

## **POLICY ISSUE NOTATION VOTE**

November 2, 2004

SECY-04-0220

FOR: The Commissioners

FROM: Jesse L. Funches  
Chief Financial Officer

SUBJECT: PROPOSED FY 2005 LICENSE FEE RULE POLICY CHANGES

PURPOSE:

This paper requests approval of two policy decisions for the proposed Fiscal Year (FY) 2005 license fee rule regarding: (1) the method for calculating FY 2005 annual fees, and (2) billing for licensee-specific activities associated with orders not related to civil penalties. It also identifies the administrative and other minor changes the staff plans to include in the proposed rule.

BACKGROUND:

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

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To ensure that 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. For example, last year the staff sought a decision from the Commission on the recovery of the costs of the Baseline National Materials Program (AFY 2004 Proposed Fee Rule Policy Issues,<sup>@</sup> November 7, 2003). The Commission approved the staff=s recommendation regarding this issue in its SRM dated November 25, 2003, and this decision was incorporated into the FY 2004 fee rule.

## DISCUSSION:

This paper addresses two policy issues for the FY 2005 fee rule. The first issue is the method that should be used to calculate the FY 2005 annual fees. The second issue is charging Part 170 fees for NRC=s licensee-specific activities associated with orders.

### *Policy Issues*

#### *I. Method for Calculating FY 2005 Annual Fees*

In FY 1999, the Commission determined that annual fees should be rebaselined every three years, or earlier if there is a substantial change in the total NRC budget or in the magnitude of the budget allocated to a specific class of licensees. In its February 4, 2000, Staff Requirements Memorandum (SRM) for SECY-00-0012, AFY 2000 Proposed Fee Rule,<sup>@</sup> the Commission directed the staff to calculate annual fees by both the rebaseline and percent-change methods, and to provide a summary of the results when making its recommendation to the Commission. I am requesting that the Commission suspend this requirement for FY 2005 for the reason presented below.

To meet the Omnibus Budget Reconciliation Act of 1990 (OBRA-90) requirements, the FY 2005 final fee rule must become effective no later than the end of August 2005. This means that the proposed fee rule must be published in the *Federal Register* by late March 2005, and that the final fee rule must be published by late June 2005<sup>1</sup>. Additionally, the Commission has expressed interest in the staff developing the fee rule as early as possible each fiscal year. For FY 2004, staff implemented process improvements that allowed the NRC to issue the fee rule two months earlier than previous years<sup>2</sup>. The staff plans to publish the fee rule early again this year, but must proceed with numerous detailed fee calculations and related processes.

The NRC=s FY 2005 budget, as passed by Congress in H.R. 4818, represents an approximate \$45 million increase over FY 2004, shifts approximately \$9 million in general and administrative

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<sup>1</sup>The license fee rule is considered a major rule under the Small Business Regulatory Enforcement Fairness Act of 1996, thus, the final rule does not take effect until 60 days after publication in the *Federal Register*.

<sup>2</sup>The Commission approved rebaselining the FY 2004 annual fees and suspended the requirement to calculate these fees by two methods in order to issue the fee rule earlier in the fiscal year.

costs to the Nuclear Waste Fund and is based on recovering 90 percent of its non-Nuclear Waste Fund appropriations in fees compared to 92 percent last year. Based on the magnitude of these changes, I do not believe this would be an appropriate year to use the percent-change method to calculate fees. For this reason, as well as to allow the staff time to develop the FY 2005 proposed fee rule soon enough to issue the final rule no later than June, I recommend the Commission grant an exception to the requirement that the staff calculate fees by both the rebaseline and percent-change methods and approve the use of the rebaselining method to calculate annual fees for FY 2005.

*II. Charging Part 170 Fees for Licensee-Specific Activities Resulting from Orders Not Related to Civil Penalties*

As a matter of policy the Commission has exempted certain NRC licensee-specific activities from Part 170 fees (e.g., activities associated with orders and allegations). These exemptions were last addressed in SECY-98-0260 and the associated SRM. However, in recent years, there have been changes in the way orders have been typically used. Therefore, I am requesting that the Commission reevaluate its policy exempting from Part 170 fees the NRC=s licensee-specific activities resulting from orders not related to civil penalties.

Currently, Part 170 fees are not assessed for the development of orders or the review of responses to such orders because in cases where the order proposes the imposition of a civil penalty, the assessment of these costs could be viewed as augmenting the amount of the civil penalty and could discourage licensees from contesting proposed enforcement actions. Public comments on the review of fee policy conducted in accordance with the Energy Policy Act of 1992 supported changing this policy to assess fees for orders. However, the Commission decided to continue the policy at that time, because most orders were used to impose civil penalties and charging for orders could be perceived as additional fines to the licensee or, in some cases, as a penalty for a licensee exercising its rights to disagree with the NRC. The Commission came to the same conclusion in the FY 2000 fee rule in response to comments received on the FY 1999 fee rule.

However, in recent years, the use of orders to impose additional requirements for safety or security reasons has increased. For example, subsequent to the September 11, 2001, terrorist attacks, the Commission imposed security requirements on various groups of licensees through orders. Such orders resulted in NRC=s review of site-specific amendments and other activities that normally would have been billable under Part 170, except for the fact that they were associated with orders.

Given the changing regulatory environment and the extent of licensee-specific activities that are resulting from orders, I recommend that the NRC=s regulations be revised to allow for full cost recovery of these activities under Part 170 from NRC licensees<sup>3</sup>. We estimate that this would increase Part 170 revenues by approximately \$600,000 in the year following implementation.

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<sup>3</sup>For materials users licensees, the cost of all license amendments will continue to be recovered through Part 171 annual fees. In the FY 1999 final fee rule (64 FR 31448, June 10, 1999), the NRC eliminated Part 170 amendment fees for materials users licensees, instead including these costs in their annual fees to increase efficiency for both the NRC and licensees.

Note that the development of the regulatory framework for issuing orders would not be billed to the licensee, but would continue to be recovered under Part 171 annual fees as generic activities. In addition, this change would not affect the existing Part 170 exemption for orders related to civil penalties.

#### *Administrative and Other Minor Changes*

The staff plans to include the following four administrative and other minor changes in the proposed FY 2005 license fee rule. The first two changes would affect the distribution of fees between Part 170 and Part 171 by increasing Part 170 collections and decreasing Part 171 collections. However, given the effective date of the FY 2005 final fee rule is near the end of the fiscal year, the shift of fees from Part 171 to Part 170 will be evident in the following fiscal year, FY 2006, when the bulk of the fees collected reflect the use of these changes. The second two changes will help clarify the license fee rule.

Additionally, to comply with the Chief Financial Officers Act of 1990 and the Regulatory Flexibility Act of 1980, as amended, the NRC conducts biennial review of fees and reviews its small entity fees, respectively, every other year. The results of both the reviews will be presented and discussed in the FY 2005 Fee Rule, as warranted.

##### *I. Using 1,450 Direct Hours per FTE in the Hourly Rate Calculation*

OBRA-90, as amended, requires that NRC's budget, less appropriations from the Nuclear Waste Fund, be recovered through fees assessed to NRC applicants and licensees. The law requires that annual fees be used to recover that portion of the budget not recovered from applicant/licensee-specific fees (Part 170) that are authorized under the Independent Offices Appropriation Act (IOAA). Thus, any change in total Part 170 fees will have the opposite effect on total Part 171 fees and vice versa.

The IOAA is based upon the premise that Part 170 fees should be assessed for specific services rendered to identifiable recipients as defined in the OMB Circular A-25, User Charges, which states, A. . . user charges will be sufficient to recover the full cost to the Federal Government (as defined in Section 6d) of providing the service, resource, or good when the Government is acting in its capacity as sovereign.®

The industry has questioned the distribution of fees between Part 170 and 171. For example, the Nuclear Energy Institute has expressed concerns both in its comments on the FY 2004 fee rule and in its testimony to the Congress about the categorization of 75 percent of the agency's budget in one general account (Part 171). Consistent with the statutes, OMB guidance, and industry comment, an administrative change that would increase the amount of Part 170 fees with a corresponding reduction in Part 171 fees is presented.

The NRC currently uses two hourly rates to charge applicants and licensees fees for Part 170 services: the reactor program rate is used for Nuclear Reactor Safety program activities and the materials program rate is used for Nuclear Materials and Waste Safety program activities. In FY 2004, the hourly rate was comprised of 43 percent direct program costs, 21 percent indirect program costs, and 36 percent infrastructure costs. The direct program costs are for non-supervisory professional staff who perform the principal mission of

the agency. The indirect program costs are for program travel, program specific information technology, supervisory, and other positions that provide support to the non-supervisory professional staff performing the principal mission. The infrastructure costs are allocated agency-wide general and administrative costs, including financial, legal, information technology and policy support.

To calculate Part 170 reactors and material hourly rates for the fee rule, each non-supervisory professional FTE (direct FTE) is assumed to be available for 1,776 direct billable hours. The 1,776 hours is based on the Office of Management and Budget Circular A-76<sup>4</sup>, Performance of Commercial Activities. It is not based on NRC data.

For budget purposes, the NRC uses a standard of 1,450 hours per direct FTE. The standard was developed using FY 2002 data reported to the NRC Human Resources Management System=s (HRMS) time and labor system. This standard is derived by excluding from the 2,088 total available hours in a year per FTE those hours that are not available for direct program activities, and therefore not billable. The excluded activities fall into four categories: (1) paid absences for holidays and annual and sick leave (329 hours); (2) training and development (107 hours); (3) general administrative (109 hours); and (4) other non-billable activities (93 hours). The general administrative category includes time spent in staff meetings; responding to controlled correspondence; attending agency or office activities such as cultural awareness, award ceremonies, and blood drives; supporting/responding to OIG audit and investigative activities; drug testing; office moves; and participating in office partnerships. The other category includes time spent in responding to FOIA requests and acting in supervisory positions.

At this time, the staff intends to use the agency standard of 1,450 hours per direct FTE to calculate fees. Using this standard will more accurately reflect how NRC employees expend their time and the amount of direct time available for billing. Additionally, the use of actual NRC time and labor data to develop the Part 170 hourly rate is consistent with an Inspector General recommendation that actual cost and labor data be used to develop and refine future rate calculations.

The hourly rate is calculated by dividing the cost per direct FTE by the number of direct hours in a year. The use of 1,450 direct hours per FTE rather than the 1,776 hours per FTE will result in a higher hourly rate. For example, the use of 1,450 hours per direct FTE for computing FY 2004 fees would have resulted in a reactor program hourly rate of \$192 as compared to \$157 and a materials program hourly rate of \$191 as compared to \$156. A higher hourly rate will increase total Part 170 collections as a result of (1) increased full cost fees for licensing and inspection activities, and (2) increased materials flat fees for license applications. Total Part 171 annual fees would 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). For example, this change would have resulted in 31 percent of total NRC FY 2004 fees being

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<sup>4</sup>While the OMB Circular does not provide details on the computation of the 1,776 hours per FTE, it is equivalent to total available hours in a year per FTE less an estimated average for paid absences such as holiday, sick and annual leave.

recovered under Part 170 rather than 25 percent, an increase of \$33 million. While many licensees have expressed support for increasing the proportion of the budget recovered through Part 170 fees, some licensees are likely to express concern over the increase in the hourly rate.

## *II. Full cost recovery of Project Manager's (PM) time*

The FY 1999 fee rule expanded the scope of Part 170 fee assessments to include full cost recovery for PMs assigned to a specific plant or facility. Under this policy, most PM >indirect' time (e.g., training and general administration) is charged to the licensee to which the PM is assigned. Excluded from recovery under Part 170 is time spent on generic activities, like rule making and guidance development, and leave. The staff intends to clarify in the Statement of Consideration for the FY 2005 proposed fee rule that this existing policy applies to license renewal PMs. Although, license renewal PM indirect time is currently not being billed under Part 170, this change will not require a modification to the fee rule. Given the increase in license renewal activities since 1999 when the full cost recovery for PMs was enacted, the staff plans to apply the current requirements to license renewal PMs. In order to alert licensees to this, it will be discussed in the preamble of the FY 2005 fee rule.

## *III. Clarify when the CFO determines fee waivers*

10 CFR Part 170.11 currently states "No application fees, license fees, . . . shall be required for . . ." certain projects or licensees. This language is vague regarding whether a fee waiver needs to be requested by the licensee, or a licensee can >self-determine' if they meet the fee waiver criteria. The staff intends to add language clarifying which fee waivers need to be requested by the applicant and granted by the CFO in writing.

## *IV. Eliminate reference to >size of reactor' as a reason for granting annual fee exemptions*

The Statement of Consideration in the 1986 final fee rule discussed that the Commission decided against determining its fees based on the size of the reactor because the NRC found no necessary relationship between the thermal megawatt rating of a reactor and the agency's regulatory costs. Since it was not the Commission's intent to promulgate a fee schedule that would have the effect of forcing smaller, older reactors to shut down, it added an annual fee exemption provision which takes reactor size, age, and other relevant factors into consideration.

However, none of these smaller reactors is still licensed to operate. For several years there have been no waivers issued on the basis of size. Moreover, the NRC streamlined its fee program in FY 1995 by establishing a uniform annual fee for power reactors, based on the fact that the difference in fees resulting from this more detailed analysis was small relative to the size of the annual fee per reactor. The staff intends to modify the Section 171.11 (c) to eliminate >size of the reactor' as a condition for granting annual fee exemptions. No other class of licensee contains an exemption provision based on size.

RECOMMENDATION:

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

1. Suspend the requirement to calculate FY 2005 annual fees by two methods for Commission consideration and decision, and approve rebaselining FY 2005 annual fees based on H.R. 4818; and
2. Approve charging Part 170 fees for licensee-specific activities resulting from orders not related to civil penalties.

SCHEDULE:

The estimated schedule for the FY 2005 fee rule is included as Attachment 1. The Commission's decisions on the recommendations will affect the development and timely completion of the FY 2005 fee rule. To meet the attached schedule, the staff requests a Commission decision on the two policy issues by December 10, 2004.

COORDINATION:

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

**/RA/** P. Rabideau (for)

Jesse L. Funches  
Chief Financial Officer

Attachments:

1. Estimated Schedule - FY 2005 Fee Rule



COORDINATION:

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

**/RA/** P. Rabideau (for)

Jesse L. Funches  
Chief Financial Officer

## Attachments:

1. Estimated Schedule - FY 2005 Fee Rule

Distribution:

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<b>DATE</b>	10/18/04		10/23/04		11/24/04		11/24/04			

**Estimated Schedule - FY 2005 Fee Rule**

<b><u>Action</u></b>	<b><u>Date</u></b>
FY 2005 Proposed Fee Rule Policy Paper to Commission	11/24/04
Commission SRM on FY 2005 Proposed Fee Rule Policy Paper	12/10/04
Complete preliminary fee calculations	12/17/04
Draft proposed rule to offices for review	01/13/05
Office concurrences on proposed rule due	01/28/05
Proposed rule to CFO for signature	01/31/05
Proposed rule to ADM to forward to Federal Register	02/04/05
Publish proposed rule	02/11/05
30-day public comment period ends	03/12/05
Draft final rule to offices for review	03/28/05
Office concurrences on final rule due	04/11/05
Final rule to CFO for signature	04/14/05
Final rule to Commission for review	04/20/05
Final rule to ADM to forward to Federal Register	04/28/05
Publish final rule	05/05/05
Final rule effective (60 days after publication)	07/05/05

**NOTES:**

- 2) This is an estimated schedule and subject to change.
- 2) This schedule does not take into account any recalculations of fees due to changes in the budget or additional Commission decisions.
- 3) This schedule is based on no Commission paper accompanying the final fee rule (i.e., all policy issues are addressed in the AFY 2005 Proposed Fee Rule Policy Issues<sup>®</sup> paper).