

REQUEST REPLY BY: 7/23/02



CHIEF FINANCIAL
OFFICER

UNITED STATES
NUCLEAR REGULATORY COMMISSION

WASHINGTON, D.C. 20555-0001

July 17, 2002


COMSECY-02-0040

Approved, subject to Commissioner
McGaffigan's edits and certain
additional edits.

A handwritten signature in black ink, appearing to read "Richard A. Meserve".

Richard A. Meserve 7/22/02

MEMORANDUM TO: Chairman Meserve
Commissioner Dicus
Commissioner Diaz
Commissioner McGaffigan

FROM: Jesse L. Funches 
Chief Financial Officer

SUBJECT: PROPOSED RULE - PART 170 FEES FOR CONTESTED
HEARINGS RELATED TO NATIONAL SECURITY INITIATIVES

Attached is a proposed rule that would recover costs associated with contested hearings involving U.S. Government national security-related proceedings through part 170 fees assessed to the affected applicant or licensee. The proposed rule reflects the Commission's decision in its June 7, 2002, Staff Requirement Memorandum - COMSECY-02-0029.

In accordance with the rulemaking authority delegated to the CFO, I have signed this proposed rule and plan to forward it on July 24, 2002, to the Office of the Federal Register for publication unless directed otherwise by the Commission.

Secy please track.

Attachment: As stated

cc: SECY

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annual fees assessed to the members of the particular class of licensee to which the applicant belongs.

The NRC published the final rule establishing the part 170 and part 171 fees for FY 2002 on June 24, 2002 (67 FR 42612). During the comment period, the NRC received a comment from a nuclear industry group concerning the assessment of annual fees to the fuel facility class of licensees for recovery of the costs involving a contested hearing related to the application for a mixed oxide (MOX) fuel fabrication facility. The industry group commented that assessing the MOX contested hearing costs to the fuel facility fee class was unfair, and that it was a violation of the Omnibus Budget Reconciliation Act of 1990 (OBRA-90), as amended, to charge licensees for an agency activity or program from which the licensees receive no benefit. The commenter asserted that fuel facility licensees should not be responsible for bearing the costs of contested hearings associated with MOX fabrication because this process has no relation to the NRC's regulatory services from which fuel facility licensees obtain a benefit.² The commenter added that the beneficiaries of the MOX program are the Federal government and the nation's citizenry because it will aid in the reduction of weapons-grade plutonium. The commenter contended that commercial fuel facility licensees should not have to subsidize the Federal government's efforts to ensure national security, and that such costs should be appropriated through the General Fund and removed from the NRC fee base.

The NRC responded that it must recover its hearing costs through either part 170 fees for services or through part 171 annual fees in order to recover most of its budgeted costs (less

²The MOX program is a Federal government initiative to ensure national security through the disposition of plutonium from dismantled ~~atomic~~ weapons.

nuclear

the amounts appropriated from the Nuclear Waste Fund) through fees as required by OBRA-90, as amended. The Commission's longstanding policy of recovering contested hearing costs through part 171 annual fees assessed to the affected class of licensee has been confirmed repeatedly in the course of many past fee rulemakings, in court pleadings, and in an NRC report to Congress on fees.

In this case, however, the Commission has stated in the FY 2002 final fee rule that there is merit in the commenter's concern about the assessment of annual fees targeted to the fuel facility class for the MOX contested hearing costs, because the hearing involves a U.S. Government national security initiative to dispose of plutonium stockpiles. Accordingly, the FY 2002 final fee rule provided that FY 2002 budgeted costs for the MOX contested hearing be recovered through part 171 annual fees assessed to all classes of licensees. The final rule also stated that it was the Commission's intent to issue a proposed rule for public comment that would, beginning in FY 2003, recover the costs for contested hearings involving U.S. Government national security initiatives through part 170 fees assessed to the affected applicant or licensee.

Accordingly, the NRC is seeking public comment on its proposal to recover the agency's costs for contested hearings directly involving U. S. Government national security initiatives, as determined by the NRC, through part 170 fees assessed to the affected applicant or licensee. This proposed change would be a special exception to the Commission's policy of not recovering contested hearing costs through part 170 fees assessed to the affected applicant or licensee. The proposed change would only apply to contested hearings directly associated with U. S. Government national security initiatives, such as ~~Presidentially~~^{Presidentially} directed national security programs. The affected applicant or licensee would be responsible for the



payment of the part 170 fees assessed for these types of contested hearings under the proposed approach. However, because part 170 fees would only be assessed for contested hearings directly involving U. S. Government national security initiatives, the Commission expects that generally the costs would ultimately be borne by the Federal government, rather than the applicant.

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In addition to the contested hearing on the MOX fuel fabrication facility application, ^{the} contested hearing on the TVA license amendments to produce tritium at the Watts Bar and Sequoyah reactors for the nation's nuclear weapons program would be another example of a contested hearing directly involving a U. S. Government national security initiative for which Part 170 fees would be assessed under this proposed rule. Examples of contested hearings that do not involve a U.S. Government national security initiative include the contested hearing on the application for a uranium recovery license filed by Hydro Resources Inc., and the contested hearing on the independent spent fuel storage installation application filed by Private Fuel Storage L.L.C. Furthermore, the proposed rule would not change the existing policy of not assessing Part 170 fees for contested hearings associated with applications or licenses that are used to provide routine services to U.S. Government agencies.

It should be noted that the Independent Offices Appropriation Act (IOAA) prohibits the NRC from assessing part 170 fees to Federal agencies, except in limited circumstances, such as licensing and inspection of TVA power reactors. Therefore, the proposed change would not apply to most contested hearings involving U. S. Government national security initiatives where a Federal agency is the applicant or licensee.

2. Section 170.3 is amended by revising the definition of Special Projects to read as follows

§170.3 Definitions.

exemption does not apply to a contested hearing that the NRC determines directly involves a U.S. Government national security related initiative, including those specifically associated with Presidentially directed national security programs.

4. In §170.12, paragraph (d) is revised to read as follows:

§170.12 Payment of fees.

(d) *Special Project Fees.* (1) Fees for special projects are based on the full cost of the review or contested hearing. Special projects include activities such as --

(i) Topical reports;

(ii) Financial assurance submittals that do not require a license amendment;

(iii) Responses to Confirmatory Action Letters;

(iv) Uranium recovery licensees' land-use survey reports;

(v) 10 CFR 50.71 final safety analysis reports; and

(vi) Contested hearings directly involving U.S. Government national security initiatives, as determined by the NRC.

(2) The NRC intends to bill each applicant or licensee at quarterly intervals until the review or contested hearing is completed. Each bill will identify the documents submitted for review or the specific contested hearing and the costs related to each. The fees are payable upon notification by the Commission.



CHIEF FINANCIAL OFFICER

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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

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COMSECY-02-0040

July 17, 2002

Approved:

Greta Joy Dicus
Greta Joy Dicus 7/23/02

MEMORANDUM TO: Chairman Meserve
~~Commissioner Dicus~~
Commissioner Diaz
Commissioner McGaffigan

FROM: Jesse L. Punches *Jesse L. Punches*
Chief Financial Officer

SUBJECT: PROPOSED RULE - PART 170 FEES FOR CONTESTED
HEARINGS RELATED TO NATIONAL SECURITY INITIATIVES

Attached is a proposed rule that would recover costs associated with contested hearings involving U.S. Government national security-related proceedings through part 170 fees assessed to the affected applicant or licensee. The proposed rule reflects the Commission's decision in its June 7, 2002, Staff Requirement Memorandum - COMSECY-02-0029.

In accordance with the rulemaking authority delegated to the CFO, I have signed this proposed rule and plan to forward it on July 24, 2002, to the Office of the Federal Register for publication unless directed otherwise by the Commission.

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NUCLEAR REGULATORY COMMISSION

WASHINGTON, D.C. 20555-0001

COMSECY-02-0040

July 17, 2002

CHIEF FINANCIAL
OFFICER

Approved, subject to the attached edit.

MEMORANDUM TO:

Chairman Meserve
Commissioner Dicus
Commissioner Diaz
Commissioner McGaffigan

Nils J. Diaz
Nils J. Diaz 7/22/02

FROM:

Jesse L. Funches
Chief Financial Officer

Jesse L. Funches

SUBJECT:

PROPOSED RULE - PART 170 FEES FOR CONTESTED
HEARINGS RELATED TO NATIONAL SECURITY INITIATIVES

Attached is a proposed rule that would recover costs associated with contested hearings involving U.S. Government national security-related proceedings through part 170 fees assessed to the affected applicant or licensee. The proposed rule reflects the Commission's decision in its June 7, 2002, Staff Requirement Memorandum - COMSECY-02-0029.

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annual fees assessed to the members of the particular class of licensee to which the applicant belongs.

The NRC published the final rule establishing the part 170 and part 171 fees for FY 2002 on June 24, 2002 (67 FR 42612). ^{and} ~~During the comment period,~~ ^{had} the NRC received a ^{ON the proposed rule} comment from a nuclear industry group concerning the assessment of annual fees to the fuel facility class of licensees for recovery of the costs involving a contested hearing related to the application for a mixed oxide (MOX) fuel fabrication facility. The industry group commented that assessing the MOX contested hearing costs to the fuel facility fee class was unfair, and that it was a violation of the Omnibus Budget Reconciliation Act of 1990 (OBRA-90), as amended, to charge licensees for an agency activity or program from which the licensees receive no benefit. The commenter asserted that fuel facility licensees should not be responsible for bearing the costs of contested hearings associated with MOX fabrication because this process has no relation to the NRC's regulatory services from which fuel facility licensees obtain a benefit.² The commenter added that the beneficiaries of the MOX program are the Federal government and the nation's citizenry because it will aid in the reduction of weapons-grade plutonium. The commenter contended that commercial fuel facility licensees should not have to subsidize the Federal government's efforts to ensure national security, and that such costs should be appropriated through the General Fund and removed from the NRC fee base.

The NRC responded that it must recover its hearing costs through either part 170 fees for services or through part 171 annual fees in order to recover most of its budgeted costs (less

²The MOX program is a Federal government initiative to ensure national security through the disposition of plutonium from dismantled atomic weapons.



CHIEF FINANCIAL OFFICER

REQUEST REPLY BY: 7/23/02

UNITED STATES
NUCLEAR REGULATORY COMMISSION

WASHINGTON, D.C. 20555-0001

July 17, 2002

COMSECY-02-0040

*Approved subject to
attached edits*

*Ellie Truffee Jr
7/19/02*

MEMORANDUM TO: Chairman Meserve
Commissioner Dicus
Commissioner Diaz
~~Commissioner McGaffigan~~

FROM: Jesse L. Funches *Jesse L. Funches*
Chief Financial Officer

SUBJECT: PROPOSED RULE - PART 170 FEES FOR CONTESTED
HEARINGS RELATED TO NATIONAL SECURITY INITIATIVES

Attached is a proposed rule that would recover costs associated with contested hearings involving U.S. Government national security-related proceedings through part 170 fees assessed to the affected applicant or licensee. The proposed rule reflects the Commission's decision in its June 7, 2002, Staff Requirement Memorandum - COMSECY-02-0029.

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²The MOX program is a Federal government initiative to ensure national security through the disposition of plutonium from dismantled atomic weapons.

the amounts appropriated from the Nuclear Waste Fund) through fees as required by OBRA-90, as amended. The Commission's longstanding policy of recovering contested hearing costs through part 171 annual fees assessed to the affected class of licensee has been confirmed repeatedly in the course of many past fee rulemakings, in court pleadings, and in an NRC report to Congress on fees.

In this case, however, the Commission has stated in the FY 2002 final fee rule that there is merit in the commenter's concern about the assessment of annual fees targeted to the fuel facility class for the MOX contested hearing costs, because ^(the NRC licensing action that is the subject of) the hearing involves a U.S. Government national security initiative to dispose of plutonium stockpiles. Accordingly, the FY 2002 final fee rule provided that FY 2002 budgeted costs for the MOX contested hearing be recovered through part 171 annual fees assessed to all classes of licensees. The final rule also stated that it was the Commission's intent to issue a proposed rule for public comment that would, beginning in FY 2003, recover the costs for contested hearings ^{on licensing actions} involving U.S. Government national security initiatives through part 170 fees assessed to the affected applicant or licensee. X

Accordingly, the NRC is seeking public comment on its proposal to recover the agency's costs for contested hearings ^{on licensing actions} directly involving U. S. Government national security initiatives, as determined by the NRC, through part 170 fees assessed to the affected applicant or licensee. This proposed change would be a special exception to the Commission's policy of not recovering contested hearing costs through part 170 fees assessed to the affected applicant or licensee. The proposed change would only apply to contested hearings ^{on licensing actions} directly associated with U. S. Government national security initiatives, such as Presidentially-directed national security programs. The affected applicant or licensee would be responsible for the X

payment of the part 170 fees assessed for these types of contested hearings under the proposed approach. However, because part 170 fees would only be assessed for contested hearings ^{on licensing actions} directly involving U. S. Government national security initiatives, the Commission ^X expects that generally the costs would ultimately be borne by the Federal government, rather than the applicant.

In addition to the contested hearing on the MOX fuel fabrication facility application, the contested hearing on the TVA license amendments to produce tritium at the Watts Bar and Sequoyah reactors for the ^{the} nation's nuclear weapons program would be another example of a ^{on a licensing action} contested hearing ^X directly involving a U. S. Government national security initiative for which ^A Part 170 fees would be assessed under this proposed rule. Examples of contested hearings ^{on licensing} ^{actions} that do not involve a U.S. Government national security initiative include the contested hearing on the application for a uranium recovery license filed by Hydro Resources Inc., and the contested hearing on the independent spent fuel storage installation application filed by Private Fuel Storage L.L.C. Furthermore, the proposed rule would ^{leave intact} ~~not change~~ the existing policy of not ^X assessing Part 170 fees for contested hearings associated with applications or licenses that are used to provide routine services to U.S. Government agencies.

It should be noted that the Independent Offices Appropriation Act (IOAA) prohibits the NRC from assessing part 170 fees to Federal agencies, except in limited circumstances, such as licensing and inspection of TVA power reactors. Therefore, the proposed change would not apply to most contested hearings ^{on licensing actions} involving U. S. Government national security initiatives where ^X a Federal agency is the applicant or licensee.

In the future, the Commission plans to consider a similar approach for recovering NRC's costs for other activities involving U. S. Government national security-related programs, such as allegations and 10 CFR 2.206 petitions, through part 170 fees assessed to the applicant or licensee.

II. Proposed Action

The NRC is proposing to amend 10 CFR part 170 to establish a provision for assessing part 170 fees to the affected applicant or licensee to recover the NRC's full costs of contested hearings ^{on licensing actions} directly involving U.S. Government national security initiatives, as determined by the NRC. To implement this special exception to the Commission's longstanding policy of not assessing part 170 fees for contested hearing costs, the NRC is proposing to add a fee exemption to §170.11 for contested hearings, and to specifically exclude contested hearings ^{on licensing actions} directly related to U. S. Government national security initiatives, as determined by the NRC, from the fee exemption. The NRC is proposing to revise the definition of *Special Projects* to include contested hearings ^{on licensing actions} related to U. S. Government national security initiatives, and to make corresponding changes to the section related to the payment of special project fees and to fee category J. of §170.21 and fee category 12. of §170.31. Only those contested hearings ^{on licensing} directly associated with a U. S. Government national security initiative, such as those specifically related to Presidentially-directed national security programs, would be subject to cost recovery under part 170. The NRC would continue to recover its costs for those contested hearings that are exempted from part 170 fees through part 171 annual fees assessed to the particular class of licensees.

415 U.S. 345 (1974). In these decisions, the Court held that the IOAA authorizes an agency to charge fees for special benefits rendered to identifiable persons measured by the "value to the recipient" of the agency service. The meaning of the IOAA was further clarified on December 16, 1976, by four decisions of the U.S. Court of Appeals for the District of Columbia: National Cable Television Association v. Federal Communications Commission, 554 F.2d 1094 (D.C. Cir. 1976); National Association of Broadcasters v. Federal Communications Commission, 554 F.2d 1118 (D.C. Cir. 1976); Electronic Industries Association v. Federal Communications Commission, 554 F.2d 1109 (D.C. Cir. 1976); and Capital Cities Communication, Inc. v. Federal Communications Commission, 554 F.2d 1135 (D.C. Cir. 1976). The Commission's fee guidelines were developed based on these legal decisions.

The Commission's fee guidelines were upheld on August 24, 1979, by the U.S. Court of Appeals for the Fifth Circuit in Mississippi Power and Light Co. v. U.S. Nuclear Regulatory Commission, 601 F.2d 223 (5th Cir. 1979), cert. denied, 444 U.S. 1102 (1980). [This court held that --

(1) The NRC had the authority to recover the full cost of providing services to identifiable beneficiaries;

(2) The NRC could properly assess a fee for the costs of providing routine inspections necessary to ensure a licensee's compliance with the Atomic Energy Act and with applicable regulations;

(3) The NRC could charge for costs incurred in conducting environmental reviews required by NEPA;

(4) The NRC properly included the costs of uncontested hearings and of administrative and technical support services in the fee schedule;

(5) The NRC could assess a fee for renewing a license to operate a low-level radioactive waste burial site; and

(6) The NRC's fees were not arbitrary or capricious.]

VIII. Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Commission certifies that this proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. This proposed rule would impose a fee on a very limited number of applicants or licensees to recover the costs of contested hearings involving Commission-specified U. S. Government national security related initiatives, and it is unlikely that these few organizations would fall within the scope of the definition of "small entities" set forth in the Regulatory Flexibility Act or the size standards established by the NRC (10 CFR 2.810).

IX. Backfit Analysis

The NRC has determined that the backfit rule, 10 CFR 50.109, does not apply to this proposed rule and ^{therefore,} that a backfit analysis is not required for this proposed rule. ~~The backfit analysis is not required because these proposed amendments do not require modification of or that would impose backfits as defined in 10 CFR Chapter I,~~ ^{impose any provisions}

~~additions to systems, structures, components, or the design of a facility, the design approval or manufacturing license for a facility, or the procedures or organization required to design, construct, or operate a facility.~~

List of Subjects

10 CFR Part 170 -- Byproduct material, Import and export licenses, Intergovernmental relations, Non-payment penalties, Nuclear materials, Nuclear power plants and reactors, Source material, Special nuclear material.

For the reasons set forth in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 553, the NRC is proposing to adopt the following amendments to 10 CFR Part 170.

PART 170 -- FEES FOR FACILITIES, MATERIALS, IMPORT AND EXPORT LICENSES, AND OTHER REGULATORY SERVICES UNDER THE ATOMIC ENERGY ACT OF 1954, AS AMENDED

1. The authority citation for part 170 continues to read as follows:

Authority: sec. 9701, Pub. L. 97-258, 96 Stat. 1051 (31 U.S.C. 9701); sec. 301, Pub. L. 92-314, 86 Stat. 227 (42 U.S.C. 2201w); sec. 201, Pub. L. 93-438, 88 Stat. 1242, as amended (42 U.S.C. 5841); sec. 205a, Pub. L. 101-576, 104 Stat. 2842, as amended (31 U.S.C. 901, 902).

2. Section 170.3 is amended by revising the definition of Special Projects to read as follows

§170.3 Definitions.

Special Projects means those requests submitted to the Commission for review for which fees are not otherwise specified in this chapter and contested hearings ^{on licensing actions} directly related to U.S. Government national security initiatives, as determined by the NRC. Examples of special projects include, but are not limited to, contested hearings ^{on licensing actions} directly related to Presidentially-directed national security programs, topical report reviews, early site reviews, waste solidification facilities, route approvals for shipment of radioactive materials, services provided to certify licensee, vendor, or other private industry personnel as instructors for part 55 reactor operators, reviews of financial assurance submittals that do not require a license amendment, reviews of responses to Confirmatory Action Letters, reviews of uranium recovery licensees' land-use survey reports, and reviews of 10 CFR 50.71 final safety analysis reports.

3. In §170.11, paragraph (a)(2) is added to read as follows:

§170.11 Exemptions.

(a) ***

(2) A contested hearing conducted by the NRC on a specific application or the authorizations and conditions of a specific NRC license, certificate, or other authorization. This

exemption does not apply to a contested hearing ^{on a licensing actions} that the NRC determines directly involves a U.S. Government national security related initiative, including those specifically associated with Presidentially-directed national security programs. X

4. In §170.12, paragraph (d) is revised to read as follows:

§170.12 Payment of fees.

(d) *Special Project Fees.* (1) Fees for special projects are based on the full cost of the review or contested hearing. Special projects include activities such as --

(i) Topical reports;

(ii) Financial assurance submittals that do not require a license amendment;

(iii) Responses to Confirmatory Action Letters;

(iv) Uranium recovery licensees' land-use survey reports;

(v) 10 CFR 50.71 final safety analysis reports; and

(vi) Contested hearings ^{on licensing actions} directly involving U.S. Government national security initiatives, X

as determined by the NRC.

(2) The NRC intends to bill each applicant or licensee at quarterly intervals until the review or contested hearing is completed. Each bill will identify the documents submitted for review or the specific contested hearing and the costs related to each. The fees are payable upon notification by the Commission.

- 5. In §170.21, the introductory text is presented for the convenience of the user and Category J is revised to read as follows:

§170.21 Schedule of fees for production and utilization facilities, review of standard referenced design approvals, special projects, inspections, and import and export licenses.

Applicants for construction permits, manufacturing licenses, operating licenses, import and export licenses, approvals of facility standard reference designs, re-qualification and replacement examinations for reactor operators, and special projects and holders of construction permits, licenses, and other approvals shall pay fees for the following categories of services.

SCHEDULE OF FACILITY FEES

(See footnotes at end of table)

Facility Categories and Type of Fees

Fees^{1,2}

J. Special projects:

Approvals and preapplication/licensing activities	Full Cost
Inspections ³	Full Cost
Contested hearings ^{on licensing actions} directly related to U.S. Government national	

X

Applicants for materials licenses, import and export licenses, and other regulatory services, and holders of materials licenses or import and export licenses shall pay fees for the following categories of services. The following schedule includes fees for health and safety and safeguards inspections where applicable:

SCHEDULE OF MATERIALS FEES

(See footnotes at end of table)

<u>Category of materials licenses and type of fees¹</u>	<u>Fee^{2,3}</u>

12. Special projects:	
Approvals and preapplication/licensing activities	Full Cost
Inspections	Full Cost
Contested hearings ^{on licensing actions} directly related to U.S. Government national	
security initiatives	Full Cost

¹ Types of fees - Separate charges, as shown in the schedule, will be assessed for pre-application consultations and reviews and applications for new licenses and approvals, issuance of new licenses and approvals, certain amendments and renewals to existing licenses