

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 01/19/05

COMMISSIONERS:

SERVED 01/21/05

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

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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)

CLI-05-06

MEMORANDUM AND ORDER

I. Background

On July 2, 2004, the Nuclear Regulatory Commission (NRC) issued an order to four licensees imposing enhanced security measures for spent nuclear fuel shipments.¹ On August 2, 2004, Public Citizen, Inc., requested a hearing on the order. Public Citizen contends that the security 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).”²

On September 3, 2004, the Commission issued an order holding Public Citizen's hearing

¹See *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). The precise details of this security order are not publicly available because they have been designated Safeguards Information. See *id.* at 42,072.

²Hearing Request at 1.

request in abeyance pending the outcome of related litigation in the D.C. Circuit between Public Citizen and the NRC.³ There, too, Public Citizen maintained that NRC security orders amounted to unlawful “rules.” The D.C. Circuit subsequently held that case in abeyance pending a possible NRC rulemaking.⁴ Hence, on October 29, 2004, the Commission lifted its abeyance order in this case and invited responses to Public Citizen’s hearing request. No responses to Public Citizen’s hearing request have been received.

We have considered Public Citizen’s hearing request carefully, but remain persuaded that it is lawful to enhance security requirements through adjudicatory orders rather than the rulemakings Public Citizen would prefer. Thus, although we will assume *arguendo* that Public Citizen has standing to challenge the order and has stated an admissible contention by raising a procedural claim,⁵ further administrative litigation is pointless. Referral to the Atomic Safety and Licensing Board is unnecessary because Public Citizen has raised purely procedural and legal challenges to the spent fuel security order at issue—there is no need for Board fact-finding or other proceedings in this case. For the reasons stated below, we conclude Public Citizen’s contention lacks merit as a matter of law.

II. Analysis

Public Citizen contends that the Commission’s spent fuel security order is unlawful because it is really a regulation promulgated without the notice-and-comment rulemaking procedures required by the Administrative Procedure Act (APA), the Atomic Energy Act (AEA),

³*Public Citizen, Inc. and San Luis Obispo Mothers for Peace v. NRC*, No. 03-1181 (D.C. Circuit) (filed June 30, 2003).

⁴See *id.*, Order dated September 17, 2004.

⁵See generally 10 C.F.R. §§ 2.309(d), (f); cf. *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92-96 (1993) (allowing NRC litigation on procedural claim).

and NRC regulations.⁶ Whether this contention succeeds or fails turns entirely on Public Citizen's effort to characterize the Commission's security order as a "rule." If the security order is a rule, then the APA's notice-and-comment procedures apply to this proceeding. But if the order is a form of APA adjudication, those procedures are not required.

Public Citizen first argues that the security order is really a rule "because it prospectively imposed binding requirements on private entities subject to NRC's authority. . ."⁷ The Commission's security order unquestionably imposes binding legal requirements and has future effect. But that does not transform the order into a rule. As both the AEA and the APA recognize, binding legal requirements can be imposed in two ways—by the issuance of orders through adjudicatory processes, or by the issuance of rules through notice-and-comment procedures. Nothing in the AEA or the APA requires the Commission to establish prospectively-applicable safety or security standards by rulemaking alone.

If Public Citizen were correct that the Commission is constrained to employ only rulemaking procedures to impose prospective requirements, several provisions of the AEA would be rendered meaningless. For example, language in AEA section 161b.⁸ authorizing the Commission to issue orders to establish safety and security "standards"—*i.e.*, criteria to be followed in the future—would be a dead letter. So would language in AEA section 147⁹ requiring the Commission to prescribe regulations or issue orders as necessary to prohibit the unauthorized disclosure of Safeguards Information.

The APA does not require this result. As the Supreme Court has held, the APA provides

⁶See 5 U.S.C. § 553; 42 U.S.C. § 2239(a); 10 C.F.R. § 2.804.

⁷Hearing Request at 4.

⁸42 U.S.C. § 2201(b).

⁹42 U.S.C. § 2167.

agencies with considerable flexibility to choose between rulemaking and adjudicatory procedures when making law.¹⁰ Here, the Commission chose adjudication for a number of sound reasons. A primary reason was the need to protect the details of the order, which are Safeguards Information and cannot be publicly disclosed. Protection of Safeguards Information is more easily achieved in the adjudicatory context, where well-established procedures for the protection of Safeguards Information exist.¹¹

The Commission also based its choice on the need for regulatory flexibility and administrative efficiency. The order required individual licensees to “notify the Commission. . . if compliance with any of the requirements [in the order] is unnecessary in their specific circumstances,” or if “implementation of any of the requirements would cause the licensee to be in violation of the provisions of any Commission regulation or the facility license.”¹² The order also allowed individual licensees to seek relaxation or modification of the new security requirements upon a showing of “good cause.”¹³ Through these mechanisms, the Commission could tailor its security requirements to the peculiar needs of individual licensees if necessary, and do so in a single adjudicatory proceeding.

Moreover, using the adjudicatory process allows the Commission to more readily adapt its security enhancements in response to an evolving terrorist threat. Prematurely codifying requirements in legislative-type regulations might limit the Commission’s ability to act swiftly and efficiently to deal with future, unanticipated changes to the threat environment.

Still, Public Citizen does not consider this an adjudicatory proceeding because “[t]he

¹⁰See, e.g., *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

¹¹See 10 C.F.R. §§ 2.390(a)(3), (f); 2.705(c); 2.709(f).

¹²69 Fed. Reg. at 42,072.

¹³*Id.*

Commission did not ‘adjudicate’ anything in the 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.”¹⁴ But this is only because the licensees subject to the order did not request a hearing or challenge the particulars of the order, despite their opportunity to do so. Had a party brought forth a substantive challenge to the order, the Commission would have fairly considered that challenge and resolved it, perhaps resulting in substantive changes to the order’s requirements. That this did not actually occur makes this proceeding no less an adjudication.

As a legal matter, this proceeding falls well within the APA’s definition of “adjudication.” Under the APA, “adjudication” includes any “agency process for the formulation of an order.”¹⁵ An “order” may be developed in a “licensing” process—*i.e.*, an “agency process respecting the . . . modification. . . of a license.”¹⁶ Thus, the APA explicitly recognizes proceedings such as this, which result in the issuance of an order modifying licenses, as a form of “adjudication” to which notice-and-comment procedures do not apply.

Public Citizen argues that the security order cannot be considered an adjudication because it is “an across-the-board standard” applicable to “a broad class of regulated entities.”¹⁷ To be clear, the security order Public Citizen challenges applies only to the four licensees the order names.¹⁸ The order does not apply prospectively to applicants for new licenses (as a rule would). And unlike a rule, the order remains in effect only “until the Commission determines

¹⁴Hearing Request at 13.

¹⁵U.S.C. § 551(7).

¹⁶U.S.C. §§ 551(6), (9).

¹⁷Hearing Request at 12.

¹⁸Those licensees had near-term plans to ship spent nuclear fuel, which necessitated the issuance of additional security measures by order.

otherwise. . .”¹⁹ Thus, the order lacks the kind of prospective legal effect that is fundamentally characteristic of NRC regulations.

Public Citizen next argues that the Commission’s decision to act by adjudication rather than rulemaking was impermissible because the order essentially amends existing rules, which cannot be done without following notice-and-comment procedures. Public Citizen relies on language in the order itself to support this argument, noting that the order “govern[s] the behavior of licensees ‘notwithstanding any Commission regulation or license to the contrary.’”²⁰

This argument misinterprets the language and purpose of the order. The order does not repudiate or rescind any NRC safety and security requirements. Rather, the order imposes new, more stringent security requirements that supplement those already found in NRC regulations. The “notwithstanding” clause Public Citizen refers to simply states a rule of construction—if, in implementing the order, licensees perceive a conflict between the baseline requirements of NRC regulations and the supplemental requirements of the order, the more stringent requirement applies.

Public Citizen also argues that the order is an impermissible amendment of NRC regulations because “requirements concerning its subject matter are already set forth in 10 C.F.R. § 73.37. . .”²¹ But this argument goes too far. If accepted, it would mean that the Commission could never issue orders dealing with a given subject once a regulation concerning that subject already exists. Under this theory, the NRC would be forced to adopt needlessly lengthy and prescriptive regulations at every turn, knowing that it could not act on the same subject in the future by issuing adjudicatory orders. Or, Public Citizen’s theory might lead the

¹⁹69 Fed. Reg. at 42,072.

²⁰Hearing Request at 8, *quoting* NRC Order, 69 Fed. Reg. at 42,072.

²¹*Id.*

NRC to rescind all regulations and forgo rulemaking entirely, dealing only in adjudication when developing new requirements. Neither option is desirable or consistent with the APA or the AEA, which afford the Commission discretion in its choice of lawmaking procedures.

In sum, the Commission's decision to impose new requirements by order rather than rule was made quite deliberately and for legitimate reasons. It was not made, as Public Citizen suggests, to achieve "an end run around the rulemaking process" or to deprive interested parties of an opportunity to comment on Commission policy.²²

III. Conclusion

The Commission has met its obligations under the AEA in this proceeding by offering a hearing on the order challenged by Public Citizen. That order did not amend or rescind any safety or security requirements contained in NRC regulations. Therefore, the notice-and-comment procedures set forth in the APA and NRC regulations do not apply. Public Citizen's contention is without merit.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, MD
this 19th day of January, 2005.

²²Hearing Request at 11. As we have frequently stated, the Commission welcomes perspectives on its security policy, and members of the public are free to submit views on the proper scope or content of the NRC's security requirements through written correspondence, a petition for rulemaking under 10 C.F.R. § 2.802, or a petition for enforcement action under 10 C.F.R. § 2.206.