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OFFICE OF SECRETARY
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ADJUDICATIONS STAFF

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

ASLBP No. 03-804-01-OLA

In the Matter of	)	November 22, 2002
	)	
ARIZONA PUBLIC SERVICE COMPANY	)	Docket No. 50-528-OLA
	)	
(Palo Verde Nuclear Generating Station, Unit 1)	)	
	)	

MOTION TO TERMINATE PROCEEDING

Pursuant to 10 CFR 2.730, Arizona Public Service Company ("APS") respectfully requests that the Atomic Safety and Licensing Board ("the Board") terminate the above-captioned proceeding in light of the Nuclear Regulatory Commission ("NRC") Staff's approval ("Approval") of APS's Request for Withdrawal ("Request for Withdrawal") of its September 26, 2002 license amendment request ("LAR") for the Palo Verde Nuclear Generating Station ("PVNGS"), Unit 1. APS submitted its Request for Withdrawal to the NRC Staff on November 19, 2002. The NRC approved APS's Request for Withdrawal on November 22, 2002. A copy of NRC's Approval is attached as Enclosure 1 to this Motion.

As indicated in APS's Motion to Hold Proceedings in Abeyance dated November 21, 2002, Section 2.107(a) of the NRC's regulations provides:

> The Commission may permit an applicant to withdraw an application prior to the issuance of any notice of a hearing on such terms and conditions as it may prescribe or may, on receiving a request for withdrawal of an application, deny

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> the application or dismiss it with prejudice. Withdrawal of an application after the issuance of a notice of a hearing shall be on such terms as the presiding officer may prescribe.

10 CFR 2.107(a).

This rule draws a distinction between the Commission's authority and the Presiding Officer's authority based upon whether or not a Notice of Hearing is issued, which occurs pursuant to 10 CFR 2.105(e)(2). Such a Notice in this matter could only be issued after the Board, as Presiding Officer, has ruled on the pending hearing request and petition to intervene. The Board here has not yet determined whether or not any petitioner has standing, or whether any admissible contention has been articulated, and thus, no Notice of Hearing pursuant to 10 CFR 2.105(e)(2) has been issued.

In "Petitioners' Opposition to APS'[s] Motion to Hold Proceedings in Abeyance" ("Opposition"), Petitioners claim that this Board has jurisdiction based upon its Order dated November 14, 2002, scheduling a Status Conference for November 25, 2002. Petitioners argue that this Board "in effect issued a pre-hearing in the instant action." Opposition at 3. Obviously, an Order establishing a Status Conference is not a "pre-hearing." Moreover, even if the Board had scheduled a pre-hearing conference, *per se*, this would not establish any jurisdiction by the Board over APS's withdrawal of the LAR. It is not unusual for a Board to conduct a pre-hearing conference before ruling on a request for a hearing. Thus, it is normal to conduct such conferences before any Notice of Hearing is issued pursuant to 10 CFR 2.105(e)(2), which occurs after a hearing is granted.

Accordingly, the authority to approve APS's Request for Withdrawal of the LAR resides exclusively in the NRC Staff. *See Vermont Yankee Nuclear Power Corporation*

(Vermont Yankee Nuclear Power Station), CLI-93-20, 38 NRC 83 (1993); *GPU Nuclear Corporation* (Oyster Creek Nuclear Generating Station), CLI-99-29, 50 NRC 331 (1999) (vacating Board decision on withdrawal of LAR, because under 10 CFR 2.717, the jurisdiction of the Board commences when the proceeding commences, and the proceeding commences when a Notice of Hearing is issued).

On November 22, 2002, the NRC Staff approved APS's Request for Withdrawal without condition. As a result, there are now no issues in dispute and no basis for continuing this proceeding. *See North Atlantic Energy Service Corp.* (Seabrook Station Unit No. 1), CLI-98-24, 48 NRC 267 (1998) (noting that licensee's abandonment of its amendment requests rendered the adjudications moot); *Pacific Gas and Electric Co.* (Humboldt Bay Power Plant, Unit 3), LBP-86-1, 23 NRC 25, 26 (1986) (noting that when a license amendment request is rendered moot, there are no issues in dispute which are within the Board's jurisdiction, and no reason to hold a hearing or for the Board to retain jurisdiction).

APS respectfully requests that this Board terminate this proceeding.

Respectfully submitted,

John E. Matthews
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202-739-5524

COUNSEL FOR THE ARIZONA PUBLIC SERVICE COMPANY

Dated November 22, 2002

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

November 22, 2002

Mr. Gregg R. Overbeck
Senior Vice President, Nuclear
Arizona Public Service Company
P. O. Box 52034
Phoenix, AZ 85072-2034

SUBJECT: PALO VERDE NUCLEAR GENERATING STATION, UNIT 1 - WITHDRAWAL OF AMENDMENT REQUEST ON THE STEAM GENERATOR TUBE INSPECTION (TAC NO. MB6378)

Dear Mr. Overbeck:

In your letter of September 26, 2002 (102-04844), you requested a change to Section 5.5.9, "Steam Generator (SG) Tube Surveillance Program," of the Technical Specifications for the Palo Verde Nuclear Generating Station, Unit 1. The staff's review of the proposed amendment resulted in several conference calls with your staff to understand the information provided in your application and your submittal of supplemental information in the letter dated October 23, 2002 (102-04856). Although you requested that the amendment be issued on an exigent basis before plant entry into Mode 4 in the restart of Unit 1 from its refueling outage, the staff issued its letter dated October 25, 2002, stating that the amendment was not needed for the restart of Unit 1.

Based on the staff's October 25, 2002, letter you submitted a letter dated November 19, 2002 (102-04865), stating that you wanted to withdraw the proposed amendment request for Unit 1. The NRC staff does not object to your withdrawal of the proposed amendment for Unit 1. This is based on the staff's intent to issue generic guidance on this matter in the near future, and our understanding that you will attempt to pursue resolution of this issue on a generic basis, and submit a future license amendment request as appropriate in light of the generic resolution of this issue.

Sincerely,

Jack Donohew, Senior Project Manager, Section 2
Project Directorate IV
Division of Licensing Project Management
Office of Nuclear Reactor Regulation

Docket No. STN 50-528

cc: See next page

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion to Terminate Proceeding were served upon the persons listed below by U.S. mail, first class, postage prepaid, with copies by electronic mail as indicated by an asterisk, this 22nd day of November 2002.

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** Original and 2 copies

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