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

Subject: Comments Concerning Proposed Rule 10 CFR Parts 170 and 171, "*Revision of Fee Schedules; Fee Recovery for Fiscal Year 2015*"
(80FR15476, dated March 23, 2015) (Docket ID NRC-2014-0200)

Exelon Generation Company, LLC ("Exelon") submits these comments on the Nuclear Regulatory Commission's proposed rule to revise the fee schedules in 10 CFR 170 and 171 for Fiscal Year 2015, published at 80FR15476 dated March 23, 2015 (hereinafter, the "Proposed Rule"). Exelon operates the largest fleet of nuclear plants in the United States and will be substantially and adversely affected by the proposed fees. The Proposed Rule would increase the annual fee for each operating power reactor by \$101,000 – from \$5.223 million to \$5.324 million – translating into more than \$2 million increase and about \$117 million total in the annual fees that must be paid by Exelon's 22-operating reactor fleet. The Supplementary Information indicates that the final rule will adjust the fee to reflect the NRC's FY 2015 reduced appropriation (see 80FR15477), which has not yet been taken into account in the proposed rule despite having been passed by Congress in December 2014 (over three months before the proposed rule) and provides an estimate that this adjustment will reduce the final annual fees for reactors to \$4.984 million (see *id.*, Table I.I). Assuming this occurs, it would still not come close to rectifying the \$833,000 fee increase for each reactor that occurred in 2014. Even with the estimated reduction, the annual fees for each operating reactor will remain about \$600,000 over 2013 levels and result in a total of about \$110 million in the annual fees assessed to Exelon's fleet.

Further, the Work Papers (ADAMS Accession No. ML15021A198) upon which the Proposed Rule is based indicate that the annual fee charged to operating reactors is subsidizing some portion of approximately \$204 million of new reactor costs. (See Work Papers, Table XIII, showing that the \$809.5 million of FY 2015 allocations includes \$31,581,000 in contract costs for new reactors plus 438 Full Time Equivalents ("FTE") with an average cost of \$393,458 per FTE). The Proposed Rule and Work Papers provide insufficient information to determine how much of this new reactor cost is being recovered through user fees and how much is being subsidized by the annual fee paid by operating reactors. However, the Work Papers indicate that approximately 65 percent of the total FY 2015 allocations are being recovered through the annual fees. If one assumes that the same percentage of the new reactor allocations is recovered through the annual fees, then approximately \$132 million of new reactor costs are being recovered through such annual fees paid solely by operating reactors. This would correspond to \$1.34 million per reactor, or about \$29.5 million charged to Exelon's fleet. Since Exelon is not currently pursuing any new plant licenses, this charge bears no relation to regulatory costs attributable to Exelon's fleet.

As discussed below, Exelon respectfully submits that the NRC Proposed Rule revising the 10 CFR 170 and 171 fee schedule is unjustified, manifestly unfair, arbitrary and capricious, and contrary to law. As a threshold matter discussed later in this comment letter, the Proposed Rule is not supported by sufficient information and explanation necessary to provide the requisite rational basis for the rule and to permit meaningful public comment. As the NRC recognized in its recommendations in Project Aim 2020, which included recommending improving the transparency and simplifying how the NRC calculates and accounts for fees, “[w]hen the NRC published the 2014 Fee Rule, many commenters raised concerns regarding the lack of clarity in the work papers to justify fees.”¹ The NRC Chairman also has recognized the need to focus on the transparency of the fee rule.² Yet the 2015 proposed rule has provided no better explanation of the fees than last year. Even putting this deficiency aside, the inclusion of the substantial costs for new reactor licensing in the annual fee for operating reactors violates applicable statutory constraints on the NRC authority to assess fees. Under these statutory constraints, described below, such costs should either be recovered through user fees on the entities engaged in new reactor activities, or recovered through an annual fee imposed on a more specifically defined class of licensees (defined to include holders of design certifications) engaged in new reactor activities. Further, the Proposed Rule violates statutory requirements by failing to subtract from NRC budgetary authority the cost of activities covered by appropriations from the Nuclear Waste Fund (“NWF”).

Statutory Constraints

The NRC collection of fees is governed by two statutes. The user fees in 10 CFR 170 are governed by the Independent Offices Appropriations Act of 1952 (“IOAA”), 31 U.S.C. 9701, as modified by the Omnibus Budget Reconciliation Act of 1990 as amended (“OBRA”), 42 U.S.C. 2214(b). The annual fees in 10 CFR 171 are governed by OBRA. As discussed later in these comments, the Commission’s proposed fee structure violates both of these statutes.

The IOAA conveys the sense of Congress that each service or thing of value provided by an agency to a person (other than a governmental official) “is to be self-sustaining to the extent possible.” (31 U.S.C. 9701(a)). The IOAA then authorizes agencies to prescribe regulations establishing the charge for a service or thing of value provided by the agency, and provides that “Each charge shall be (1) fair; and (2) based on (A) the costs to the Government; (B) the value of the service or thing to the recipient; (C) public policy or interest served; and (D) other relevant facts.” (31 U.S.C. 9701(b)).

While the IOAA is permissive in allowing agencies to establish user fees, OBRA modifies the IOAA by making the user fees mandatory and requiring full-cost recovery. As OBRA provides, “[p]ursuant to the [IOAA], *any person who receives a thing of service or thing of value from the Commission shall pay fees to cover the Commission’s costs* in providing any such service or thing of value.” (42 U.S.C. 2214(b) (emphasis added)).

¹ SECY-15-0015, Project Aim Report and Recommendations, Encl. 1, App. A at 9 (ADAMS Accession No. ML15023A577).

² Testimony by Stephen G. Burns, Chairman United States Nuclear Regulatory Commission to the House Appropriations Committee, Subcommittee on Energy and Water Development Concerning Fiscal Year 2016 Budget (Mar. 24, 2015) at 5 (ADAMS Accession No. ML15079A050).

OBRA further provides that any NRC licensee or certificate holder may also be required to pay, in addition to user fees, an annual charge. (42 U.S.C. 2214(c)(1)). The aggregate amount of annual charges collected from all licensees and certificate holders must approximate 90% of the NRC budget authority for the fiscal year, less the amounts collected through user fees, amounts appropriated from the Nuclear Waste Fund, amounts appropriated for Waste Incidental to Reprocessing, and amounts appropriated for certain homeland security costs. (42 U.S.C. 2214(c)(2)). OBRA directs that the schedule of annual charges must “fairly and equitably allocat[e] the aggregate amount of charges among ... licensees.” (42 U.S.C. 2214(c)(3)). It further provides that, “[t]o the maximum extent practicable, the charges shall have a reasonable relationship to the cost of providing regulatory services. . . .” (*Id.*).³

The Proposed Rule Is Unsupported by Sufficient Data and Explanation

The Proposed Rule and Work Papers fail to provide sufficient information explaining and supporting the derivation of the annual fee. The NRC failure to adequately explain and support its Proposed Rule denies meaningful opportunity for public comment and renders the proposal arbitrary and capricious. The Administrative Procedure Act requires an agency to make available to the public in a form that allows meaningful comment the data the agency used to develop the proposed rule. (*Engine Mfrs. Ass’n v. EPA*, 20 F.3d 1177, 1181 (D.C. Cir. 1994), citing 5 U.S.C. § 553(b)). The notice must include available data and studies in an intelligible form, so that the public sees an accurate picture of the reasoning used by the agency to develop the proposed rule. (*Id.*, citing *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 520-31 (D.C. Cir.), *cert. denied*, 459 U.S. 835 (1982)). A reasonable explanation of the cost basis for proposed fees is one that the concerned public can understand, at least with the aid of other information that was also reasonably available to the public during the time for public comment. (*Engine Mfrs. Ass’n*, 20 F.3d at 1181). “An agency commits serious procedural error when it fails to reveal portions of the technical basis for the proposed rule in time to allow for meaningful commentary.” (*Connecticut Light & Power Co.*, 673 F.2d at 530-31).

The tables in the Work Papers do not allow one to determine whether the Proposed Rule meets statutory requirements. The tables simply lay out the entire originally proposed NRC budget, and provide no indication which of the budgeted resources are being recovered through user fees and which are being recovered through annual fees. Such “impressive looking but utterly useless tables” do not provide the requisite information. (*Engine Mfrs. Ass’n*, 20 F.3d at 1181). The agency should provide the basis for key assertions and a reasonable basis for its conclusions. (*Id.* at 1182). Without this information, the Proposed Rule fails to demonstrate that (1) the user fees recover full costs from all persons who receive a service or thing of value; (2) remaining costs recovered through the annual fees are allocated “fairly and equitably” so that “[t]o the maximum extent practicable, the charges shall have a reasonable relationship to the cost of providing regulatory services,” as OBRA commands.

³ To the extent that there are costs that cannot be attributed to licensees or a class of licensee, “[t]he Commission should assess the charge for these costs as broadly as practicable in order to minimize the burden for these costs on any licensee or class of licensee so as to establish as fair and equitable a system as is feasible.” H.R. Rep. No. 101-964, *reprinted in* 1990 U.S.C.C.A.N. 2374, 2666.

Foremost, the Proposed Rule and Work Papers do not reflect the resources that have been authorized by the 2015 Consolidated and Further Continuing Appropriations Act. Instead, the Proposed Rule and Worksheet are based on the earlier President's Budget, which was \$44.2 million greater than the appropriated amount. (See 80FR15477). As a result, it is not possible to tell whether any of the resource allocations in the Work Papers are accurate. Further, while the Supplementary Information promises that the final rule will make appropriate adjustments, the Supplementary Information only provides an estimate of the adjustment and denies any meaningful opportunity to understand the actual calculations or comment on the real fee adjustment. Nor is there any apparent reason for the NRC's failure to base its rule on its actual budget authority. The Consolidated and Further Continuing Appropriations Act, 2015, became law (Public Law No. 113-235) on December 16, 2014, more than three months before publication of the Proposed Rule.

The Proposed Rule and Work Papers also fail to provide any meaningful detail on management and support costs that are applied in calculating, and recovered through, the NRC hourly rate. In particular, with the diminished workload resulting from the reduced number of operating plants, reduced number of new plant applications under active review, and reduced work on Yucca Mountain licensing, the NRC should explain and justify the office costs that are included in its calculations. Exelon understands that portions of 3 White Flint are being occupied by other agencies. The NRC should provide sufficient detail in the Work Papers to demonstrate that no portion of the fees are being collected to defray or subsidize the rental or other related costs of other tenants.

Further, the Proposed Rule and the Work Papers do not provide any information explaining how the estimated 10 CFR 170 fee collections for FY 2015 (\$324.3 million) are calculated. There is not a single statement in the Proposed Rule or any table in the Work Papers explaining or supporting this estimate, or why the estimate remains unchanged between the Proposed and Estimated Final fee values provided. (See 80FR15478). Since the annual fees are determined by subtracting the estimated 10 CFR 170 collections from the adjusted budget authority, the absence of support for the 10 CFR 170 estimate necessarily makes the calculated amount recoverable under 10 CFR 171 unsupported and arbitrary. In the FY 2014 fee rulemaking,⁴ the NRC responded to a similar comment and claimed that, "[b]ecause the fee calculation worksheets used to develop the 10 CFR part 170 estimates involve thousands of calculations, it would be impractical for the NRC to provide details on every calculation, let alone explanations for every calculation such that each individual calculation became accessible and understandable to members of the public." (79FR37138). The purported impracticality of providing explanations for thousands of calculations does not justify providing no explanation whatsoever for its estimated 10 CFR 170 collections, or for not making public the more detailed calculations. Where operating reactors are on the hook for millions of dollars in annual fees (and over \$110 million in fees for Exelon alone), and the calculation of those annual fees are dependent on subtracting the estimated 10 CFR 170 collections from the adjusted budget authority, transparency requires that the NRC provide some reasonable and verifiable level of explanation of its estimate. The Proposed Rule and Work Papers provide none.

⁴ 10 CFR Parts 170 and 171, Revision of Fee Schedules; Fee Recovery for Fiscal Year 2014; Final Rule, 79FR37124 (June 30, 2014).

Moreover, the Supplementary Information indicates that resources allocated to the Operating Reactors business line are being increased to support efforts to reduce the inventory of pending licensing actions. (See 80FR15447). Yet the estimated 10 CFR 170 receipts, when normalized to account for the slight reduction in the hourly rate and the slight increase in hours per direct FTE, reflects an increase of only 2 FTE for all operating reactors. If the NRC were making a concerted effort to decrease the backlog of pending licensing actions, one would expect a greater commitment of resources and more significant increases in estimated 10 CFR 170 receipts. The absence of a projected increase in such receipts suggests that the current projections may be based on some formulaic approach that does not take current planning into account.

In addition, neither the Proposed Rule nor the Work Papers provide any information showing the specific costs that are being recovered through the annual fee. With respect to the annual fee for operating reactors, the Work Papers merely list all of the items comprising the entire NRC budgeted resources for new reactors, operating reactors, and certain unexplained materials licensing activities, in order to provide an estimate of the portion (\$809.5 million) of the total budget allocated to operating reactors. The amount proposed to be recovered through the annual fee is then derived simply by subtracting from this amount the apparently arbitrarily established portion of estimated 10 CFR 170 collections (\$288.5 million) attributed to entities paying user fees for reactor-related activities. The same approach is taken for the other classes of licensees and certificate holders that are being assessed an annual fee. As a result, it is impossible to determine from the Work Papers which of the specific line items in the list of budgeted resources are being recovered through user fees and which are being left for recovery under the annual fees. The descriptions of the line items themselves are very vague, preventing one from determining whether they are generic (and thus potentially appropriate for recovery under 10 CFR 171) or supporting a regulatory service to an identifiable beneficiary (thus appropriate for recovery under 10 CFR 170).⁵ The absence of meaningful information prevents one from determining the extent to which “*all persons*” who receive a benefit or thing of value are being charged user fees under 10 CFR 170, whether the 10 CFR 170 user fees cover the full cost of providing the services or things of value, and consequently, and whether the proposed annual fee is limited to legitimate generic costs. In response to a similar comment from the FY 2014 rulemaking, the NRC claimed that “it is impractical for the NRC to determine in advance what precise percent of a given business line will be recovered through 10 CFR part 170 user fees versus 10 CFR part 171 annual fees.” (79FR37138). While it may be true that the NRC cannot make precise predictions, the NRC should be capable of making reasonable estimates, based on cost breakdowns from previous years and its current business planning. For example, there is no apparent reason why the Work Papers cannot identify the specific contracts comprising the \$31 million allocated to the New Reactors Business Line (see note 4) and identify whether those contract costs are being collected through user or annual fees.

The Work Papers also allocate to operating reactors certain budgeted resources (relating mainly to training) for the business lines pertaining to nuclear materials users, and nuclear materials

⁵ For example, the budgeted resources for new reactors include \$31,581,000 in contract costs for the new reactors business line. See Work Papers, Table XIII. One cannot tell from the Work Papers (1) how much of this cost relates to contracts supporting specific proceedings; (2) how much is recoverable under the Part 170 fees; (3) what amount is being recovered through the annual fee; and therefore (4) whether any recovery under Part 171 is reasonable.

decommissioning and low level waste. (See Work Papers, Table XIII). There is no explanation anywhere of how these activities apply to operating reactors.

Finally, the Work Papers allocate to operating reactors approximately \$7 million (\$2,335,000 in contract costs plus 11.1 FTE) for Spent Fuel Storage and Transportation. (See Work Papers, Table XIII). As there is no meaningful description, one cannot determine to what activities the costs are being allocated. The NRC FY 2015 Congressional Budget Justification indicates that the Commission's activities related to Spent Fuel Storage and Transportation include:

- Analysis, data collection, and modeling for future alternate strategies for disposal of SNF and high-level waste, including: laboratory studies and field investigations to try to understand key technical issues and risk insights; technical inputs to resolution of regulatory gaps; exercise of the performance assessment scoping tool for risk insights; and continued coordination for assessment of alternative disposal strategies with other aspects of the back end of the fuel cycle.
- Supporting and responding to changes in the national high-level waste and spent nuclear fuel management strategy.

(See NUREG-1100, Vol. 30, FY 2015 Congressional Budget Justification (Mar. 2014), at 82-83).

If the portion of Spent Fuel Storage and Transportation costs allocated to operating reactors includes these sorts of costs for spent fuel disposal activities (some of which is still being paid through previous appropriations from the Nuclear Waste Fund), or for long-term storage activities attributable to the Department of Energy's ("DOE") failure to meet its contractual obligations, these costs should be specified separately. Any budgetary resources relating to spent fuel disposal or other DOE activities should be accounted for separately, not only to inform operating reactors what costs they are being asked to bear, but also to allow a determination of whether such costs should be offset from the carry-over appropriation relating to review of the Yucca Mountain license or recovered through user fees assessed to DOE or the Nuclear Waste Fund.

The \$7 million in Spent Fuel Storage and Transportation costs allocated to Operating Reactors is in addition to the \$28.9 million for spent fuel storage and decommissioning activities that is recovered through an annual fee on power reactors and 10 CFR 72 licensees that do not hold a 10 CFR 50 license. (See 80FR15485; and Work Papers, Table XIV). The NRC should also provide a detailed breakdown of this annual fee specifying any amounts that are attributable to spent fuel disposal activities or for long-term storage activities attributable to the Department of Energy's failure to meet its contractual obligations. Any activities relating to DOE's obligations under the Nuclear Waste Policy Act should either be offset by the carry-over appropriation from the Nuclear Waste Fund or recovered from DOE through a user fee. While power reactors ultimately benefit from the disposal of spent nuclear fuel, they have already paid for that benefit through the fees charged under their contracts with DOE. But for DOE's unilateral termination of the statutorily-mandated Yucca Mountain repository, there would be no need for the NRC to expend funds associated with the assessment of alternative disposal strategies or responding to changes in the national high-level waste and spent nuclear fuel management strategy. Thus, DOE is the more direct beneficiary as the entity proposing alternative means to fulfill its existing obligations, and should pay for the NRC services that are attributable to these actions.

The Proposed Annual Fee on Operating Reactors Is Excessive, Unfair, and Violates Statutory Requirements.

The Proposed Rule violates the statutory standards in three significant respects. First, the Proposed Rule fails to subtract from the NRC budget the costs of activities that are covered by appropriations from the Nuclear Waste Fund. Second, the proposed 10 CFR 170 fees fail to recover from every person who receives a service or thing of value the full cost of such service or thing of value. This failure harms Exelon because it leaves an inordinate and unreasonable amount of the Commission's budget to be collected through annual fees borne predominantly by 99 reactor licensees, and over twenty percent by Exelon. Third, the Commission has failed to allocate the annual fee "fairly and equitably" so that "[t]o the maximum extent practicable, the charges shall have a reasonable relationship to the cost of providing regulatory services."

The NRC Calculation of Non-Fee Items Fails to Include Activities Covered by Appropriations from the Nuclear Waste Fund

The Proposed Rule violates OBRA because the Commission has not subtracted from its budget authority the costs of activities that are covered by appropriations from the Nuclear Waste Fund. OBRA requires the Commission to assess fees recovering approximately 90% of its budget authority, less the cost of certain non-fee items including "amounts appropriated to the Commission from the Nuclear Waste Fund." (42 U.S.C. 2214(c)(2)). Pursuant to writ of mandamus,⁶ the Commission has resumed work on review of the Yucca Mountain application. (See *U.S. Department of Energy* (High Level Waste Repository), CLI-13-08, 78 N.R.C. 219 (2013)). This work is continuing in FY 2015 and is covered by previous unexpended appropriations from the Nuclear Waste Fund that remain available to the NRC. The Commission's Monthly Status Reports on Activities Related to Yucca Mountain Licensing Action indicate that over \$2 million was expended on these activities in the first five months of FY2015. If this level of expenditure remains constant, the NRC expenditures on Yucca Mountain licensing in FY 2015 would be over \$4 million.⁷ Yet no credit is provided for this funding in calculating the non-fee exclusions that factor into determining the total amount that must be recovered through annual and user fees. (See 80FR15447, indicating that the non-fee items consist of \$1.4 million for WIR activities, \$0.9 million for Inspector General Services for the DNFSB, and \$18.1 million for generic homeland security activities). The failure to subtract the costs of activities covered by the carry-over appropriations from the Nuclear Waste Fund violates OBRA and results in reactor licensees being overcharged.

In response to a similar comment during the FY 2014 fee rulemaking, the NRC stated that the NRC's activities related to review of Yucca Mountain are being charged to a carry-over balance of the NRC's NWF appropriations from prior years and will not be billed to licensees. (79FR37139). However, the Work Papers calculate the hourly FTE rate based on the full NRC

⁶ See *In re Aiken County*, 725 F.3d 255 (D.C. Cir. 2012), *reh'g en banc denied*, 2013 U.S. App. LEXIS 22003 (D.C. Cir. Oct. 28, 2013).

⁷ In COMSECY 14-0041, the NRC Staff projected going forward costs after Nov. 30, 2014 of up to \$4.4 million. COMSECY-14-0041, Yucca Mountain Project Activities, Enclosure 1, Resource Estimates for Yucca Mountain Project Activities, at Table 1 (Dec. 24, 2014).

budget less non-fee costs less direct non-labor; and thus the hourly rate for the mission direct hours worked by each direct FTE is calculated to recover the salary and benefits of all 3791 FTE employed by the NRC. (Work Papers, Table II). The Work Papers then allocate all direct FTEs and all direct contract costs to the Annual Fee categories or Fee Relief Categories. Consequently, other than the non-fee items (which for FY 2015 does not include any NWF expense) and fee relief items (which do relate to Yucca Mountain), the costs of all other NRC resources are being recovered either through user fees or annual fees. Since the Proposed Rule and Work Papers do not reflect any user fees assessed to DOE for Yucca Mountain activities, whatever NRC resources are being expended on Yucca Mountain would ultimately be recovered through the annual fees as currently calculated in the Work Papers.

The NRC also argued during last year's rulemaking that it may not deduct expenses paid from carry-over appropriations because OBRA-90 only allows the NRC to deduct amounts appropriated from the NWF "for the fiscal year." (79FR37139). First, there is no reason not to treat a carry-over appropriation as an appropriation for the fiscal year, because that appropriation remains available. But even if the NRC could not deduct the carry-over appropriation as a non-fee item, it would be inappropriate to charge the costs of the Yucca Mountain application to reactors as an annual fee, because these costs are direct services to an applicant (DOE), not generic costs. Thus, if the Yucca Mountain expenses cannot be deducted as a non-fee item, they must, under OBRA, be recovered through a direct user fee assessed to DOE.

A Greater Amount of the NRC Budget Should be Collected
Through 10 CFR 170 User Fees

Although the lack of adequate supporting information prevents one from fully determining the extent of this non-compliance, it seems apparent that the Proposed Rule fails to charge user fees for all recipients of services, and fails to recover the full cost of those services. Of the \$935.3 million that the Commission must recover through fees, only \$324.3 million is estimated by the Commission to be recoverable through the 10 CFR 170 user fees. This could only be correct if approximately two-thirds of the Commission's budget does not benefit any identifiable entity, which Exelon presumes cannot be the case. The Commission has previously acknowledged the consistent industry recommendation that the NRC collect more of its budget through 10 CFR 170 fees (see, e.g., 72FR5108, 5111, dated February 2, 2007), but has not done enough to address this concern.

As a specific example, the 10 CFR 170 rules do not appear to impose user fees for vendor inspections. (See FY 1999 Rulemaking, SECY-98-260, dated November 5, 1998, at 8 (ADAMS Accession Number ML093020263), recommending that vendor inspections remain subject to recovery under 10 CFR 171 because "[r]eactor vendors are not NRC licensees and not directly subject to most NRC regulations").⁸ But OBRA *requires* full cost recovery from "*any person*"

⁸ In the same vein, the Proposed Rule states incorrectly that the "10 CFR Part 170 user fees, under the authority of the IOAA, recover the NRC's costs of providing specific regulatory benefits to identifiable applicants and licensees." 80FR15477. To the contrary, "[p]ursuant to the [IOAA], *any person* who receives a thing of service or thing of value from the Commission *shall pay* fees to cover the Commission's costs in providing any such service or thing of value." 42 U.S.C. 2214(b) (emphasis added).

receiving a service or thing of value, not just applicants and licensees. Vendors are specifically identifiable persons receiving the benefit of NRC inspections in order to establish their qualifications to provide safety-related services. There is no basis to exclude these services from 10 CFR 170 user fees. The Work Papers reflect \$12.4 million in budgeted resources for vendor inspections relating to new reactors (\$200,000 in contracts and 31.0 FTE at an average cost of \$393,458 per FTE), and presumably there are additional vendor inspections conducted relating to operating reactor activities (though no separate line item identifies this work). Such costs must be collected through 10 CFR 170, not 10 CFR 171.

In the FY 2014 fee rulemaking, the NRC responded to a similar comment and asserted that “[e]stablishing vendors as a new recipient of user fees would require the NRC to revise its existing part 171 regulations,” and thus the comment was “outside of the scope of the proposed fee rule.” (79FR37319). This assertion was incorrect. Part 171 would not be implicated in any way in assessing user fees to vendors for NRC inspections that establish their qualifications to provide safety-related services. Nor is any additional rulemaking required. The Proposed Rule itself notes that the 10 CFR 170 user fees are assessed “to cover the costs of inspections,” whereas the Part 171 annual fees “recover generic regulatory costs that are not otherwise recovered through 10 CFR part 170 fees.” (80FR15477). The NRC exercises regulatory authority over non-licensed vendors, routinely conducts inspections of them, and on occasion has taken enforcement action against them. Certainly, it also has the authority to assess them fees for services rendered. The existing rules at 10 CFR 170.12(c)(2) and 170.12(d) would allow such assessment. No further rulemaking is required.

In any event, in its annual rulemaking establishing its annual fees, the NRC is required to ensure that its fee assessments comply with statutory requirements. Determining that the new annual fees established by this rulemaking meet statutory requirements necessarily involves consideration whether user fee categorizations and collections remain in compliance with OBRA. Further, many of the user fee categories were determined decades ago as activities requiring NRC review or oversight change. At a minimum, the NRC rulemakings revising the fee schedules and establishing the annual fees should periodically revisit whether its user fees remain in compliance with OBRA, just as the NRC periodically rebaselines other aspects of its fee schedules. Any lesser approach would abrogate the Commission’s statutory responsibilities.

Further, as discussed above, the NRC has not included any carry-over appropriation from the Nuclear Waste Fund in calculating the non-fee items that are subtracted from the total budgetary authority to determine the amount that must be recovered by fees. If the costs of these activities are not subtracted from the total budget as a non-fee item, as OBRA directs, they should be recovered through user fees assessed to DOE or Yucca Mountain. If these activities are not accounted for properly, operating reactors may be assessed millions of dollars that should come from the Nuclear Waste Fund. As previously discussed, the absence of any specific identification of the costs that are being recovered under 10 CFR 171 prevents any meaningful analysis of whether other recipients of services are being charged the full cost of those services through user fees. In other words, because the Work Papers do not identify what specific costs are being recovered under 10 CFR 171, it is not possible to determine whether the 10 CFR 171 charges include costs that should more appropriately assigned to specific identifiable beneficiaries. Nevertheless, the disproportionate amount of the NRC budgetary authority that is being recovered through the annual fees (over \$611 million of the

\$935 million that the NRC must recover) strongly suggests that the user fees fail to recover full costs.

For example, the budgeted resources for new plants include more than \$2 million in advance reactor research (\$820,000 in contract costs plus 3.5 FTE at an average cost of \$393,458 per FTE) and \$9 million in new reactor research (\$4,031,000 in contract costs plus 13.0 FTE at an average cost of \$393,458 per FTE). While the Work Papers do not provide sufficient information to determine whether these costs are being recovered under 10 CFR 170 or 10 CFR 171, Exelon submits that all such research costs should be recovered from the persons that are most benefiting from such research, and that much of this cost could be recovered through user fees. The identifiable beneficiaries of such research may include applicants for, and holders of, design certifications and manufacturing licenses (including vendors seeking pre-application review), applicants for and holders of combined licenses, or in certain cases, the Department of Energy, depending on the purpose and scope of the research. The same treatment should be applied to other support costs primarily benefiting new reactors, such as rulemaking and development of standards undertaken to allow new reactor licensing to proceed. Indeed, Exelon cannot perceive any reason why new reactor costs should not be recovered entirely through fees paid by participants in new reactor licensing, i.e., the applicants, licensees, holders of design certifications, and vendors that are engaged in new reactor activities.⁹

Recovering such support costs from identifiable beneficiaries through 10 CFR 170 user fees is permissible under the IOAA and far more equitable than seeking recovery through an annual fee on reactor licenses, such as Exelon, who are not currently pursuing any new reactor licensing. While the IOAA has been interpreted as allowing assessment of user fees only to persons who are identifiable recipients of certain special benefits, this interpretation does not preclude full recovery of all costs including support activities required for the NRC to provide its services. The special benefits for which a user fee should accrue are not limited to the granting of licenses or other approvals, but include any government service that “provides business stability or contributes to public confidence in the business activity of the beneficiary.”¹⁰ Under NRC guidelines upheld upon judicial review, special benefits include services “necessary to assist a recipient in complying with statutory obligations or obligations under the Commission regulations.” (*Mississippi Power & Light*, 601 F.2d at 226 n.3). “All direct and indirect costs incurred by the NRC in providing special benefits may be recovered.” (*Id.*). Administrative and

⁹ For example, the NRC 2014 Congressional Budget Justification indicates that new reactor research funding supports the resolution of technical issues in Design Certification Reviews. See NUREG-1100, Vol. 30, FY 2015 Congressional Budget Justification at 49. The costs of this research should, therefore, be recovered through the user fees charged to applicants (or pre-applicants) seeking design review or certification of such reactors, or holders of Design Certifications if the research relates to amendments or other reviews of already certified designs. Again, the absence of sufficient information in the Work Papers makes it impossible to determine whether such research is indeed being recovered through user fees or is simply being imposed on all operating reactors through the annual fee.

¹⁰ The NRC may also recover the full cost of providing a service to an identifiable beneficiary regardless of incidental benefits flowing from the provision of that service to the public. *Mississippi Power & Light Co. v. NRC*, 601 F.2d 223, 230 (5th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980).

support costs, including training, should be recovered. (*Id.* at 232). Moreover, as the Commission itself has maintained, research is a “regulatory service” because “research programs are necessary for the Commission to have continuing confidence that licensed reactors can be operated consistent with the public health and safety and the Commission’s regulations. (*Florida Power & Light Co. v. United States*, 846 F.2d 765, 769-70 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1045 (1989)). By the same logic, research supporting new plant activities is a “regulatory service” to the entities engaged in such activities because it enables, and provides confidence in, the NRC licensing and regulation of those activities.

Any Annual Fee for New Reactor Costs Should Be Assessed to a Class of Licensee That Benefits From Such Activities, and Not to All Operating Reactors

If the NRC is unable to recover the full amount of its new reactor costs through user fees, it should define a new, more focused, class of licensees that should be assessed the annual fee needed to collect the remainder. In order to meet the statutory requirement that the generic costs be allocated “fairly and equitably” so that “[t]o the maximum extent practicable, the charges shall have a reasonable relationship to the cost of providing regulatory services” to such licensees, the annual fee for new reactor activities should be assessed to holders of design certifications, design approvals and manufacturing licenses, licensees that hold or have active applications for combined licenses,¹¹ holders of active construction permits, and holders of any other NRC approvals allowing or pertaining to new plant activities. Because OBRA authorizes annual charges collected from “licensees and certificate holders” (*see* 42 U.S.C. § 2214(c)), this annual fee probably could not be assessed to design certification *applicants* per se – making this an inferior alternative to direct collection through user fees. However, the NRC does have the authority to define a “new reactor licensee” to include any approval or form of permission granted under its regulations in 10 CFR 52, consistent with the Administrative Procedure Act (at 5 U.S.C. 551(8)) and similar to the approach it has taken in defining a “materials license” in 10 CFR 171. (*See* 10 CFR 171.5). Thus, the NRC can define a licensee for purposes of the fee in 10 CFR 171 in such a way that the 10 CFR 171 fees apply to *holders* of design certifications, design approvals or any other such approvals (including for example vendors who have obtained NRC approval of a QA program in order to pursue work and NRC review of new plant designs).

During the FY 2014 fee rulemaking, the NRC responded to a similar comment, by stating that “the NRC’s generic new reactor work yields indirect benefits for existing operating reactor licensees.” (79FR37140). The possibility that such research might have some indirect benefit to existing licensees does not justify the millions of dollars in fees being imposed on operating reactor licensees with no present or foreseeable intention to build new reactors. The NRC also responded that “there is no practicable or reliable method to determine which existing NRC licensees will develop an interest in future reactor activities.” *Id.* An equitable allocation of new reactor activity costs does not require the NRC to make any such prediction. As noted, the NRC can readily identify those entities that have any NRC approvals allowing or pertaining to new plant activities and impose a fee on them.

¹¹ If the NRC can assess an annual fee to all operating reactor licensees to recover new reactor costs, it can assess such a fee to the subset of operating reactor licensees engaged in new reactor activities (regardless of whether they hold a combined operating license (“COL”) yet).

The NRC also offered the vague rationale that generic new reactor activities “help to establish and maintain the regulatory infrastructure at the NRC,” which allegedly results in “regulatory predictability that is useful for business planning purposes.” (*Id.*) As an example, the NRC claimed that imposing new reactor costs on current reactors is akin to imposing license renewal costs on “all holders of power reactor operating licenses without regard to whether the operating license holder intends to seek renewal” because “a stable and efficient regulatory regime for license renewal indirectly benefits all existing power plants.” (*Id.*) This comparison is inapt. Existing operating reactors in their initial license term who have not yet decided to seek license renewal will have to decide at some point whether or not to seek license renewal for their already existing assets. That decision undoubtedly will be informed by the experience of existing operating reactors who are seeking, or have already obtained, renewed licenses. But the same “regulatory predictability” for existing nuclear assets, and whether or not to renew the licenses of those existing assets, does not apply to nuclear assets that do not exist and may never exist. Indeed, an existing operating reactor licensee may never have to decide whether to build a new reactor.

Imposing any annual fee that may be needed for new reactor activities on holders of design certifications, design approvals and manufacturing licenses, licensees that hold or have active applications for combined licenses, and holders of active construction permits, would impose the new reactor costs on those entities that have the closest relationship to the regulatory services, and would be the most fair and equitable allocation. In contrast, imposing these fees on all operating reactor licensees, including many like Exelon that are not currently pursuing any new reactor licensing applications, while giving a free pass to the reactor vendors directly benefiting from NRC new reactor activities, violates OBRA’s requirement to allocate annual fees fairly and equitably, and in a manner ensuring that “[t]o the maximum extent practicable,” the annual fee has “a relationship to the cost of providing regulatory services” to the class of licensee paying this fee.¹²

Further, the NRC current approach of automatically charging the vast majority of supposedly generic costs to operating reactors dates back to times where power reactor licensees were almost all regulated electric utilities with the ability to recover their costs through rates. This is no longer the case. In fact, neither Exelon, nor any of its affiliates holding ownership interests in the fleet, is an electric utility with the ability to pass through its costs to ratepayers through cost of service based rates. In enacting OBRA, Congress specifically advised the Commission to take into account, in establishing its fee schedule, whether licensees have the ability to pass through these costs to the ultimate customer. (*See Allied Signal, Inc. v. NRC*, 988 F.2d 146, 149 (D.C. Cir 1993)). With deregulation, it is no longer reasonable to assume that reactor licensees have the ability to pay and recover such costs. Indeed, in the current environment, the excessive annual fees assessed to reactors may contribute to unnecessary and undesirable plant closures.

¹² In enacting OBRA, Congress specifically rejected a proposal that the total amount intended to be recovered through annual charges be divided among power reactor licensees equally, stating instead that “the conferees intend that the NRC assess the annual charge under the principle that licensees who require the greatest expenditure of the agency’s resources should pay the greatest annual charge.” H.R. Rep. No. 101-964, *reprinted in* 1990 U.S.C.C.A.N. 2374, 2667.

The Annual Fee for Operating Reactors Should Apply to Holders of Combined Licenses

The annual fee for operating reactors under 10 CFR 171 should be assessed not just to the 99 current operating licensees, but also to the additional holders of combined licenses. Currently, the annual fees do not apply to the holder of a combined license until such time as the Commission makes a finding under 10 CFR 52.103(g) allowing operation. (See 10 CFR 171.15(a)). This is inequitable because many of the NRC generic activities for operating reactors, such as the Fukushima Near Term Task Force (“NTTF”) activities, benefit combined license holders just as much as 10 CFR 50 operating licensees. Further, the substantial new reactor costs included in the annual fees benefit combined license holders much more directly and substantially than 10 CFR Part 50 operating licensees. If holders of combined licenses are not included in the assessment, they will be the beneficiaries of these services without ever bearing any of the costs. In addition, the current combined license holders are far better positioned to recover these costs than many current operating licensees because the combined license holders remain electric utilities able to recover their costs through rates, and regulatory costs during construction are largely capitalized.

The Proposed Rule Reflects Underutilization and Inefficiency in NRC Resources That Should Be Corrected in Future Budgets

As noted by NRC Chairman Burns in his March 24, 2015 testimony before Congress on the NRC budget, the NRC “needs to function more efficiently.” Chairman Burns identified multiple means by which it can accomplish this goal: “right-sizing the agency while retaining appropriate skill sets needed to accomplish its mission; streamlining agency processes to use resources more wisely; improving timeliness in regulatory decision making and responding quickly to changing conditions; and promoting unity of purpose with clearer agency-wide priorities.” Chairman Burns’ comments are particularly appropriate in light of the fact that the NRC oversees a reduced number of operating plants, is reviewing a much lower number of active new plant applications compared to recent years, and has significantly reduced work on Yucca Mountain licensing. Exelon strongly supports Chairman Burns’ statement that the NRC “should take a hard look at how to ensure the agency carries out its mission effectively while also being more efficient and fiscally responsible.” Chairman Burns Mar. 24, 2015 Testimony at 6. There is no basis for the NRC to remain a billion dollar agency in light of its reduced workload.

The declining efficiency of the NRC Staff is a particular concern. License renewal proceedings that used to take two to three years now often take five years or more. License transfer reviews that used to be routinely completed within six months now take a year or more. A number of new plant applications have been pending before the NRC for six or seven years.

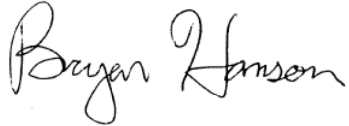
The NRC current estimate of the direct hours per FTE provides another troubling measure of productivity. While the current estimate of direct hours per FTE has been increased slightly from FY 2014 to 1420 hours per FTE, that estimate remains below the 1446 hour estimated in 2005, and even further below the 1776 hours estimated in previous fiscal years. See 70FR30526, 30533, dated May 26, 2005. The current, low level of productivity does not appear justifiable. Accordingly, Exelon strongly encourages the Commission to re-examine Staff productivity and make appropriate adjustments in future budgets.

April 22, 2015

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Exelon appreciates the opportunity to submit these comments. If you have any questions about these comments or require further information, please contact Dominic Imburgia, Manager, Licensing Programs, at 630-657-2827.

Respectfully,

A handwritten signature in black ink that reads "Bryan C. Hanson". The signature is written in a cursive style with a large, stylized 'B' and 'H'.

Bryan C. Hanson
President and Chief Nuclear Officer