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August 2, 2004

By Federal Express

Director
Office of Nuclear Reactor Regulation
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Re: Matter of All Power Reactor Licensees and Research Reactor Licensees Who Transport Spent Nuclear Fuel (Docket and License Nos. Redacted by Commission)

Dear Sir or Madam:

Enclosed please find a copy of Public Citizen, Inc.'s Answer and Request for Hearing on "Order Modifying License (Effective Immediately)," which responds to the Order published in the Federal Register in the captioned matter on July 13, 2004 (69 Fed. Reg. 42071). The Answer and Request for Hearing has been filed with the Secretary of the Commission today by e-mail.

Please note that although it is Public Citizen's position that this Answer and Request for Hearing is timely (for the reasons stated therein), the Answer and Request for Hearing also contains a written request that the Director, Office of Nuclear Reactor Regulation, grant an extension of time for filing in the event that it is deemed not timely. The grounds for this request are that the Order was not available to the public until its publication on the Federal Register on July 13, 2004, and that Public Citizen has acted diligently by filing its Answer and Request for Hearing within 20 days of that date.

Sincerely yours,

Scott L. Nelson

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UNITED STATES
NUCLEAR REGULATORY COMMISSION

In the Matter of All Power Reactor Licensees and Research Reactor Licensees Who Transport Spent Nuclear Fuel.	)	Docket Nos: (Redacted) License Nos: (Redacted) EA (Redacted)

PUBLIC CITIZEN, INC.'s ANSWER AND REQUEST FOR HEARING ON "ORDER MODIFYING LICENSE (EFFECTIVE IMMEDIATELY)"

Public Citizen, Inc., on behalf of itself and its members, submits this Answer and Request for Hearing in response to the Commission's "Order Modifying License (Effective Immediately)" (the "Order") in this matter, which was published in the Federal Register on July 13, 2004 (at 69 Fed. Reg. 42071). Public Citizen requests a hearing on its contention that the Order is unlawful because it is a substantive regulation, and it has been promulgated without the notice-and-comment rulemaking procedures required by the Administrative Procedure Act, 5 U.S.C. § 553, and the Atomic Energy Act, 42 U.S.C. § 2239(a).[1]

[1] Public Citizen believes that this Answer and Request for Hearing is timely. The Order was first published in the Federal Register on July 13, 2004, and this Answer and Request for Hearing is being filed within 20 days of that date. Although the published Order purports to be dated July 2, 2004, and says that any interested person who contests the lawfulness of the Order must file an Answer and Request for Hearing within 20 days, this Answer and Request for Hearing is timely because the Order does not appear to have been available to the public in any form until July 13, 2004. (Indeed, in repeated searches of the NRC's website during the week of July 26, counsel for Public Citizen was unable to find the Order, or even any mention of it, on the website.) Therefore, the time for seeking a hearing should run from the date of publication, in accordance with the Commission's general policy that "[w]here an opportunity for hearing is published in the Federal Register, the deadline for hearing opportunity is determined by the date of publication in the Federal Register." www.nrc.gov/what-we-do/regulatory/adjudicatory/hearing-license-applications.html

Should the Commission take the view that the time for an affected member of the public to seek a hearing began to run on July 2 even though the Order was not available on that date, Public Citizen requests that the Director of the Office of Nuclear Reactor Regulation grant it an extension of time, to and including today's date (August 2, 2004), to request a hearing, on the

A. **Public Citizen's Interest in the Proceeding.**

Public Citizen, Inc., has its principal address at 1600 20th Street, N.W., Washington, D.C. 20009, and its telephone number is (202) 588-1000. Because Public Citizen is not a licensee, we begin by setting forth how Public Citizen's interests are adversely affected by the Order and addressing the requirements of 10 C.F.R. § 2.309, as required by Part IV of the Order. Public Citizen is a nonprofit membership organization devoted to representing the interests of consumers and the public on a wide range of issues, including the safety of atomic energy as well as procedural regularity and openness in the operations of the government of the United States. In pursuit of these interests, Public Citizen has intervened in Commission licensing proceedings and sought judicial review of Commission regulations and orders, including the Commission's April 2003 order revising the "design basis threat" regulation for power reactors.[2] Public Citizen and its members assert a right to participate in this matter under 5 U.S.C. § 553 and 42 U.S.C. § 2239(a), which provide members of the public a right to participate in NRC rulemakings through the notice-and-comment process.

The interests of Public Citizen and its members are adversely affected by the Order at issue here because of their strong, and very real, interest in the adequacy of security for spent nuclear fuel shipments. Public Citizen has many members who travel on and live and work near rail and highway routes used, or planned to be used, for the shipment of spent nuclear fuel.[3] Should inadequate security measures for the transportation of spent fuel result in sabotage or a

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ground that the unavailability of the Order until 11 days after its purported date constitutes good cause for such an extension.

[2] *Public Citizen, et al., v. United States Nuclear Regulatory Commission*, No. 03-1181 (D.C. Cir.) (oral argument scheduled for September 10, 2004).

[3] The Declaration of one such member, Cory Conn, is submitted herewith. As the Declaration indicates, Mr. Conn has specifically authorized Public Citizen to represent his interests in this matter.

terrorist attack leading to the release of radioactive materials, those members are at risk of injury or disease caused by exposure to radiation. Similarly, if inadequate security were to lead to the hijacking of shipments of spent fuel and their use in the creation of a "dirty bomb" or similar weapon, Public Citizen's members who live in cities that are likely targets of attack through such means would stand to suffer injuries, disease, and damage to their property.

The vital interest of Public Citizen and its members in the adequacy of the Commission's rules for the security of spent nuclear fuel shipments has been impaired by the Commission's promulgation, without notice-and-comment procedures required by law, of new rules governing such shipments. The Commission's action deprives Public Citizen and its members of their opportunity to submit comments aimed at ensuring that the measures required by the Commission are sufficient to protect them and other members of the public from the dangers posed by terrorist threats to shipments of radioactive materials. The Order's issuance thus not only denies Public Citizen and its members their procedural rights under the APA and AEA, but also, to the extent that the failure to consider public comments may have resulted in an insufficiently protective set of rules, threatens their physical safety and well-being.

B. Public Citizen's Contention: The Order Constitutes the Promulgation of a Rule Without Required Notice-and-Comment Rulemaking Proceedings.

Public Citizen seeks a hearing on its contention that the Order, despite being labeled an enforcement action, is in reality the promulgation of a rule, and is subject to the procedural requirements imposed on Commission rulemaking by the APA and the AEA.[4] The Order at

[4] Public Citizen does not believe that it is necessary for it to request a hearing in order to preserve for judicial review its contention that the Commission's order is a procedurally defective rulemaking. *See NRDC v. NRC*, 666 F.2d 595 (D.C. Cir. 1981). However, because the Commission has taken the position in its briefs in the pending case of *Public Citizen v. NRC*, No. 03-1181 (D.C. Cir.), that a request for a hearing is a necessary prerequisite to a Hobbs Act challenge to such an action by the Commission, we are filing this request for hearing as a protective matter.

issue, by its terms, supplants published regulations governing the security of spent nuclear fuel shipments. As the Order acknowledges, "Commission regulations for the shipment of spent nuclear fuel at 10 CFR 73.37(a) require these licensees to maintain a physical protection system that meets the requirements contained in 10 CFR 73.37(b), (c), (d), and (e)." The Order imposes different "compensatory requirements" that will remain in effect "until the Commission determines otherwise," and that will govern the behavior of licensees "notwithstanding any Commission regulation or license to the contrary."

In promulgating the Order without notice and an opportunity for comment by interested persons such as the petitioners, the NRC violated the APA, the Atomic Energy Act, and its own regulations, and the resulting rule is unlawful under 5 U.S.C. § 706(2)(D) as agency action taken "without observance of procedure required by law." Section 4 of the APA provides that when an agency issues a substantive rule that imposes binding obligations on the agency or a private person or entity, it must comply with the requirement of notice-and-comment rulemaking. *See* 5 U.S.C. § 553; *see, e.g., Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003). Both the Atomic Energy Act and the NRC's regulations impose similar requirements. *See* 42 U.S.C. § 2239(a); 10 C.F.R. § 2.804; *Union of Concerned Scientists v. NRC*, 711 F.2d 370, 380-81 (D.C. Cir. 1983).

Here, the Commission's action constituted the issuance of a rule subject to these requirements both because it prospectively imposed binding requirements on private entities subject to NRC's authority, *see, e.g., Sprint Corp.*, 315 F.3d at 373, and because it amended an existing legislative rule. *See, e.g., id.* at 374. The NRC's utter failure to comply with the procedural requirements applicable to the issuance of such a rule compels the conclusion that the agency's action was unlawful, and that the agency must, if it wishes to promulgate new security

standards, conduct a rulemaking in accordance with the requirements of the APA, the Atomic Energy Act, and its own regulations. *See, e.g., Sugar Cane Growers*, 289 F.3d at 95-98.

The courts have long required agencies to adhere strictly to the requirement that "[u]nder the APA, agency rules may be issued only after the familiar notice-and-comment procedures enumerated in the statute are completed." *Community Nutrition Institute v. Young*, 818 F.2d 943, 945 (D.C. Cir. 1987) (citing 5 U.S.C. § 553; footnote omitted). The plain terms of the APA, together with a long line of judicial decisions construing it, make clear that in issuing the Order, the NRC promulgated a rule. The NRC's failure to follow the rulemaking procedures prescribed by the APA, the Atomic Energy Act, and the agency's own regulations renders the resulting rule unlawful.

1. The APA, the Atomic Energy Act, and the NRC's Own Regulations Require Notice-and-Comment Procedures for the Promulgation of Substantive Rules.

Section 4 of the APA, 5 U.S.C. § 553, provides that, to promulgate a rule, an agency must publish a rulemaking notice that sets forth the "time, place, and nature of public rule making proceedings," refers to the "legal authority" for the proposed rule, and describes the "terms or substance of the proposed rule" or the "subjects and issues involved." 5 U.S.C. § 553(b). Thereafter, the "agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments," shall consider "the relevant matter presented," and shall "incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c). These requirements apply to all "rules" except for "interpretative rules, general statements of policy, or rules of agency organization, procedure and practice," unless "the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(A) & (B).

The requirements of § 553(b) are echoed almost verbatim in the NRC's own regulations, which provide that whenever the NRC "proposes to adopt, amend, or repeal a regulation," it will follow notice and comment procedures unless one of the § 553(b) exceptions is applicable. 10 C.F.R. § 2.804. Similarly, the Atomic Energy Act itself, in requiring a "hearing" before the agency may promulgate "rules and regulations dealing with the activities of licensees," 42 U.S.C. § 2239(a), has been held by the courts to embody the requirement of notice-and-comment rulemaking — a requirement that, unlike the requirements of 5 U.S.C. § 553, is not subject to a "good cause" exception, reflecting the great importance placed by the Atomic Energy Act on public participation in matters relating to atomic power. *Union of Concerned Scientists v. NRC*, 711 F.2d at 380-81. [5]

2. The Order Promulgated a Substantive, or "Legislative," Rule.

a. The Order Imposes Binding Requirements on Private Entities.

Under the APA, a "rule" is "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4). The Order easily meets this definition: It is a statement of general applicability to NRC licensees, and it is designed both to "implement" and "prescribe" both "law" and "policy." In short, it tells regulated entities what they are required to do on pain of sanctions imposed through enforcement proceedings.

[5] The Commission has in the past asserted that *Union of Concerned Scientists*' holding that the Atomic Energy Act does not permit exceptions to notice-and-comment rulemaking should be limited only "to rulemakings which specifically amend reactor licenses." 50 Fed. Reg. 13006, 13008 (April 2, 1985) (order issuing final rule amending 10 C.F.R. § 2.804 to permit exceptions similar to those in 5 U.S.C. § 553(b)). Even if the NRC's position were correct, this rulemaking would fit precisely into that category, since the orders in question purport to "modify" licenses.

Judicial decisions leave no room for doubt that the Order is not only a rule, but also a substantive or "legislative" rule (as opposed to an "interpretative" rule), and thus is subject to all of the procedural requirements set forth in 5 U.S.C. § 553. The most essential characteristic of substantive or legislative rules is that they "grant rights, impose obligations, or produce other significant effects on private interests." *Batterton v. Marshall*, 648 F.2d 694, 701-02 (D.C. Cir. 1980). Put another way, legislative rules are "presently binding norms," *Community Nutrition Institute v. Young*, 818 F.2d at 947, that are "directly aimed at and enforceable against" private entities, *CropLife America v. EPA*, 329 F.3d 876, 881 (D.C. Cir. 2003), that create "new rights or duties," *Orengo Caraballo v. Reich*, 11 F.3d 186, 195 (D.C. Cir. 1993), and that "bin[d] private parties or the agency itself with the 'force of law.'" *General Electric Co. v. EPA*, 290 F.3d 377, 382 (D.C. Cir. 2002). In sum, "an agency's imposition of requirements that 'affect subsequent [agency] acts' and have a 'future effect' on a party before the agency triggers the APA notice requirement." *Sprint Corp. v. FCC*, 315 F.3d at 373 (emphasis added; citation omitted).

Applicable case law "likewise make[s] clear that an agency pronouncement will be considered binding as a practical matter if it ... appears on its face to be binding ...." *General Electric*, 290 F.3d at 383. Though the specific features of its "face" are hidden from view because the new standard has not been disclosed to the public, the Order nonetheless "appears on its face to be binding." The D.C. Circuit has held that when the NRC imposes a requirement on all licensees, it has engaged in "rulemaking." *Union of Concerned Scientists v. NRC*, 711 F.2d at 380, 382. The Order does just that: It provides that all licensees are subject to the new standard (unless they obtain a specific modification) and that the standard is enforceable against licensees in NRC administrative proceedings. "This clear and unequivocal language ... creates a '"binding norm"' that is '"finally determinative of the issues or rights to which it is addressed."'"

CropLife America, 329 F.3d at 881 (quoting *Chamber of Commerce v. Department of Labor*, 174 F.3d 206, 212 (D.C. Cir. 1999) (quoting *Pacific Gas & Elec. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974))). Such a binding requirement is a rule.

b. The Order Amends an Existing Legislative Rule.

If there were any doubt that the Order is a legislative rule, the fact that it expressly imposes new requirements with respect to matters already subject to NRC regulations, and that it governs the activities of licensees notwithstanding the terms of those regulations, lay it to rest. The APA expressly defines "rule making" to include "amending, or repealing a rule," 5 U.S.C. § 551(5), and courts have repeatedly emphasized that the APA means what it says: "'Rulemaking,' as defined in the APA, includes not only the agency's formulation, but also its modification, of a rule." *Air Transport Ass'n of America v. FAA*, 291 F.3d 49, 55 (D.C. Cir. 2002); *accord Paralyzed Veterans of America v. DC Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997) ("Under the APA, agencies are obliged to engage in notice and comment before formulating regulations, which applies as well to 'repeals' or 'amendments.'"); *see also Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1028 (D.C. Cir. 2000) (agency cannot amend rule without notice and comment); *American Mining Congress v. MSHA*, 995 F.2d 1106, 1112 (D.C. Cir. 1995) (same).

That the Order amends a published regulation is evident on its face. The Order expressly acknowledges that requirements concerning its subject matter are already set forth in 10 C.F.R. § 73.37, that it "supplements" those requirements, and that its terms govern the conduct of licensees "notwithstanding any Commission regulation or license to the contrary." As the D.C. Circuit has explained, such an amendment of a regulation can only be effected through rulemaking:

> It is a maxim of administrative law that: "If a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must

itself be legislative."

National Family Planning & Reproductive Health Ass'n v. Sullivan, 979 F.2d 227, 235 (D.C. Cir. 1992) (citation omitted; alteration by the Court); *accord Sprint Corp. v. FCC*, 315 F.3d at 374.

3. The NRC's Promulgation of the Order Was Unlawful.

Here, despite having issued a new substantive rule and amended an existing one, the Commission ignored the rulemaking process called for by the APA, the Atomic Energy Act, and its own regulations, with the result that "interested parties" (5 U.S.C. § 553(c)) such as Public Citizen were completely deprived of notice and an opportunity to comment on the proposed rule. Nor did the agency attempt to excuse itself from compliance with notice-and-comment procedures under 5 U.S.C. § 553(b)(B) or 10 C.F.R. § 2.804(d)(2). Such a determination would have required an express finding, within the text of its orders promulgating the rule, that such procedures were not practicable or were contrary to the public interest. No such determination appears in the Order.[6] *See Sugar Cane Growers*, 289 F.3d at 95 n. 5 (noting that "good cause" exception is unavailable in litigation if not asserted by agency at time of rulemaking); *see also United States v. Picciotto*, 875 F.2d 345, 348 (D.C. Cir. 1989) ("To come within [the § 553(b)(B)] exemption, the agency must incorporate, in the rule issued, a statement explaining why it found good cause to omit [notice-and-comment] procedures ...."). And in any event, while the APA rulemaking provisions and the NRC's regulations contain a good cause exception

[6] The Order states only that the NRC has found that the public interest requires that the new rule be made effective immediately, which corresponds roughly to the type of finding required by 5 U.S.C. § 553(d) to bypass the normal requirement that a final rule be effective no earlier than 30 days after publication; but it does not amount to, or even come close to, a finding that affording interested persons prior notice and opportunity to comment would have been impracticable or contrary to the public interest, as required to invoke the exception set forth in 5 U.S.C. § 553(b)(B).

to the notice-and-comment requirement, the D.C. Circuit, as noted above, has held that the Atomic Energy Act does not. *Union of Concerned Scientists v. NRC*, 711 F.2d at 380-81.

Even if the law permitted an exception, and the Commission had attempted to invoke it, there is nothing about the nuclear security that renders proper rulemaking proceedings regarding it impracticable or contrary to the public interest. The steps that should be taken to protect spent nuclear fuel shipments against terrorist attacks are a matter of great public concern and a legitimate subject for public discussion and debate, even — or perhaps especially — when such discussion may lead to the revelation of flaws in security procedures that require a remedy for the protection of the public. *See, e.g.*, United States General Accounting Office, *NUCLEAR REGULATORY COMMISSION: Oversight of Security at Commercial Nuclear Power Plants Needs to Be Strengthened*, GAO-03-752 (Sept. 2003) (reporting that in simulated attacks on nuclear power plants, defenders failed to defeat attackers 54% of the time except when plants artificially increased levels of security above those called for by their security plans); *cf.* National Public Radio, Protecting the Nation's Nuclear Materials, Morning Edition (Feb. 26-27, 2004) (www.npr.org/features/feature.php?wfId=1701249) (reporting that mock terrorism drills at DOE nuclear facilities resulted in "terrorist" successes 20% of the time). Indeed, in 1994, the NRC itself engaged in full notice-and-comment rulemaking, without any suggestion that there was anything inappropriate about public comment on nuclear plant security, when it revised the design basis threat to include the requirement that licensees take measures to protect nuclear reactors against "malevolent use of vehicles" — more commonly known as car or truck bombs. See 59 Fed. Reg. 38889 (Aug. 1, 1994) (notice of final rule); 58 Fed. Reg. 58804 (Nov. 4, 1993) (notice of proposed rule).

Here, by contrast, the NRC attempted an end run around the rulemaking process. Such open disregard of rulemaking procedures prescribed by law would render Section 4 of the APA virtually a dead letter. The courts have made clear that such "an utter failure to comply with notice and comment" is patently unlawful. *Sugar Cane Growers*, 289 F.3d at 96.

4. The Order Cannot Be Defended as a Proper Exercise of "Adjudication."

We anticipate that the Commission will take the position, as it has in the design basis threat litigation, that the Order reflects a permissible choice to promulgate standards through adjudication rather than rulemaking. That view, however, begs the question by assuming that what happened was an "adjudication" merely because that is the label the Commission may choose to put on it. The courts have made clear in a variety of contexts, however, that "[t]he label an agency attaches to its action is not determinative." *Continental Air Lines v. Civil Aeronautics Board*, 522 F.2d 107, 124 (D.C. Cir. 1975) (en banc); *see also Sea-Land Service, Inc. v. Department of Transportation*, 137 F.3d 640, 647 (D.C. Cir. 1998) ("the label placed by the agency on its action is normally not conclusive") (quoting *CBS v. United States*, 316 U.S. 407, 416 (1942)); *Batterton v. Marshall*, 648 F.2d 694, 705 n.58 ("Where necessary, the court will look behind the particular label applied by the agency to challenged action in order to discern its real intent and effect."). "[I]t is the substance of what the [agency] has purported to do and has done which is decisive." *Environmental Defense Fund v. Gorsuch*, 713 F.2d 802, 816 (D.C. Cir.1983) (quoting *CBS*, 316 U.S. at 416). Here, an examination of the substance of the Commission's action belies any claim that it issued its rule through adjudication.

In the design basis threat litigation, the Commission has placed primary reliance on the line of authority exemplified by *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), and *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), in which the Supreme Court recognized that, when an agency resolves cases presented to it for adjudication, it has the power to formulate and elaborate

upon standards that will govern the future conduct of persons and entities subject to regulation. *See Bell Aerospace*, 415 U.S. at 292-94. But what the Supreme Court meant in those cases when it said that "the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion" (*id.* at 294) was *not* that an agency that wants to issue a general rule of prospective application can skip notice-and-comment rulemaking proceedings simply by issuing an order announcing the rule and *calling* it an adjudication. Rather, what the Court meant (and said) was that an agency can choose to forgo rulemaking in favor of a process of elaborating standards of conduct "on a case-by-case basis" through "individual, ad hoc adjudication." *Id.* at 293 (quoting *Chenery*, 332 U.S. at 202-03). In this way, "'[a]djudicated cases may and do ... serve as vehicles for the formulation of agency policies, which are applied and announced therein,' and ... such cases 'generally provide a guide to action that the agency may be expected to take in future cases.'" *Id.* at 294 (quoting *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765-66 (1969) (opinion of Fortas, J.)).

To say that an agency may devise standards of conduct through the process of case-by-case adjudication, however, is not to say that it can freely engage in rulemaking in the guise of adjudication. As the Ninth Circuit has observed, "[a]n agency cannot avoid the requirement of notice-and-comment rulemaking simply by characterizing its decision as an adjudication." *Yesler Terrace Community Council v. Cisneros*, 37 F.3d 442, 449 (9th Cir. 1994). When an agency is not devising a rule of decision applicable to the particular facts of a case before it, but is instead simply announcing an across-the-board standard applicable in the future to a broad class of regulated entities, it is engaging in rulemaking, not adjudication, and it cannot disregard the APA's rulemaking provisions. *See NLRB v. Wyman-Gordon Co.*, 394 U.S. at 764-65; *see*

also Alabama Power Co. v. FERC, 160 F.3d 7, 11 n.5 (D.C. Cir. 1998) ("The APA does not contemplate the use of adjudication to develop rules.").

The D.C. Circuit explained the distinction in *Association of National Advertisers v. FTC*, 627 F.2d 1151 (D.C. Cir. 1979):

> The object of the rule making proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent's past conduct. Typically, the issues relate not to the evidentiary facts, as to which the veracity and demeanor of witnesses would often be important, but rather to the policy-making conclusions to be drawn from the facts. ... Conversely, adjudication is concerned with the determination of past and present rights and liabilities. Normally, there is involved a decision as to whether past conduct was unlawful, so that the proceeding is characterized by an accusatory flavor and may result in disciplinary action.

Id. at 1160 (quoting Attorney General's Manual on the Administrative Procedure Act 14 (1947)). In short, when an agency is "promulgating policy-based standards of general import" outside of the context of a particular case, it is "engaged in rulemaking." *Id.* at 1161. The fundamental dividing line between rulemaking and adjudication is the "recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules ... on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other." *Id.* at 1165 (quoting *United States v. Florida East Coast Railway*, 410 U.S. 224, 245 (1973)).

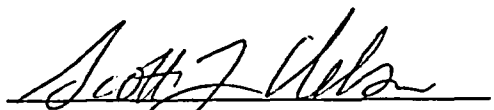
Here, the Order falls well within the realm of rulemaking. In issuing the Order, the Commission did not purport to be deciding a case about whether the practices of a particular licensee satisfied security requirements. The Commission did not "adjudicate" anything in any ordinary sense of the word: No parties appeared before it in a contested proceeding, whether on the record or otherwise, involving the application of law to fact. Rather, the new standard was the result of a "comprehensive review of [the Commission's] safeguards and security programs

and requirements." Based on this policy review, the Commission decided that it needed to revise spent fuel transportation security requirements for all licensees. As is common in rulemaking, "[t]he decision was of general application only"; it "did not purport to decide any individual case"; and it "applied prospectively only." *Motion Picture Ass'n of America v. Oman*, 969 F.2d 1154, 1157 (D.C. Cir. 1992). In short, "[t]he proceeding was a rulemaking." *Id.*

CONCLUSION

In sum, the Commission has issued a rule in the guise of an order, and it has done so without compliance with the procedural requirements applicable to NRC rulemaking under the AEA. For this reason, Public Citizen, Inc. requests a hearing on its admissible contention that the Order is unlawful because it is a rule promulgated without notice-and-comment rulemaking proceedings.

Respectfully submitted,



Scott L. Nelson
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(202) 588-1000

Attorney for Public Citizen, Inc.

August 2, 2004

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Answer and Request for Hearing has been served on August 2, 2004, on the Office of the General Counsel at OGCMailCenter@nrc.gov and on the Director, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001 by Federal Express. No copies have been served on licensees, because no licensees are identified in the Order, or on Regional Administrators, because the contention advanced by Public Citizen is not specific to any particular facility located in a particular region.

Scott L. Nelson

DECLARATION OF COREY J. CONN

1. My name is Corey J. Conn. I am a member of Public Citizen, Inc., an advocacy group that represents the interests of consumers and members of the public on a wide range of issues, including nuclear safety.

2. I live and work in Chicago, Illinois. My home address is 3936 W. George, #1, Chicago, IL, 60618, and my work address is University of Illinois-Chicago College of Medicine, 1853 West Polk Street, Chicago, IL 60612-7332.

3. Both my home and my workplace, as well as my commuter route between them, are adjacent to or closely surrounded by rail lines that have been designated by the Nuclear Regulatory Commission as likely routes for the shipment of spent nuclear fuel to the waste repository at Yucca Mountain, Nevada, if it is constructed. These same rail lines are likely routes for the shipment of spent nuclear fuels to and from the nuclear plants that ring Chicago even before the Yucca Mountain facility begins operations.

4. Chicago is also proximate to interstate highways that are likely routes for the shipment of spent nuclear fuels. I personally travel on interstate highways both in and around the Chicago area and in other parts of the country.

5. As a person who lives and works near rail lines and roadways used for the shipment of spent nuclear fuels and who travels on those same roadways, I would be endangered if inadequate regulation of the security of spent nuclear fuel shipments resulted in a terrorist attack or sabotage that led to the release of radioactive materials.

6. In addition, as a resident of a major U.S. city that is a likely potential target of terrorist attacks, I would be endangered if inadequate regulation of the security of spent fuel

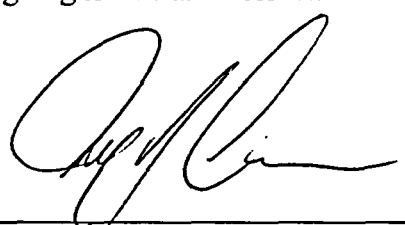
shipments resulted in the hijacking of one or more shipments and the use of radioactive materials it contained to create a "dirty bomb" or other terrorist weapon.

7. My interests have therefore been adversely affected by the NRC's denial of an opportunity for members of the public, including Public Citizen, to have notice and an opportunity to comment on the Commission's new standards for the protection of spent fuel shipments, which have been promulgated as secret orders rather than through rulemaking proceedings.

8. As a member of Public Citizen, Inc., I have authorized it to represent my interests in challenging the NRC's promulgation of its new standards in violation of applicable notice-and-comment rulemaking requirements.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 29, 2004.



Corey J. Conn