulatory Services Under the Atomic Energy Act of 1954, As Amended" that are focused solely on one particular aspect of the proposed changes to Part 170 – that related to Fee Waiver policy (§170.21, Footnote 4).

EPRI believes that the proposed change to fee waiver policy could negatively impact an effective working relationships between NRC and industry on resolving generic technical and regulatory issues. It could undermine Commission policies intended to encourage industry organizations to work cooperatively with NRC on a generic basis to support regulatory improvement. It could also undermine the NRC's commitment to improved regulatory efficiency, effectiveness, and increased realism in regulatory decision-making. The NRC views on industry initiatives (as reflected in the relevant SECYs, SRMs, public meeting presentations, etc.) consistently recognize the increased efficiency and effectiveness resulting from encouraging industry to investigate and propose its own solutions to technical issues, subject to NRC review.

The proposed position on fee waivers for generic industry initiatives is inconsistent with NRC management encouragement of industry initiatives. NRC proposes to tighten its waiver criteria for charging review fees for generic industry efforts in a manner that will discourage industry initiative and penalize self-generated industrywide generic initiatives.

The proposed change is to insert the word "NRC's" in the third criterion for fee waivers listed in §170.21, Footnote 4, which would state, with this proposed modification: "Fees will not be assessed for requests/reports submitted to the NRC ... (c) as a means of exchanging information between industry organizations and the NRC for the purpose of supporting NRC's generic regulatory improvements or efforts;" (see Attachment A for full text of waiver criteria).

On the surface, it would appear that this change is not significant, since the rule clearly applies to the U.S. NRC, not some other regulatory agency. However, the rationale for this change, which will form the basis for NRC's waiver decisions, is problematic (see text under para. II.5, Fee Waivers, CFR page 16985).

- (1) That rationale attempts to distinguish between fee waiver requests based on the industry's future use of the reports, in contrast to reports being submitted, reviewed, and approved for the purpose of NRC's generic regulatory improvements.
- (2) The rationale also cites a sentence from the statement of considerations for the FY 1994 fee rule that discusses NRC's development of generic guidance and regulations.

It appears that the reason for making these distinctions is to establish that the original intent of the fee waiver provision was to restrict fee waivers to situations where NRC specifically requests industry to develop a report and/or situations where industry reports are incorporated into NRC regulations or guidance. This interpretation is inconsistent with the history of the fee rule and many of the generic industry initiatives developed and submitted to NRC for review without fee. It runs counter to NRC policy of encouraging proactive industry initiatives.

In an April 18, 2001 letter, to the Commission, I appealed an NRC staff decision to deny our request for a waiver of the 10 CFR Part 170 fees covering the staff's review of the RETRAN-3D safety analysis code. In that letter, I disagreed with recently imposed interpretations of the fee waiver criteria that limit its scope.

Imposing additional and costly review fees on organizations that develop generic industry solutions to technical and regulatory issues (e.g., NEI, EPRI) discourages generic industry initiative. The value of industry generic activities is well acknowledged by NRC. For example, SECY-00-0116 states: "... it is expected that addressing issues through industry initiatives would, overall, save resources for both the NRC and the industry. Most industry initiatives would address issues generically, rather than on a plant-specific basis, and staff experience is that the generic approach saves resources. Industry initiatives also allow the nuclear power reactor industry more flexibility in the selection of the schedule and technical approach for addressing the issue. Further, since industry and other members of the public would be involved at an earlier stage in addressing an issue, the staff expects better communication and more timely identification of appropriate actions to address emerging issues. This would also save resources and would improve timeliness of actions."

Commission direction to the staff in COMSECY-96-062 was to "move as expeditiously as possible, within budget constraints, to evaluate on a case-by-case basis, initiatives proposing further NRC reliance on industry activities as an alternative to NRC activities."

The staff response, SECY-97-303 ("The Role of Industry and Use of Industry Initiatives") included the following means of addressing the review fee issue for industry initiatives:

"Another issue to be considered is the fee structure associated with the review of industry initiatives that would be substitutes for regulatory action, specifically, whether or not the

sponsoring organization should be charged for the cost of the review. Based on the level of effort that has, in the past, been necessary for staff to review and endorse industry initiatives, this is likely to be a significant issue. Currently, consistent with the fee policy for topical reports, fees will be assessed for the full cost of the reviews unless the industry initiative meets the criteria specified in Footnote 4 to 10 CFR 171.21 or Footnote 5 to 10 CFR 171.31."

From our perspective, NRC staff efforts the past five years have encouraged industry initiative and have focused on better ways to credit industry initiative in existing NRC processes while maintaining the statutory authority of the NRC to assure adequate protection of public health and safety. Optimizing the existing parallel but independent processes of industry initiative and regulatory oversight meant improving information exchange and achieving regulatory efficiency by allowing industry to carry a greater burden for analyzing issues and identifying practical and effective responses to safety issues, subject to NRC review.

To a significant degree, the way these two seemingly unrelated regulatory procedures – the industry initiative process outlined in SECY-00-0116, and the proposed revision to the fee rule to allow the staff discretion in not granting a waiver for industry initiatives that it did not specifically request – could work in concert to create unintended consequences is evident in these hypothetical examples:

- NRC staff could impose review fees on broad-based, generic industry submittals for improved, risk-informed and/or best-estimate analysis tools (e.g., RETRAN-3D), but not impose a review fee on analysis tools submitted by only two licensees, but that are more deterministic or conservative than the preferred realistic or best-estimate analysis tools.
- NRC staff could impose review fees on an industrywide solution to a generic technical issue – one supported by all licensees, but one that does not involve an explicit commitment to NRC for taking enforcement action (because §50.109 criteria have not been met); but not impose a review fee on another solution by two licensees willing to commit, for enforcement purposes, to specific actions, despite the lack of a regulatory basis.
- NRC could impose review fees on a high-value, unsolicited, risk-informed, performance-based initiative supported by all licensees on the sole basis that the staff had not specifically requested the industry to propose that initiative, or on the sole basis that the staff did not envision the need to incorporate the industry initiative into its regulations or guidance.

I am not suggesting that the NRC staff would exploit these rules and guidelines in such a manner as to exact a *quid pro quo*. I am arguing that the NRC staff should not propose, nor promulgate, policies and rules that knowingly establish the opportunity for such unintended consequences.

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I recommend the fee waiver criteria in Part 170 not be changed. Further, I request that the NRC reaffirm its intent and desire to encourage industry initiatives that improve plant performance and safety, even in cases where the NRC does not specifically request the action, and in cases where the NRC might not modify its own regulations and guidance to reflect the industry initiative.

There will be increasing instances in our commercial nuclear business where industry takes the initiative to address issues on a generic basis and where NRC has an interest in or need to review the industry's analysis, guidelines, and implementation plans. Industry groups like NEI and EPRI should not be penalized for these industrywide activities through costly review fees. Further, the staff should not be empowered with the ability to favor some industry initiatives over others through discretionary use of fee waiver criteria that are not clearly understood and not based on sound and fair policies.

The NRC should reaffirm its support of fee waivers for all NEI documents, and all other documents from EPRI or other organizations – even unsolicited ones, that enjoy broad-based, industrywide support for addressing a generic regulatory issue applicable to the entire industry or a large class of licensees (e.g., BWRs or PWRs).

Since granting a fee waiver is revenue-neutral to NRC, and since the use of industry initiatives in the regulatory process can provide effective and efficient use of resources and resolution of issues, NRC policies, regulations and implementing guidance must continue to encourage cooperation, industry initiative, and generic approaches to issues.

Sincerely,



Theodore U. Marston, Ph.D.
Vice President & Chief Nuclear Officer

TUM/bjr/9850L
Attachment

c: Ralph Beedle
Sam Collins
Ashok Thadani

Complete Citation from Part 170 of Generic Fee Waiver Criteria

The regulatory basis for granting an exemption from review fees is footnote 4 to the Special Projects fee category in the table presented in 10 CFR 50.170.21, which says:

[footnote] "4. Fees will not be assessed for requests/reports submitted to the NRC:

1. In response to a Generic Letter or NRC Bulletin that does not result in an amendment to the license, does not result in the review of an alternate method or reanalysis to meet the requirements of the Generic Letter, or does not involve an unreviewed safety issue;
2. In response to an NRC request (at the Associate Office Director level or above) to resolve an identified safety, safeguards, or environmental issue, or to assist NRC in developing a rule, regulatory guide, policy statement, generic letter or bulletin; or
3. As a means of exchanging information between industry organizations and the NRC for the purpose of supporting generic regulatory improvements or efforts."