

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

September 3, 2004 (10:38AM)

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

**SERVED September 3, 2004**

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In the Matter of )  
)  
)

ALL POWER REACTOR )  
LICENSEES AND RESEARCH )  
REACTOR LICENSEES WHO )  
TRANSPORT SPENT NUCLEAR FUEL )  
\_\_\_\_\_) )

Docket Nos. (Redacted)  
License Nos. (Redacted)

**ORDER**

On July 13, 2004, the Nuclear Regulatory Commission (NRC) published in the *Federal Register* an immediately effective order imposing security requirements on four licensees who plan to transport spent nuclear fuel in the near future.<sup>1</sup> Though the order's caption suggests it applies to all power reactor and research reactor licensees who transport spent nuclear fuel, the order itself states that it applies only to "[t]he licensees identified in Attachment 1. . .".<sup>2</sup> Attachment 1, which was redacted from the *Federal Register* notice for security reasons and to avoid publicly identifying the origin of the upcoming spent fuel shipments, named only four licensees.

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<sup>1</sup> See *In the Matter of All Power Reactor Licensees and Research Reactor Licensees Who Transport Spent Nuclear Fuel; Order Modifying License (Effective Immediately)*, 69 Fed. Reg. 42,071 (July 13, 2004).

<sup>2</sup> *Id.* Previously, the Commission had issued a similar order to other licensees who transport spent nuclear fuel. See *In the Matter of All Power Reactor Licensees, Research and Test Reactor Licensees, and Special Nuclear Material Licensees Who Possess and Ship Spent Nuclear Fuel; Order Modifying License (Effective Immediately)*, 67 Fed. Reg. 63,167 (October 10, 2002).

The order invited adversely affected persons to request a hearing in accordance with 10 C.F.R. § 2.202 and to bring forth “reasons as to why the Order should not have been issued.”<sup>3</sup> On August 2, 2004, Public Citizen, Inc., filed a timely hearing request contending 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. . . .” Public Citizen’s hearing request does not directly challenge the substance of the order.

Public Citizen in its hearing request raises issues analogous to those presently being litigated by Public Citizen and the NRC in the United States Court of Appeals for the District of Columbia Circuit.<sup>4</sup> In that case, Public Citizen alleges that the Commission’s April 29, 2003, design basis threat orders are substantive rules improperly promulgated without notice-and-comment procedures. The parties have filed briefs on the matter and oral argument is scheduled for September 10, 2004.<sup>5</sup>

The D.C. Circuit’s ruling may well provide guidance on the proper resolution of aspects of Public Citizen’s pending hearing request. Adjudicating the merits of Public Citizen’s hearing request before the D.C. Circuit has acted might result in an unnecessary diversion of resources by both the Commission and the parties to this proceeding. Accordingly, this proceeding will be held in abeyance, pending the D.C. Circuit’s upcoming decision in *Public Citizen v. NRC*.

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<sup>3</sup>See 69 Fed. Reg. at 42,073.

<sup>4</sup>*Public Citizen, Inc. and San Luis Obispo Mothers for Peace v. NRC*, No. 03-1181 (D.C. Circuit) (filed June 30, 2003).

<sup>5</sup>Public Citizen has also filed a petition for review in the D.C. Circuit challenging the spent fuel security orders that are the subject of this proceeding. See *Public Citizen v. NRC*, No. 04-1293 (D.C. Circuit) (filed August 31, 2004).

For good cause shown, any party may seek to lift our abeyance order at any time. Such motions, and any other filings in this proceeding, shall be served only on the Secretary, which will in turn serve other parties, as appropriate.<sup>6</sup>

IT IS SO ORDERED.



For the Commission

A handwritten signature in black ink, reading "Annette L. Vietti-Cook".

Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland  
this 3rd day of September, 2004.

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<sup>6</sup>The Secretary is serving a copy of this order, and a copy of Public Citizen's request for hearing, on the licensees named in Attachment 1 of the NRC's July 13, 2004, security order.

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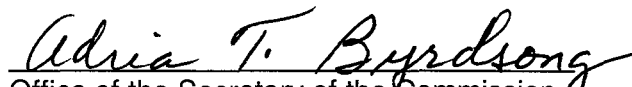
CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION ORDER, DATED 09/03/04, have been served on the appropriate licensees and the named persons below by U.S. mail, first class, or through NRC internal distribution with copies by electronic mail as indicated.

Office of Commission Appellate  
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Washington, DC 20555-0001

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 3<sup>rd</sup> day of September 2004