Duke Power Company
ATTN: W. R. McCollum, Jr.
Vice President
Oconee Nuclear Site
P.O. Box 1439
Seneca, SC 29679

January 13, 1998

Dear Mr. McCollum:

This is to acknowledge receipt of your December 18, 1997, letter requesting an exemption from 10 CFR 171 for your ISFSI specific License SNM-2503, Docket 72-04 and the general license provisions of 72.214.

We are working with the technical staff on the issues you raised in support of your request and plan to respond in the near future.

If you have any questions, please contact Glenda Jackson at 301-415-6057.

Sincerely,

(Signed) Diane B. Dandois

Diane B. Dandois, Chief
License Fee and Accounts Receivable Branch
Division of Accounting and Finance
Office of the Chief Financial Officer

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A Duke Energy Company

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December 18, 1997

Executive Director for Operations, and
Document Control Desk
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Subject: Duke Energy Corporation
Oconee Nuclear Site
Independent Spent Fuel Storage Installation (ISFSI)
Materials License No. SNM-2503 Docket No. 72-04
Request for Exemption from the Requirements of 10 CFR Part 171

Gentlemen:

Pursuant to 10 CFR Part 171.11(d), Duke Energy Corporation hereby requests an exemption from the requirements of 10 CFR Part 171 that would impose a duplicate annual fee in connection with Duke's use of the General License in 10 CFR, Part 72, Subpart K, 72.214, Certificate No. 1004 at the Oconee Nuclear Site ISFSI. The grounds supporting this exemption request are set forth in the enclosed attachment. Duke submits that, under the circumstances described in the accompanying attachment, the imposition of an additional annual user would result in a significantly disproportionate allocation of NRC costs to Duke Energy Corporation.

Questions on this exemption request should be directed to E.D. Price Jr. at (864) 885-4388.

Very truly yours,

W. R. McCollum, Jr.
Vice President, Oconee Nuclear Site

9712230073 Duke3++

cc: Mr. Luis A. Reyes
Administrator, Region II
U.S. Nuclear Regulatory Commission
61 Forsyth Street, S. W., Suite 23T85
Atlanta, GA 30303

Mr. D. E. LaBarge
U.S. Nuclear Regulatory Commission
Office of Nuclear Reactor Regulation
Washington, D.C. 20555

Mr. M. A. Scott
NRC Resident Inspector
Oconee Nuclear Site

Attachment **December 18, 1997**

DUKE ENERGY CORPORATION REQUEST FOR EXEMPTION FROM THE REQUIREMENTS OF 10 C.F.R. §171.16

Pursuant to 10 C.F.R. § 171.11(d), Duke Energy Corporation ("Duke") herein requests an exemption from the requirements of 10 C.F.R. Part 171 that would impose a duplicate annual fee of $ 283,000[1] in connection with Duke's use of the general license in 10 C.F.R. Part 72, Subpart K at the Oconee Nuclear Site Independent Spent Fuel Storage Installation ("ISFSI"). The grounds supporting this exemption request are set forth below. Duke submits that, under the circumstances described below, the imposition of this additional annual user fee would result in a significantly disproportionate allocation of NRC costs to Duke Energy Corporation.

I. Background re Oconee Nuclear Site ISFSI

Duke currently stores dry spent nuclear fuel in an ISFSI located at the Oconee Nuclear Site. This activity is authorized by an NRC site-specific ISFSI license (SNM-2503), which was issued in 1990 pursuant to 10 C.F.R. Part 72. Under this specific license, Oconee has dry storage capacity for up to 88 storage modules of spent nuclear fuel (SNF).

Duke' specific license for the Oconee ISFSI authorized use of the VECTRA NUHOMS-24P spent fuel storage system. This system is comprised of the following:

-- seal welded metal dry storage canisters (DSCs), [each of which] provide for the confinement of 24 fuel assemblies;

-- a Transfer Cask (TC) used to transfer and protect the loaded DSCs while they are in transit from the Spent Fuel building to the ISFSI;

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[1] NRC's FY 1997 Revision of Fee Schedules, 62 Fed. Reg. 29,194 (May 29, 1997).

-- concrete Horizontal Storage Modules (HSMs) that house the loaded DSCs for long term storage;

-- auxiliary transfer equipment used to move the loaded transfer cask from the Spent Fuel Building to the ISFSI location.

The Oconee ISFSI currently contains forty loaded Horizontal Storage Modules, twenty in Phase I and twenty in Phase II. Duke is now involved in Phase III activities at the facility. Using the standardized design, the ISFSI's storage capacity may be expanded to add another 44 spent fuel storage modules. Currently Duke has constructed 8 modules of the standardized design. As was the case with the move from Phase I to Phase II, the move to Phase III (the standardized design) will be unnoticeable in terms of spent nuclear fuel operations.

Under NRC fee regulations in 10 C.F.R. Part 171, Duke currently pays the Commission an annual license fee as a holder of a Part 72 specific license for dry cask storage at the Oconee ISFSI. This fee is paid on a quarterly basis, and changes each year in accordance with the NRC budget. During fiscal year 1996, the annual fee was $260,900.[2] During FY 1997 (which ended September 30th, 1997), this license fee increased to $ 283,000 per year.

In addition to its Part 72 specific license, Duke will also use the Part 72 general license (set forth in Section 72.210) as authority to store additional SNF during Phase III of the operation of the Oconee ISFSI. This general license is limited to storage of spent fuel in casks approved under the provisions of part 72, Subpart K. Pursuant to that subpart, the NRC issued a Certificate of Compliance to VECTRA for the Standardized NUHOMS system in 1995. The Standardized NUHOMS system, the use of which has been approved under the Part 72 general license, is very similar to the spent fuel storage system currently in use at the Oconee ISFSI.

A number of factors supported Duke's decision to use the VECTRA Standardized NUHOMS system for continued spent fuel storage during Phase III of the Oconee ISFSI's operation. For example, there are numerous

[2] NRC's FY 1996 Revision of Fee Schedules, 61 Fed. Reg. 16,220 (April 12, 1996).

similarities between the Oconee site-specific NUHOMS system and the Standardized NUHOMS system which make the latter attractive for future use at the Oconee ISFSI. In fact, the NUHOMS system that was licensed for use at the Oconee site-specific ISFSI provided the basis for the standardized NUHOMS system. This similarity will also allow Duke the economic benefit of using the same transfer equipment and transfer cask during Phase III as were used during earlier phases of operation.

Along with the monetary savings achieved by using the same transfer equipment and processes, Duke's years of experience with the use of the NUHOMS system at the ISFSI help to ensure a high level of confidence that operation of the Oconee ISFSI will continue to be conducted in a manner that protects public health and safety. Moreover, the standardized NUHOMS system also offers slight enhancements, such as allowing for construction in smaller increments and permitting storage of hotter spent fuel (five year cooled versus ten year cooled fuel). In sum, Duke has opted to construct and operate Phase III of the Oconee ISFSI under the Part 72 general license in order to limit the time, expense and licensing effort required for implementation.

In the end, the spent fuel storage activity that will be conducted during Phase III of the ISFSI's operation will be virtually identical to that conducted during earlier phases, regardless of whether Phase III storage is authorized pursuant to Oconee's Part 72 specific license or the Part 72 general license. As discussed below, the only substantial difference is in the annual user fees associated with the different NRC licensing approaches.

II. Background re Part 171 Annual User Fees

The NRC is required to recover approximately 100% of its budget by assessing two types of fees.[3] NRC license and inspection fees imposed under 10 C.F.R. Part 170 are designed to recover the NRC's cost of "providing individually identifiable services to specific applicants for, and holders of, NRC licenses and approvals.[4] By contrast, NRC annual user

[3] See 56 Fed. Reg. 31, 472 et seq. (July 10, 1991) (publication of final rule mandating 100% fee recovery).

[4] 56 Fed. Reg. 31, 472 (July 10, 1991); see also 62 Fed. Reg. 29, 194 (May 29, 1997)

fees imposed under 10 C.F.R. Part 171 are intended to recover NRC budgeted costs for "generic and other research activities directly related to the regulation of materials licenses," and "other safety, environmental, and safeguards activities for materials licenses." except for costs for licensing and inspection activities directly associated with plant-specific licensing and inspections which are recovered under Part 170. See 10 C.F.R. §171.16(b). In assessing these annual user fees, the Commission applies the principle that "licensees who require the greatest expenditure of agency resources should pay the greatest annual fee". (56 Fed. Reg. at 31, 480).

With respect to annual user fees, 10 C.F.R. § 171.16(a)(5) provides that persons who conduct activities authorized under 10 C.F.R. Part 72 for independent storage of spent nuclear fuel and high level waste:

> shall pay an annual fee for each license, certificate, approval or registration the person(s) holds on the date the annual fee is due. If a person holds more than one license, certificate, registration, or approval, the annual fee will be the cumulative total of the annual fees applicable to the licenses, certificates, registrations or approvals held by that person.

This language suggests that Duke's use of the Part 72 general license for Phase III storage activities may subject it to duplicate user fees under Section 171 under the theory that Duke will "hold more than one license" under Part 72.[5] Should the NRC follow this line of reasoning, the Commission would collect duplicate annual user fees from Duke for its Part 72 spent fuel storage, even though the same activity (SNF storage) will be carried out under the specific license and the general license. At FY 1997 rates, the NRC user fees imposed for both a specific license and a general license under Part 72 would total approximately $566,000 per year ($283,000 per license). Clearly the imposition of an additional annual fee for the use of the Part 72 general license would diminish significantly the attractiveness of this preferred licensing approach.

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[5] In this regard, see Section 171.16(d), "Schedule of Materials Annual Fees and Fees for Government Agencies Licensed by NRC," categories 1.B. and 13.B., 2 Fed Reg. 29,194, 29,214-216.

III. Duke's Exemption Request Satisfies the Criteria of Section 171.11(d)

With respect to exemptions, 10 C.F.R. § 171.11 (d) provides that: The Commission may grant a materials licensee an exemption from the annual fee if it determines that the annual fee is not based on a fair and equitable allocation of the NRC costs. The following factors must be fulfilled as determined by the Commission for an exemption to be granted.

1. There are data specifically indicating that the assessment of the annual fee will result in a significantly disproportionate allocation of costs to the licensee, or class of licensees; or

2. There is a clear and convincing evidence that the budgeted generic costs attributable to the class of licensees are neither directly or indirectly related to the specific class of licensee not explicitly allocated to the licensee by Commission policy decisions; or

3. Any other relevant matter that the licensee believes shows that the annual fee was not based on a fair and equitable association of NRC costs.

Under the circumstances described in this application, the NRC's imposition of an additional Part 171 annual user fee in connection with Duke Energy Corporation's use of the Part 72 general license for Phase III of the Oconee ISFSI would reflect a significantly disproportionate – and thus inequitable –misallocation of NRC costs on Duke. The cost allocation would impose a disproportionate financial burden on Duke because Duke (in contrast to all other current Part 72 licensees) would be required to pay twice, through duplicate annual user fees, for conducting the same licensed activity (spent fuel storage) that other licensees conduct under a single Part 72 license. Accordingly, pursuant to Section 171.11(d), Duke requests that the NRC exempt it from the annual user fee assessed for Part 72 general licenses.

The Imposition of an NRC Annual User Fee for Duke Energy Corporation's Use of the Part 72 General License Will Result in a Significantly Disproportionate Allocation of Costs to Duke.

Since Duke intends to store spent nuclear fuel at its Oconee ISFSI under both the Part 72 specific license and the Part 72 general license, it could be assessed two annual user fees for the same Part 72 activities under the provisions of Section 171.16(a)(5). If Duke Energy Corporation is deemed to "hold more than one [Part 72] license" for the purposes of that provision, Duke would presumably be deemed liable for the "cumulative total of the annual fees applicable to the licenses" that it holds under Part 72.

Should the NRC so interpret this regulation, we understand that Duke Energy Corporation will be the only NRC licensee to date to be subjected to duplicate annual user fees in connection with its spent fuel storage activity. While there are other Part 72 ISFSIs that incorporate different vendors and use more than one storage system, Duke understands that they all do so under a single, site-specific Part 72 license. Still other ISFSIs use the Part 72 general license exclusively. Accordingly, the licensees that operate these other ISFSIs are only charged a single annual user fee for their Part 72 activities. By contrast, Duke could be charged an additional fee per year ($283,000 in 1997), every year, because it has elected to use the general and specific licenses under Part 72. Such an allocation of NRC costs to Duke under Section 171.16(a)(5) is clearly disproportionate, and warrants an exemption.

Moreover, such an allocation of costs to Duke is manifestly unfair in this instance because Duke will be performing **the same activity** – spent fuel storage—under its Part 72 specific license and the Part 72 general license as other similarly situated licensees are performing under a single Part 72 license. Viewed from this perspective, the imposition of a second annual user fee for Part 72 activities at the Oconee ISFSI would be duplicative.

In this regard, see Allied-Signal, Inc. v. U. S. NRC, 988 F.2d 146 (D.C. Cir. 1993), where the court overturned the NCR's denial of an

exemption request under 10 C.F.R. § 171.11(d). That exemption request was filed by a licensee who owned and operated two separately licensed low enriched uranium manufacturing facilities. The licensee asserted that it held separate licenses for the two facilities solely because of historical chance, that the two facilities were operationally equivalent to the single-plant, single license facilities of other LEU manufacturers, and that it should, therefore, not have to pay a double annual fee under Part 171. The Court ruled that the "double burden" for the licensee, measured against the "de minimis additional burden" that the Commission had shown, amply overcame the hurdle established by Section 171.11(d). Accordingly, the Court found the NRC's denial of the exemption request arbitrary and capricious, and it directed the Commission to grant an exemption on the additional fees collected as a result of the double licensing of the facilities in question. Allied-Signal, 988 F.2d at 152-53.[6]

In summary, Duke requests that the NRC exempt it from any annual user fee (currently $283,000 for FY 97) assessed under Section 171.16(a)(5) in connection with Duke's use of the Part 72 general license at the Oconee ISFSI. Duke already pays the NRC an annual user fee in connection with its Part 72 ISFSI activity under an NRC specific license. As discussed above, the Oconee ISFSI should not be assessed duplicate annual user fees for its spent fuel storage, particularly since this activity will remain the same throughout Phases I, II, and III of the ISFSI's operation. The imposition of an additional user fee would result in a significantly disproportionate allocation of costs to Oconee without a noticeable increase in NRC costs. Thus, this annual fee would not be based upon a fair and equitable allocation of the NRC costs involved, as required by 10 C.F.R § 171.11(d).

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[6] The many parallels between the two SNF storage systems to be used at the Oconee ISFSI under the specific and the general licenses further emphasize the similarity in the Part 72 activity being conducted there. The site-specific spent fuel storage system currently in use is the predecessor to, and formed the technical basis for, the standardized NUHOMS storage system that will be used during Phase III. The existing Oconee NUHOMS system was heavily referenced in the [NRC submittal describing the standardized NUHOMS system]. The system components being added to Phase III of the ISFSI operation are very similar to those used for Phases I and II. The spent fuel canisters and transfer cask will be identical, and the old and new storage modules are very similar (i.e., manufactured from similar materials and designed using the same codes and calculations).