Exelon Generation®

J. Bradley Fewell
Senior Vice President of Regulatory Affairs & General Counsel

4300 Winfield Road
Warrenville, IL 60555

630.657.3752 Office
630.657.4335 Fax
www.exeloncorp.com
bradley.fewell@exeloncorp.com

RS-16-119

3/22/2016
81FR15352

May 6, 2016

(3)

Cindy Bladey
Office of Administration
Mail Stop OWFN-12-H08
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Subject: Comments Concerning Fee Development and Communications (81FR15352, dated March 22, 2016) (Docket ID NRC-2016-0056)

In response to a request for comments published in the *Federal Register* (81 Fed. Reg. 15,352) (dated March 22, 2016), Exelon Generation Company, LLC ("Exelon") submits these comments on the Nuclear Regulatory Commission's ("NRC") process for developing fees and the general communications the agency provides about its fees. Exelon supports the Commission's direction resulting from SECY-15-0015 that the NRC:

> Improve the transparency and simplify how the NRC calculates and accounts for fees, and improve the timeliness of when the NRC communicates fee changes. ... Identify the specific reasons for the stated fee changes and determine necessary changes to any future presentation and communication of fee changes to the industry.[1]

In response to that direction, the NRC requested information from its stakeholders that it could consider in evaluating any changes to improve its fee development and invoicing processes. Specifically, the NRC asked nine questions. Exelon's responses to each question are below, following Exelon's general comments on the NRC's fee development and budgeting process. Exelon also supports the comments submitted by the Nuclear Energy Institute.

General Comments

Overview of Statutory Framework

NRC fee collection is governed by two statutes. The user fees in 10 CFR Part 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 Part 171 are governed by OBRA.

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[1] Staff Requirements Memorandum, SECY-15-0015, "Project Aim 2020 Report and Recommendations," dated June 8, 2015.

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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."[2] IOAA then authorizes agencies to prescribe regulations establishing the charge for a service or thing of value provided by the agency, and provides that "[e]ach 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."[3]

While IOAA is permissive in allowing agencies to establish user fees, OBRA modifies IOAA by mandating user fees 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."[4]

OBRA further provides that any NRC licensee or certificate holder may also be required to pay, in addition to user fees, an annual charge. 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. OBRA directs that the schedule of annual charges must "fairly and equitably allocat[e] the aggregate amount of charges among ... licensees."[5] It further provides that, "[t]o the maximum extent practicable, the charges shall have a reasonable relationship to the cost of providing regulatory services. . . ."[6]

The NRC's Calculation of the Operating Reactor Annual Fee is Deficient

As a general matter, the NRC's fee development process is deficient in two significant respects. First, the 10 CFR Part 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 100 reactor licensees, and over twenty percent by Exelon. Second, the NRC does not allocate the annual fee "fairly and equitably" so that "...the charges shall have a reasonable relationship to the cost of providing regulatory services."

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

Although the lack of adequate supporting information (discussed further below) prevents a full assessment, the NRC consistently fails to charge user fees for all recipients of services, and

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[2] 31 U.S.C. 9701(a).

[3] 31 U.S.C. 9701(b).

[4] 42 U.S.C. 2214(b) (emphasis added).

[5] 42 U.S.C. 2214(c)(3).

[6] *Id.* 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.

fails to recover the full cost of those services. For example, in the FY2016 Proposed Fee Rule, of the $883.9 million that the NRC must recover through fees, only $325.8 million is estimated by the NRC to be recoverable through the 10 CFR Part 170 user fees. This could only be correct if approximately two-thirds of the NRC's budget does not benefit any identifiable entity, which Exelon presumes cannot be the case. The NRC has previously acknowledged the consistent industry recommendation that the NRC collect more of its budget through 10 CFR Part 170 fees (*see, e.g.*, 72 FR 5108, 5111, dated February 2, 2007), but has not done enough to address this concern. Specific examples of work that should be recovered through Part 170 fees are included in the response to Question 6, below.

The absence of any specific identification of the costs recovered under 10 CFR Part 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 recovered under 10 CFR Part 171, it is not possible to determine whether the 10 CFR Part 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 $558.1 million of the $883.9 million that the NRC must recover) strongly suggests that the user fees fail to recover full costs.

For example, in the FY2016 Proposed Fee Rule, the budgeted resources for new plants include more than $1.5 million in advanced reactor research ($620,000 in contract costs plus 2.5 FTE at an average cost of $382,991 per FTE) and $7.9 million in new reactor research ($4,040,000 in contract costs plus 10 FTE at an average cost of $382,991 per FTE). While the Work Papers do not provide sufficient information to determine whether these costs are being recovered under 10 CFR Part 170 or 10 CFR Part 171, Exelon submits that all such research costs should be recovered from the persons that most benefit 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.[7] The same treatment should be applied to other support costs solely 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.

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[7] The 2015 Congressional Budget Justification describes the major research activity as "provid[ing] research support for [large light water reactor] and [small modular reactor] [design certification] reviews and analysis. . ." NUREG-11, Vol. 31 at 28. 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.

Recovering support costs from identifiable beneficiaries through 10 CFR Part 170 user fees is permissible under 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 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. As discussed above, 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" including services "necessary to assist a recipient in complying with statutory obligations or obligations under the Commission regulations."[8] Administrative and support costs, including training, should be recovered.[9] 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."[10] 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.

Responses to NRC Questions

1. What are some specific ways that the NRC can improve the public's understanding of its fees and how those fees relate to the agency's budget?

As Exelon has commented in the past, the fee-related Work Papers generally fail to provide sufficient information explaining and supporting the derivation of the annual fee. The tables in the Work Papers do not allow one to determine whether the fee rule meets statutory requirements. The tables simply lay out the entire originally proposed NRC budget, and provide no indication of which of the budgeted resources are being recovered through user fees versus annual fees. The agency should provide the basis for key assertions and a reasonable basis for its conclusions underlying its fee rules. Without this information, the NRC cannot demonstrate that the user fees recover full costs from all persons who receive a service or thing of value, and that the 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 requires.

The 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. The Work Papers also lack any information explaining how the estimated 10 CFR Part 170 fee collections are calculated. There is not a single statement in Work Papers (or the FY1016 Proposed Fee Rule)

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[8] *Mississippi Power & Light Co. v. NRC*, 601 F.2d 223, 230, 226 n. 3 (5th Cir. 1979), cert. denied, 444 U.S. 1102 (1980). 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. *Id.* at 230.

[9] *Id.* at 232.

[10] *Florida Power & Light Co. v. United States*, 846 F.2d 765, 769-70 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1045 (1989).

explaining or supporting this estimate. Since the annual fees are determined by subtracting the estimated 10 CFR Part 170 collections from the adjusted budget authority, the absence of support for the 10 CFR Part 170 estimate renders the calculated amount recoverable under 10 CFR Part 171 unsupported and arbitrary.

In the FY2015 fee rulemaking, 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."[11] The purported impracticality of providing explanations for thousands of calculations does not justify providing no explanation whatsoever for its estimated 10 CFR Part 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 approximately $108 million in fees for Exelon alone), and the calculation of those annual fees are dependent on subtracting the estimated 10 CFR Part 170 collections from the adjusted budget authority, transparency requires that the NRC provide some reasonable and verifiable explanation of its estimate. The Work Papers provide none.

In addition, the Work Papers fail to 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 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 portion of estimated 10 CFR Part 170 collections 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 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 Work Papers' 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 Part 171) or supporting a regulatory service to an identifiable beneficiary (thus appropriate for recovery under 10 CFR Part 170).[12] 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 Part 170, whether the 10 CFR Part 170 user

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[11] Revision of Fee Schedules; Fee Recovery for Fiscal Year 2015, 80 Fed. Reg. 37,432, 37,447 (June 30, 2015).

[12] For example, the FY2016 budgeted resources for new reactors include $27,714,000 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.

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 FY2015 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."[13] 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 $27.7 million allocated to the New Reactors Business Line 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 decommissioning and low level waste. *See* Work Papers, Table XIII. There is no explanation anywhere of how these activities apply to operating reactors.

In terms of understanding the relationship between the NRC's fees and its annual budget, the NRC could improve the discussion in the Congressional Budget Justification (CBJ), particularly in the Executive Summary narrative, explaining the basis for the table of the NRC's budget authority and full-time equivalents. For example, the Budget Authority and FTE table of the FY2017 CBJ (p. x) indicates that the Operating Reactor budget request is a decrease of $1.7 million compared to the FY2016 request, including a decrease of 53.6 FTE. However, a reduction of 53.6 FTE would lead to much greater savings than $1.7 million, which means that other contract support and travel costs within Operating Reactors must have increased in order to offset much of the FTE decrease. Nowhere in the Executive Summary are these figures explained.[14] This lack of transparent explanation is inconsistent with the NRC's principles of openness and clarity, and should be remedied in future CBJs.

Additional specific ways that the NRC could improve the public's understanding of its fees and how those fees relate to the agency's budget include:

- Including in each inspection report a section on the cost of the inspection, specifically NRC hours expended and the total cost to the licensee. Since most inspection reports are publicly available, licensees would be able to compare inspection costs across the industry, and potentially identify efficiencies for resource savings.
- Prior to conducting each inspection or licensing action review, the NRC should provide to the licensee an estimate of the NRC staff hours that will be necessary to perform the inspection or review the action, and provide a total cost estimate to the licensee. An estimated fee would foster more accurate budgeting and work planning for licensees, as well as provide reasonable parameters for disciplined NRC staff activities.

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[13] 80 FR at 37,446.

[14] After further discussions with NRC staff, we understand that much of the offsetting costs are attributed to an across-the-board pay raise for Federal government employees, as well as increased information technology costs.

- Individual time activity code (TAC) numbers should include running cost totals until the TAC number is closed. This simple summary would promote accurate accounting and tracking of the full project costs by both the NRC and licensees. Unusually high project costs would also be more apparent and allow for additional project management and oversight, as necessary.
- Exelon applauds the NRC for providing licensees with estimated fee spreadsheets that summarize costs for each NRC pay period; NRC should continue this practice.

2. What are some specific improvements that could be made to the fee-related Work Papers or forms that would assist in the public's understanding of those papers and forms? For example, can the NRC improve the clarity and content of NRC invoice forms? If so, how?

Exelon's fundamental concern with the Work Papers relates to whether those papers, and the method by which the NRC calculates fees, demonstrate compliance with statutory requirements and therefore provide the legal basis for the annual fee revisions. The Work Papers (and proposed fee rules) should provide sufficient information to demonstrate that the statutory requirements governing fees are being met. As described above, the statutory requirements in IOAA and OBRA require that *"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."[15] Consequently, no such costs should be included in annual fees. In addition, the annual fees recovering remaining costs (other than non-fee and fee-relief items) must be "are fairly and equitably allocated" among licensees and "to the maximum extent practicable, the charges shall have a reasonable relationship to the cost of providing regulatory services."[16]

Neither the Work Papers nor the fee rules have provided meaningful information demonstrating that these statutory requirements have been met. Simply listing all of the budgeted resources for a fee class, and then subtracting the user fees that the Commission is currently collecting from that fee class does not (1) demonstrate that the appropriate amount is being collected through user fees, or (2) that the resources collected through annual fees are indeed generic costs not benefitting any identifiable recipient.

In addition, specific suggestions on the NRC's invoicing process include:

- Currently, paper copies of quarterly invoices are sent to licensees via U.S. Mail, and payment is due one month after the NRC invoice is issued. The processing and delivery of paper copy invoices takes approximately one week of this month. Electronic copies may be requested, but only after the paper copies are mailed. Exelon strongly suggests that the NRC modernize its fee billing system to standardize electronic invoicing as the default delivery method. In fact, we understand that the Office of the Chief Financial Officer has already begun efforts to support electronic invoicing.
- Invoices for inspection reports should provide the name or subject of the inspection report in the "TAC/IR Name" field of the invoice. Currently, invoices simply list the

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[15] 42 U.S.C. 2214(b) (emphasis added).

[16] 42 U.S.C. 2214(c)(3).

inspection report number without any indication of the subject or purpose of the inspection.

3. How can the NRC improve its explanation of any changes to the annual fees or hourly rates in the annual fee rule?

As described above, the tables in the Work Papers for the annual fees do not provide enough information to demonstrate whether the statutory requirements for fees are being met. They do not allow one to determine whether the budgeted resources collected through annual fees are in fact generic costs not providing any special benefit to an identifiable recipient.

Because the Work Papers for the annual fees list all of the resources budgeted for the Business Lines, it is impossible to tell what portion of each Business Line and Product Line/Product is being collected through a user fee vice an annual fee. Simply listing the Business Lines and Product Lines/Products is insufficient to describe the specific work being budgeted. While the Congressional Budget Justification for each fiscal year more fully describes the Business Lines and Product Lines, it does not allow identification of the specific activities being allocated to an annual fee category, or a determination of whether those activities are generic or benefiting an identifiable recipient. For example, the tables in the Work Papers for annual fees generically identify contract costs (some of which appear to be recurring), but never identify what those contracts are for, who they are with, and whether their costs are recovered through user fees.

This deficiency could be remedied by establishing separate product lines for user-related work and generic work, providing more specific information describing the activities under each category, showing the amount of user fees being collected for each user-related line item, and explaining any shortfall. Such an approach would validate whether sufficient costs are being recovered through user fees, and whether the annual fees indeed represent generic costs not benefiting an identifiable recipient.

The following is an example from the FY2016 Proposed Fee Rule Work Papers, Table XIII.

New Reactor Business Line

Product	Contract ($, K)	FTE
Combined Licenses	4,291	54
Design Certification	9,291	41.5
Early Site Permits	445	8
Licensing Actions	1,055	31.5
Licensing Support	2,891	60.5
Operator Licensing	0	15
Pre-Application Reviews	480	5.5
Construction Inspections	470	70.5

Security	640	5
Vendor Inspections	200	25.5

Each of these activities appears to be work for which the full cost could be recovered through a user fee. Generic aspects of this work, if any, are not apparent. With respect to each of these items (and indeed, every product line/product under the New Reactor Business Line), the NRC should identify how much is in fact being collected through user fees and explain any shortfall in full recovery. If all the activities identified in the above table were collected through user fees, they would represent about $145 million in user-fee collections, or over 80 percent of the New Reactor total budget allocations.

4. **What additional information can the NRC provide along with the proposed fee rule and Work Papers to help explain how the NRC determines fees?**

See responses to Questions 1, 2, and 3, above.

5. **Given the statutory requirement to base the NRC's fees on the annual appropriation enacted by Congress, are there any ways that the NRC can improve the timeliness of completing its annual fee rulemaking or communicating fee changes?**

Exelon supports the Nuclear Energy Institute's response to this question. Earlier publication of the proposed and final fee rules would aid licensees' budgeting and financial planning.

In addition, if the calculated hourly rate reflects a significant decrease from the previous fiscal year, the NRC should make the new hourly rate immediately effective (or amend its rules to allow a year-end adjustment or refund). Otherwise, as occurs under the current rules, licensees are overcharged at the previous year's higher hourly rate until the new rule is finalized (typically near the fourth quarter) with no provision for recovery.

6. **Are there activities that the NRC should convert from fee-billable to non-fee-billable (or vice versa) and, if so, why? For example, should hearings for new licenses be fee-billable, or should the NRC continue to recover those costs through 10 CFR part 171 annual charges?**

Exelon notes two specific examples where the NRC should convert activities to fee-billable under 10 CFR Part 170: (1) vendor inspections, and (2) spent fuel storage and transportation.

The 10 CFR Part 170 rules do not appear to impose user fees for vendor inspections. *See* SECY-98-260, FY1999 Rulemaking, at 8 November 5, 1998 (ADAMS Accession Number ML093020263) (recommending that vendor inspections remain subject to recovery under 10 CFR Part 171 because "[r]eactor vendors are not NRC licensees and not directly subject to most NRC regulations").[17] But OBRA *requires* full cost recovery from "*any person*" receiving a

[17] In the same vein, the Proposed Fee Rule for FY2016 states incorrectly that OBRA requires the NRC to use its authority under IOAA to "collect user fees for NRC work that provides

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 Part 170 user fees, and such costs may not be collected through 10 CFR Part 171.[18]

In the FY 2015 fee rulemaking, the NRC responded to a similar comment and asserted that "the NRC cannot assess user fees when performing vendor inspections" because "the vender is not receiving any sort of NRC stamp-of-approval or certification."[19] The NRC also asserted that it could not bill vendor inspections to specific licensees because the vendor is typically supplying more than one licensee at any given time.[20] *However*, 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."[21] 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."[22] Assessing user fees for vendor inspections is appropriate under these standards because the inspections assist the vendors in complying with their obligations under Appendix B to 10 CFR Part 51, 10 CFR Part 21, 10 CFR Part 26 (for contractors implementing FFD element), 10 CFR § 52.4, 10 CFR § 52.5, as well as sections 206 and 211 of the Energy Reorganization Act of 1974. Vendor inspections related to new reactors are also focused on, and enhanced to validate, use of foreign suppliers and use of modular construction, and verify compliance with inspections, tests, analyses, and acceptance criteria. These inspections thus contribute to confidence in the business activity of the beneficiary.

Further, while vendors may be supplying more than one licensee, assessing the user fees to the vendor allows the vendors to determine the appropriate licensee(s) to which the cost should be passed on. The NRC exercises regulatory authority over non-licensed vendors, routinely inspects them, and on occasion takes enforcement action against them. Certainly, it also has the authority to assess them fees for services rendered. Even if the NRC were to decide to continue its practice of not charging user fees to vendors for vendor inspections, any recovery through annual fees should be assessed only on licensees engaged in the new plant activities. That vendors may be supporting more than one licensee does not justify indiscriminately

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specific benefits to identifiable *applicants and licensees*. . . ." 81 FR at 15,458 (emphasis added). 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).

[18] The NRC applied this very logic in the FY2016 Proposed Fee Rule regarding full-cost recovery for work spent processing Touhy requests. 81 FR at 15,466-67. There, the NRC recognized that it had the authority (under IOAA) to collect user fees for Touhy requests because "the NRC is bestowing a benefit on a private litigant" by providing information to that litigant. The same rationale applies to charging user fees to vendors.

[19] 80 FR at 37,449.

[20] *Id.*

[21] *Mississippi Power & Light*, 601 F.2d at 230.

[22] *Id.* at 226 n.3.

charging every operating reactor licensee, when it is clear that the vendor inspections only benefit a few.

A second example of the NRC's insufficient collection under user fees deals with spent fuel storage and transportation. The annual fees assessed to operating and shutdown reactors for Spent Fuel Storage/Reactor Decommissioning are based on budgeted resources that appear on their face to be largely recoverable as user fees. The proposed FY2016 annual fee amount of $211,000 on each such licensee[23] is based on $30.5 million of total FY2016 allocations.[24] The budgeted resources include 10.8 FTE for "inspection" relating to decommissioning and low level waste. They also include 2.5 FTE and $200,000 in contract costs for "environmental reviews," 1 FTE and $15,000 in contract costs for "licensing actions," 6 FTE for "licensing support," 17 FTE and $500,000 in contract costs for "storage licensing," and 11 FTE for "inspection" related to spent fuel storage and transportation. The 2016 Congressional Budget Justification states that the Spent Fuel Storage and Transportation business line activities include:

> conducting safety, security, and environmental reviews of spent nuclear fuel (SNF) storage casks and transportation packages and Independent Spent Fuel Storage Installation (ISFSI) license renewal applications, including development and update of regulations and guidance; conducting safety inspections of transportation packages, storage cask vendors and fabricators, ISFSI operations, security inspections of SNF ISFSIs and transportation; and, evaluating storage and transport of high burnup fuels.[25]

Thus, these budgeted resources for licensing and inspections pertain to holders of certificates of compliance for transportation and storage casks, waste package approvals, and ISFSI licenses, and are therefore recoverable as user fees. Collectively, the budgeted resources for inspections and licensing amount to over $23 million of the $30.5 million in total allocations (over 75%), but only $5.9 million (less than 20%) is being collected in user fees. Accordingly, $17 million of the $24.7 million collected through the annual fees assessed to operating and shutdown reactors appears unjustified and inconsistent with IOAA and OBRA.

In response to comments on the FY2015 fee rule for spent fuel storage and transportation, the NRC explained that its budget includes interim measures for spent fuel disposal, and that the activities included "efforts to maintain and enhance its technical capabilities and understanding of the potential behavior of different geologic environments and engineered barrier systems for disposal of spent fuel and high-level waste, and monitoring national-level developments stemming from the report of the Blue Ribbon Commission on America's Nuclear Future and DOE's response to that report."[26] If the portion of Spent Fuel Storage and Transportation costs allocated to operating reactors includes these sorts of costs for spent fuel disposal activities, 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, and the NRC

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[23] Revision of Fee Schedules; Fee Recovery for Fiscal Year 2016, 81 Fed. Reg. 15,457, 15,461, Table V (March 23, 2016).

[24] FY2016 Proposed Fee Rule Work Papers, Table XIV.

[25] NUREG-1100, Vol. 31, "2016 Congressional Budget Justification," at 51.

[26] 80 FR at 37,447.

should explain why these costs are not being recovered from DOE either as a user fee or annual fee. 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 recovered through fees assessed to DOE.

Any activities relating to DOE's obligations under the Nuclear Waste Policy Act that are not funded by the carry-over appropriation from the Nuclear Waste Fund should be recovered from DOE through a user or annual 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 abandonment 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, is the entity that most equitably should bear these costs, and should pay for the NRC services that are attributable to its actions.

Additionally, in response to the example in the NRC's question, the cost of contested hearings should continue to be recovered through annual fees instead of through Part 170 user fees. Contested hearings are largely outside of an applicant's control, and recovering such costs through user fees could incentivize litigants opposed to the application to abuse the hearing process in order to make licensing as expensive as possible.

Lastly, the NRC is proposing to amend Part 170 to allow recovery of costs spent responding to Touhy requests requiring more than 50 hours of NRC time. The 50-hour limitation is inconsistent with IOAA and OBRA; the full cost should be charged to any recipient of this service.

7. **Are there activities or fee classes that are more suited to flat fees rather than hourly? For example, should reviews of topical reports be subject to a flat fee or is the level of effort associated with individual topical reports too variable?**

   Exelon is not aware of any activities or fee classes that are more suited to flat fees rather than hourly fees.

   In terms of the flat fees charged by the NRC, the agency should validate the estimated professional process time in Section III.A.2 (Part 170 Fees, Specific Services) of the Work Papers to ensure that the current flat fee categories are effectively recovering in the aggregate all NRC review time spent on these activities. The Work Papers do not provide enough information to validate the sufficiency of the flat fees. The NRC should consider periodically auditing the flat fees to demonstrate their sufficiency.

8. **Are the current fee classes and categories appropriately defined? If not, how should they be revised and why?**

   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 requirements described above, 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,[27] 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"[28] 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 Part 52, consistent with the Administrative Procedure Act[29] and similar to the approach it has taken in defining a "materials license" in 10 CFR § 171.5. Thus, the NRC can define a licensee for purposes of the fee in 10 CFR Part 171 in such a way that the 10 CFR Part 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 Quality Assurance program in order to pursue work and NRC review of new plant designs).

During the FY2015 fee rulemaking, the NRC responded to a similar comment by stating that "the NRC's generic new reactor work yields benefits for existing operating reactor licensees."[30] The possibility that such research might have some 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, while relieving new reactor licensees and certificate holders from any obligation. 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."[31] 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 pertaining to new plant activities, and can impose a fee on them.

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 result in 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

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[27] 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 yet).

[28] 42 U.S.C. 2214(c).

[29] 5 U.S.C. 551(8).

[30] 80 FR at 37,448.

[31] *Id.*

practicable," the annual fee has "a relationship to the cost of providing regulatory services" to the class of licensee paying this fee.[32]

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.[33] 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.

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

The annual fee for operating reactors under 10 CFR Part 171 should be assessed not just to the 100 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.[34] 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 Part 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.

Last year, the NRC responded to a similar comment that "historically, plants licensed under 10 CFR part 50 did not enter the fee class until permission was granted by the NRC to load fuel and begin power operation" and that "[a]lthough combined license holders under 10 CFR part 52 do hold an operating license, they do not approach a comparable status to plants licensed under 10 CFR part 50 until the Commission determines that the inspections, tests, analyses,

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[32] 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.

[33] *See Allied Signal, Inc. v. NRC*, 988 F.2d 146, 149 (D.C. Cir 1993).

[34] *See* 10 CFR § 171.15(a).

and acceptance criteria are satisfied pursuant to 10 CFR 52.103(g), all operational programs are functional, and program compliance with regulations demonstrated."[35] The NRC's rationale does not account for the realities of holding a combined license under 10 CFR Part 52. Historically under 10 CFR Part 50, plants did not hold an operating license until they received a license to load fuel. In contrast, holders of combined licenses under Part 52 do have an operating license. As the holder of an operating license, combined license holders are under much the same obligation as a Part 50 licensee to maintain their licenses. Further, the experiences with the Part 52 combined licenses have demonstrated the need for numerous license amendments and other licensing actions after license issuance, as well as responses to Fukushima-related actions. Thus, the level of NRC support, including generic activities, for a combined license holder is likely comparable to that required for existing operating reactors.

In summary, the current NRC fee classes impose an undue burden on operating reactors to pay for new reactor costs that are unrelated to operating reactor regulation. Operating reactors are unfairly being asked to subsidize some portion of $174 million in new reactor costs. These new reactor costs should be collected either through user fees on new reactor applicants and licensees, or through annual fees on a new class of licensee/certificate holder engaged in new plant activities. Additionally, the operating reactor fee class should be assessed to additional holders of combined licenses.

Because OBRA requires that annual fees "are fairly and equitably allocated" among licensees and "to the maximum extent practicable, the charges shall have a reasonable relationship to the cost of providing regulatory services," Exelon encourages the NRC to periodically reassess the fairness of the annual fee classes in the fee revision rulemakings. Any comments submitted in response to the annual fee rule that question the appropriateness of a fee class should be considered within the scope of the rulemaking. The position that the NRC took in the 2014 fee rulemaking treating such comments as outside the scope of the rulemaking abrogates the NRC's statutory mandate, fails to provide the legal basis for the annual fees, and creates an appearance that the concerns regarding the fairness of the NRC fees are unimportant.

9. **Is there general information that the NRC can add to its public Web site that would assist stakeholders in their understanding of the NRC's fees development and invoicing processes?**

   The NRC should periodically validate the budgeting process by comparing "budgeted" with "as spent" amounts. This would enable stakeholders to determine whether the NRC is budgeting and expending funds appropriately and with maximum efficiency.

Exelon appreciates the opportunity to submit these comments. If you have any questions about these comments or require further information, please contact Darani Reddick, Regulatory Affairs Manager & Assistant General Counsel, at 202-637-0339.

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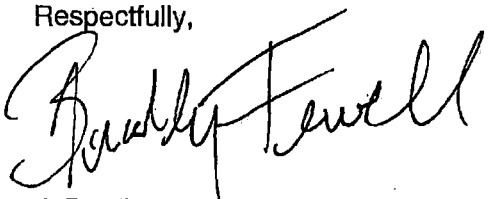
[35] 80 FR at 37,449.

Respectfully,



J. Bradley Fewell
Senior Vice President of Regulatory Affairs & General Counsel