

**NUCLEAR REGULATORY COMMISSION**

Title: Arizona Public Service Company  
Palo Verde Nuclear Generating Station,  
Unit 1

DOCKETED  
USNRC

December 10, 2002 (12:04PM)

Docket Number: 50-528-OLA

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

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Date: Monday, November 25, 2002

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Pages 1-30

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL  
LICENSING RENEWAL  
TELEPHONE CONFERENCE CALL

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IN THE MATTER OF : Docket Nos.  
ARIZONA PUBLIC SERVICE CO. : 50-528-OLA  
Palo Verde Nuclear :  
Generating Station, :  
Unit 1 :

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Monday,  
November 25, 2002

The above-entitled matter came on for hearing,  
pursuant to notice, at 11:00 a.m.

BEFORE:

THE HONORABLE ANN MARSHALL YOUNG, Chair  
THE HONORABLE DR. RICHARD F. COLE  
THE HONORABLE THOMAS D. MURPHY

1     APPEARANCES:2             On Behalf of the Licensee, Arizona Public3     Service Company:

4                     JOHN E. MATTHEWS ESQ.

5                     THOMAS SCHMUTZ, ESQ.

6             Of:     Morgan Lewis &amp; Bockius, LLP

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11             On Behalf of the Nuclear Regulatory Commission:

12                     SHERWIN E. TURK, ESQ.

13                     CASSIE GRAY, ESQ.

14                     KATHRYN WINSBERG, ESQ.

15                     U.S. Nuclear Regulatory Commission

16                     Office of the General Counsel

17                     Washington, DC 20555-0001

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19

20     ALSO PRESENT:

21                     Jack Donohew

22                     William Ruland

23                     Thomas Saporito

24

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P-R-O-C-E-E-D-I-N-G-S

11:00 a.m.

1  
2  
3 JUDGE YOUNG: Let's go ahead and go on the  
4 record. Judge Cole and Judge Murphy are here with me.  
5 This is Judge Young. Mr. Turk, why don't you  
6 introduce everyone who's with you?

7 MR. TURK: Thank you, Your Honor. My name  
8 is Sherwin Turk. I'm an attorney with the NRC Staff.  
9 With me in the room is Kathryn Winsberg, who is Acting  
10 Associate General Counsel, Reactor Program Division of  
11 OGC, and Ms. Cassie Gray, who's an attorney with our  
12 office, OGC. Also present is Mr. Jack Donohew, who is  
13 Project Manager for Office of Nuclear Reactor  
14 Regulations, and Mr. William Ruland, who is Director  
15 of Project Directorate 4 with NRR.

16 JUDGE YOUNG: I think probably you'll need  
17 to spell all those names.

18 MR. TURK: May I note also, Your Honor, I  
19 don't know if Mr. Saporito is on the phone yet.

20 MR. SAPORITO: He is.

21 MR. TURK: Okay. I hadn't heard his name.  
22 Let me go back to the names that I mentioned. First  
23 was Kathryn Winsberg, K-A-T-H-R-Y-N, Winsberg, W-I-N-  
24 S-B-E-R-G. Cassie Gray is C-A-S-S-I-E G-R-A-Y. Jack  
25 Donohew, last name is D-O-N-O-H-E-W. William Ruland,

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1 R-U-L-A-N-D.

2 JUDGE YOUNG: Thank you. And then, Mr.  
3 Saporito -- court reporter, did you list him, S-A-P-O-  
4 R-I-T-O?

5 COURT REPORTER: I did not, no.

6 JUDGE YOUNG: Mr. Saporito, do you have  
7 anyone with you?

8 MR. SAPORITO: No, Your Honor. It's just  
9 myself. I represent the National Environmental  
10 Protection Center --

11 JUDGE YOUNG: Okay.

12 MR. SAPORITO: -- as its Executive  
13 Director.

14 COURT REPORTER: Could I get a spelling on  
15 your last name?

16 MR. SAPORITO: Sure. It's S as in Sam, A-  
17 P, like in Peter, O-R-I-T-O.

18 COURT REPORTER: Thank you.

19 JUDGE YOUNG: And, Mr. Matthews?

20 MR. MATTHEWS: Yes, Your Honor. This is  
21 John E. Matthews from the law firm, Morgan Lewis, and  
22 with me here this morning is Thomas Schmutz, that's S-  
23 C-H-M-U-T-Z. And we represent the Arizona Public  
24 Service Company, and there won't be any other  
25 attorneys or representatives from APS on the call.

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1 JUDGE YOUNG: Okay. So there is anyone  
2 else present that we have not introduced? All right.  
3 We want to allow all parties to make short arguments  
4 on the current motion that's before us, and we may, in  
5 the court of that, need to address what the status of  
6 the previous Motion to Hold the Proceedings in  
7 Obedience. But, first, just to sort of maybe cut  
8 through some things and simplify matters so that we  
9 don't need to go into quite as much detail on some  
10 things that do appear to be more or less clear. I  
11 just wanted to state for the record that we have  
12 looked at the case law and assuming that the  
13 delegation still exists from the Commission and then  
14 from our Director, the NRC Staff does, under this case  
15 law authority, have the authority to address, to  
16 permit withdrawals of license amendment requests.  
17 There's no question about that, assuming that that  
18 allegation exists.

19 In this case, there are a couple of  
20 unusual circumstances, and I'm not sure whether they  
21 would have any effect on our ruling on the Motion to  
22 Terminate, but I think it would be a good idea just  
23 for the record to make sure that it's clear that the  
24 Staff, before we start arguments, fill us in on the  
25 status of the new notice that you had indicated was to

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1 be published in the Federal Register, whether that has  
2 been published, whether there's anything about that or  
3 the circumstances related to it that would prevent  
4 this case from being viewed as moot.

5 And then also there is, to some degree,  
6 some lack of clarity about the original perceived need  
7 for a license amendment request, and then at this  
8 point there apparently being no perceived need for the  
9 license amendment request.

10 So, Mr. Turk, maybe you and some of the  
11 people with you could address those two issues before  
12 we go into the actual argument so that we're all made  
13 clear about -- Court Reporter, can you hear? Are you  
14 getting everything I'm saying?

15 COURT REPORTER: Yes, I am.

16 JUDGE YOUNG: Okay, good. I heard some  
17 paper rustling, and sometimes that blocks people out.

18 COURT REPORTER: I'm sorry, that was me.

19 JUDGE YOUNG: Okay. Mr. Turk?

20 MR. TURK: Yes, Your Honor. Let me  
21 address those two questions in the order that you  
22 posed them. First, with respect to the status of the  
23 license amendment request, as you know, we had  
24 originally published notice of the exigent  
25 circumstances license amendment request in the Federal

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1 Register. We then determined that that procedure was  
2 not necessary. We sent a letter to the licensee  
3 advising them of that, I believe that was October 25,  
4 and shortly thereafter the licensee sent in a request  
5 to withdraw its application and, as you know, we  
6 issued a letter just last week indicating that we did  
7 not object to the withdrawal of the license amendment  
8 request.

9 In the meantime, as I had indicated in a  
10 letter to the Board previously, the Staff had sent to  
11 the Federal Register a new notice that the license  
12 amendment request had been received and that we would  
13 be reviewing it under a non-exigent circumstance  
14 basis. We sent that off to the Federal Register, that  
15 has gone to the Federal Register, and I believe it  
16 will be published as part of the bi-weekly notice that  
17 comes out in the Federal Register this coming  
18 Wednesday, I believe November 27 if things go  
19 according to our expectations.

20 Of course, we sent that notice to the  
21 Federal Register before we received the withdrawal  
22 request, and now that we have received a withdrawal  
23 request and taken action on it, we'll have to issue  
24 another notice to the Federal Register in which we  
25 notify the public that the request has been withdrawn.

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1 So that the current status with respect to the Federal  
2 Register is that in two days the second notice will be  
3 published, but then probably two weeks later we'll be  
4 publishing the notice of withdrawal. So that's the  
5 status of the notice history for this license  
6 amendment request.

7 JUDGE YOUNG: If any parties in the  
8 interim file any petitions, how would you handle  
9 those?

10 MR. TURK: We would deem them to be moot  
11 because there is no pending license amendment request  
12 in which a person may intervene, and we would notify  
13 them of that and we would also send them a copy of the  
14 notice of withdrawal.

15 JUDGE YOUNG: All right. Go ahead then.

16 MR. TURK: With respect to the --

17 JUDGE YOUNG: Excuse me, Judge Murphy has  
18 --

19 JUDGE MURPHY: Mr. Turk, this is Judge  
20 Murphy.

21 MR. TURK: Yes.

22 JUDGE MURPHY: Before you leave that  
23 issue, can you comment on the existing status of your  
24 authority to approve withdrawals? Does the Staff  
25 still have that delegation?

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1 MR. TURK: Yes, we do. That's a standing  
2 delegation, Your Honor. We don't receive that on an  
3 amendment-by-amendment basis; rather, we have an  
4 ongoing authority to receive docket and act upon  
5 license amendment requests, both in terms of granting  
6 them and disposing of them, along with withdrawal of  
7 them until a notice of hearing is published, which we  
8 don't have yet in this case. So that's a standing  
9 delegation.

10 JUDGE YOUNG: Okay. And then going on to  
11 the sort of underlying question about the specific  
12 perceptions of the need for a license amendment  
13 request.

14 MR. TURK: My understanding of the  
15 background, and this is third party on this end  
16 because I wasn't part of the proceedings that were  
17 going on before the Palo Verde license amendment  
18 request was received, but it's my understanding that  
19 the Staff was perceived by Palo Verde, and they can  
20 speak to this -- the Palo Verde applicant perceived  
21 that the Staff would require the amendment to be  
22 submitted and approved prior to restart of the  
23 facility. In fact, the Staff determined that that's  
24 not required prior to restart, and that's why we sent  
25 out our letter on October 25.

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1                   So I believe that whatever was Palo  
2 Verde's understanding originally ended up not being  
3 consistent with the Staff's determination on October  
4 25 that the license amendment request need not be  
5 submitted on an exigent basis or approved prior to  
6 restart.    So I think there may have been some  
7 confusion about that beforehand, but I think we've  
8 tried to clear that up and we issued our statement in  
9 writing on October 25.

10                   JUDGE YOUNG:    Just to clear up all  
11 confusion and get everything out on the table and sort  
12 of spark this as much as possible before the argument  
13 and hopefully make argument more efficient, was there  
14 any difference in what the Licensee or how the  
15 Licensee did the inspection under the current  
16 technical specifications and how they would have done  
17 it under the license amendment request?

18                   MR. TURK:    Your Honor, I think Palo Verde  
19 should address that in the first instance.    I think  
20 they'd be more familiar with how they were conducting  
21 their inspections previously.

22                   MR. MATTHEWS:   This is John Matthews from  
23 Morgan Lewis.    I think, Your Honor, the answer is more  
24 or less, no, there is no difference.    The inspections  
25 were conducted in a way that would have been

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1 consistent with the amendment but also that is  
2 consistent with the existing tech spec requirements.

3 JUDGE YOUNG: Thank you. So just to recap  
4 what I've heard, or my understanding of what I've  
5 heard, there seems to have been some miscommunication  
6 about whether a license amendment was necessary. And,  
7 Mr. Turk, maybe you'd be best --

8 MR. TURK: I'm sorry, Your Honor, could  
9 you repeat the question?

10 JUDGE YOUNG: There seems to have been  
11 some miscommunication or misunderstanding on whether  
12 a license amendment request was necessary.

13 MR. TURK: Your Honor, I don't know how  
14 much I can say to that. There was a perception that  
15 this would be a Staff requirement. There had been two  
16 other plants which the Staff has discovered were doing  
17 inspections in a certain manner, and the Staff, in  
18 discussing with those plants the nature of their  
19 inspections, had obtained license amendment requests  
20 from the plants in order to specify that. And this is  
21 based on a very weak understanding on my part on what  
22 happened with the other plants because I was not  
23 involved, but those plants did submit license  
24 amendment requests in order to modify the language of  
25 the tech spec such that inspections may not be

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1 conducted below a certain point in the tube sheet, or  
2 I should say a certain point within the tube sheet.

3 And I believe, and this is my third-hand  
4 understanding, Palo Verde can correct me if I'm wrong,  
5 but Palo Verde perceived that the Staff would require  
6 the same of them, and it's my understanding that  
7 that's probably why they submitted a license amendment  
8 request. That's supposition on my part, I'm not a  
9 party to what had happened.

10 But be that as it may, we did clarify with  
11 Palo Verde that we would not require this from them on  
12 an exigent basis before the plant could restart from  
13 their refueling outage. So whatever the circumstances  
14 were beforehand, we've examined them and determined  
15 that the amendment was not necessary prior to restart  
16 of the facility.

17 JUDGE YOUNG: And am I understanding  
18 correctly that by approving the withdrawal, you're in  
19 a sense saying that there's no amendment necessary at  
20 all and so everything is moot or is there anything  
21 that has not been mooted out by the withdrawal?

22 MR. TURK: There is nothing that has not  
23 been mooted out. In other words, the entire license  
24 amendment request is now moot. We are developing, as  
25 I believe our letter of October 25 indicated, we are

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1 developing generic guidance to the industry on what we  
2 would like to see happen with the technical  
3 specifications in this area. And Palo Verde has  
4 indicated to us that they will act in accordance with  
5 the generic resolution of this issue, and we hope to  
6 have that generic guidance out shortly. I know that  
7 there are -- it's in the works right now, and  
8 hopefully we'll get a resolution of this on a generic  
9 basis in the near future.

10 JUDGE YOUNG: I think at this point,  
11 unless there are any other questions from here, and  
12 there don't appear to be, we would go to argument on  
13 the Motion to Terminate, and I would ask just a couple  
14 of things in your argument, and I want to keep these  
15 fairly brief. We've gone into this discussion in  
16 advance of hearing arguments in large part for the  
17 purpose of getting everything sort of out on the table  
18 and as clear as possible so that everyone's on the  
19 same page so that we don't sort of replot new ground  
20 in the argument. But I would ask APS to go first and  
21 ask whether in filing your Motion to Terminate have  
22 you withdrawn your Motion to Hold the Proceedings in  
23 Obedience?

24 And in all parties' arguments, I would  
25 like everyone to keep in mind based on the case law

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1 that we've seen the Staff does have the authority to  
2 permit withdrawals as they've done in this case, and  
3 unless there is anything that would cause the  
4 proceedings not to be completely moot, then the  
5 Board's duty under the law is to terminate the  
6 proceedings.

7 So at this point, if there's anything that  
8 would counter the authority of the Staff to permit  
9 withdrawals and the duty of the Board to terminate a  
10 proceeding given that the withdrawal moots everything  
11 in the proceedings, our inclination would be to  
12 terminate the proceedings. I'm saying that so you'll  
13 know what issues you need to address. Then after APS,  
14 I want to hear from Mr. Saporito and the Staff. I  
15 don't know whether in permitting the withdrawal and  
16 based on what you've said already that you agree to  
17 APS' motion, but if you have anything, then you can  
18 say that then.

19 Again, I want to see if we can keep these  
20 as brief as possible without cutting off anyone's  
21 right to say whatever you feel is relevant to the  
22 motion or motions that are currently pending. Mr.  
23 Matthews, just to start out, what do you consider to  
24 be the status of your Motion to Hold Proceedings  
25 Obeyance.

1 MR. MATTHEWS: My understanding from the  
2 Board's order on Friday was essentially that that  
3 Motion to Hold Proceedings in Obedience was temporarily  
4 granted, and I would ask that the Board extend that  
5 status until its ruling on the Motion to Terminate.

6 JUDGE YOUNG: I don't think that we  
7 temporarily granted it. I think what we did was we  
8 said that you wouldn't be required to file any  
9 response and we'd take up the motion today.

10 MR. MATTHEWS: Well, I guess I interpreted  
11 that as a grant of extension of time to file our  
12 response. So granted, in part, I guess, was my  
13 perception of the motion, and I would ask here today  
14 that the Board extend the time for filing that  
15 response and extend the time for the Staff filing any  
16 pleadings until it rules on the Motion to Terminate as  
17 well.

18 JUDGE YOUNG: All right. So then on the  
19 Motion to Terminate, go ahead.

20 MR. MATTHEWS: On the Motion to Terminate,  
21 I guess let me just recap that we were of the opinion  
22 initially that no amendment to the tech specs were  
23 required. The tech specs currently require inspection  
24 of a certain length of each steam generator tube. We  
25 conduct an inspection using a bobbin-coil method of

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1 essentially 100 percent of the steam generator tubes,  
2 from cold end to hot end, and that that meets the  
3 requirements of the existing tech specs.

4 In addition, there is a second kind of  
5 inspection at issue, which is, I guess, the plus-point  
6 probe inspection which is a more sophisticated  
7 technology that didn't even exist, it's my  
8 understanding, when these tech specs were put in  
9 place. And the license amendment was essentially to  
10 address certain aspects of that particular type of  
11 inspection. We did not believe that the amendment was  
12 necessary, but based upon Staff action with respect to  
13 some other plants and some other amendments that those  
14 plants had submitted, we thought that it might be  
15 required, so we submitted the request, essentially  
16 prudently, perceiving that the Staff might require  
17 this additional detail.

18 The Staff, upon reviewing this, concluded  
19 that we didn't need the amendment, which was  
20 essentially in agreement with our initial position and  
21 so, hence, our withdrawal. And we've committed to  
22 continue to work with the Staff on addressing the  
23 detail of some of these more sophisticated inspections  
24 taking place in the future.

25 I think at this point the amendment is

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1 withdrawn. The Staff acted appropriately in granting  
2 the withdrawal of the amendment, and there's no  
3 proceeding to go forward, so I think the only thing  
4 that can happen is for the Board to terminate the  
5 proceeding at this point.

6 JUDGE YOUNG: All right. Mr. Saporito?

7 MR. SAPORITO: Good morning, Your Honor.  
8 Our position would be that even though the Staff, as  
9 the Court points out, may have requisite jurisdiction  
10 to grant a licensee's withdrawal of the LAR, we don't  
11 believe that the Staff acted appropriately based on  
12 the fact that the NRC, through Mr. Donovan's office,  
13 confirmed to us, in fact agreed with us, that the  
14 technical specifications as they currently exist for  
15 Palo Verde Steam Generator Unit 1 are ambiguous. And  
16 it was on that basis that the NRC, through Mr.  
17 Donovan's office --

18 JUDGE YOUNG: Excuse me, when you refer to  
19 Mr. Donovan, are you referring to Mr. Donohew?

20 MR. SAPORITO: Oh, yes, ma'am, I'm sorry  
21 -- Your Honor, it's Donohew. I stand corrected. So  
22 the NRC Staff acted to grant the Licensee's withdrawal  
23 of the LAR based on erroneous and ambiguous technical  
24 specifications which currently exist. And, therefore,  
25 it's our position that the Licensee cannot demonstrate

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1 with any reasonable assurance the operability of the  
2 Palo Verde Unit 1 steam generator, and, therefore,  
3 there is an issue outstanding before this Board which  
4 should go to hearing.

5 JUDGE YOUNG: Mr. Saporito, what the case  
6 law says is that the NRC Staff has the authority to  
7 approve withdrawals, and in those circumstances the  
8 Board, and I'm quoting from the Commission in the  
9 Vermont Yankee case of September 16, 1993 was the date  
10 of the Commission's memorandum and order, the  
11 Commission said that, "Under these circumstances, the  
12 Board should issue an order indicating that the  
13 Commission or its Staff has previously approved the  
14 withdrawal of an application and that the proceeding  
15 is being terminated, therefore, on grounds of  
16 mootness."

17 So I understand that you currently, and I  
18 think I saw somewhere in the pleadings, that you  
19 currently have a Section 2.206 Petition pending with  
20 the Commission and the Staff, but you need to realize  
21 that the Board can only act within the jurisdiction  
22 and authority granted in the rules.

23 So I guess my question to you is given  
24 that the Commission has said that in these  
25 circumstances Staff has approved a withdrawal, or

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1 permitted a withdrawal, that the Board's duty is to  
2 terminate a proceeding on grounds of mootness, what  
3 would you suggest would make this proceeding not moot  
4 such that the Board would not terminate it, because we  
5 don't -- I think we don't see that we have  
6 jurisdiction to do anything other than terminate it.  
7 What would you argue would be our authority to do  
8 anything other than to terminate the proceedings?

9 MR. SAPORITO: Your Honor, our position is  
10 the Board has, number one, inherent authority through  
11 congressional mandate to exist. A Board also inherent  
12 authority because it serves to protect the public --  
13 as a matter of public policy, it serves to protect  
14 public safety and health issues.

15 JUDGE YOUNG: And, Mr. Saporito, what  
16 would be the legal authority for your saying that we  
17 have inherent authority?

18 MR. SAPORITO: Well, the legal authority  
19 is based, in part, on the argument the Court already  
20 made in reference to the other case in so far as the  
21 other case was based on the NRC Staff having authority  
22 --

23 JUDGE YOUNG: Mr. Saporito?

24 MR. SAPORITO: Yes.

25 JUDGE YOUNG: You say the other case. I'm

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1 not sure that I understand what you're talking about  
2 there.

3 MR. SAPORITO: You mentioned it, I think  
4 it was the Yankee Plant.

5 JUDGE YOUNG: Vermont Yankee?

6 MR. SAPORITO: Yes. Yes, Your Honor. In  
7 that particular instance --

8 JUDGE YOUNG: Excuse me. Mr. Saporito,  
9 have you read that order?

10 MR. SAPORITO: I haven't. I have only  
11 referenced the -- I haven't read the order itself,  
12 only to the extent that it was in these pleadings.

13 JUDGE YOUNG: Okay. When you refer -- I'm  
14 just going to ask you to help us. When you refer to  
15 cases or to authority, I want you to point us to the  
16 place we look in the law or in a decision for  
17 authority for what you're saying, because that's how  
18 we operate. If there is law there to support what you  
19 say, then we follow that, but we can't take any action  
20 just merely on your statement or any lawyer's  
21 statement or anybody's statement that there's inherent  
22 authority. We need to base our authority on something  
23 that's written down in either a rule or a law or a  
24 decision that's been published.

25 MR. SAPORITO: All right. Well, I guess

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1 my comments are based on the authority that the Court  
2 pointed to in the Vermont Yankee Nuclear Power  
3 Corporation, CLI-93-20, 38 NRC 83, parentheses, 1993,  
4 closed parentheses; GPU Nuclear Corporation,  
5 parentheses, Oyster Creek Nuclear Generating Station,  
6 closed parentheses, CLI-99-29, 50 NRC 331, parentheses  
7 1999, closed parentheses. And then this parentheses,  
8 "vacating Board decision on withdrawal of LAR because  
9 10 CFR 2.717, the jurisdiction of the Board commences  
10 when the proceeding commences, and the proceeding  
11 commences when a Notice of Hearing is issued," closed  
12 parentheses.

13 Based on that case, the Board in this  
14 particular instance, in the instant action that we're  
15 talking about with APS, that case was because the  
16 Board -- the NRC Staff allowed the Licensee to  
17 withdraw is my understanding. So there was no issues  
18 in dispute because there was no licensing amendment  
19 request.

20 However, this case is distinguishable from  
21 that case because in this particular instance,  
22 although the NRC Staff granted the Licensee  
23 authorization to withdraw their license amendment, the  
24 NRC did so erroneously, in our opinion, because -- the  
25 NRC being Mr. Donohew's staff organization -- told us

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1 and agreed with us that the Licensee's technical  
2 specifications were ambiguous.

3 JUDGE YOUNG: Mr. Saporito, when the  
4 Commission says that the NRC Staff has the authority  
5 to approve withdrawals of application and also says  
6 that the Licensing Board's authority to address  
7 withdrawals only commences after a Notice of Hearing  
8 or when a Notice of Hearing has been issued, I don't  
9 see how you can assume that any petitioner in any of  
10 the other cases might not have also thought that the  
11 Staff was in error in what they did.

12 We don't really review the appropriateness  
13 or inappropriateness -- alleged inappropriateness or  
14 appropriateness of what the Staff action is. If the  
15 Staff has the authority to approve a withdrawal, I'm  
16 not sure where we would get the authority to go behind  
17 that and undo what the Staff has done. It  
18 specifically said that the Staff has that authority  
19 and we don't.

20 MR. SAPORITO: Your Honor, it's our  
21 position that the Staff has authority of acting sua  
22 sponte as an agency to protect public safety and  
23 health as a matter of public policy and it should act  
24 to reverse the NRC Staff authorization to allow  
25 withdrawal of a license amendment request.

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1 JUDGE YOUNG: I assume you mean that the  
2 Board has that authority.

3 MR. SAPORITO: Yes, Your Honor.

4 JUDGE YOUNG: And where does that  
5 authority come from?

6 MR. SAPORITO: It comes from the Board  
7 itself. The Board can act sua sponte, in our view, at  
8 any time in these proceedings when information comes  
9 to light that there is public policy safety issue  
10 at risk here.

11 JUDGE YOUNG: Mr. Saporito, as I said  
12 before, we only have the authority that's granted us  
13 in the law, statute or a rule or a legal decision by  
14 a court or the Commission. So, again, I ask you where  
15 would our authority come from?

16 MR. SAPORITO: I believe your authority is  
17 inherently given to you by virtue of the Congress when  
18 they mandated the NRC's organization to exist, Your  
19 Honor.

20 JUDGE YOUNG: Okay. I'm not sure that we  
21 -- Mr. Saporito, you do -- you are aware that we have  
22 not yet granted a hearing, right?

23 MR. SAPORITO: It's my understanding that  
24 this is a pre-hearing conference that I'm attending  
25 right now. That's my position.

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1 JUDGE YOUNG: But you understand that we  
2 have not granted a hearing in this case.

3 MR. SAPORITO: Yes, Your Honor.

4 JUDGE YOUNG: Okay. Before we grant a  
5 hearing, we do not have the authority to approve or  
6 disapprove withdrawals or to second guess the Staff  
7 when they approve or disapprove withdrawals. So I  
8 want you to try to wrap up your argument that we do  
9 have that authority, give us any citations of any law  
10 that you want to argue would be the basis of any such  
11 authority and then move on to your next point.

12 MR. SAPORITO: Well, in sum, our position  
13 of NEPC is that the Board has inherent authority to  
14 through congressional mandate to exist and that when  
15 such significant public policy safety issues are  
16 brought to light to the Board they should act in a sua  
17 sponte fashion in the interest of public safety and  
18 health.

19 JUDGE YOUNG: Okay. Do you have any other  
20 arguments that you'd like to make?

21 MR. SAPORITO: Well, I mean I could go  
22 into the contentions, but I don't think it's relevant  
23 at this point until the Board decides whether it's  
24 going to have a hearing, unless the Board wants me to  
25 go into those issues.

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1 JUDGE YOUNG: No. I agree, those would  
2 not be relevant at this point. All right. Mr. Turk,  
3 do you have any argument to the Motion to Terminate?

4 MR. TURK: I would simply make two points,  
5 Your Honor. First, we fully agree with your analysis  
6 of the law in that a Notice of Hearing has not been  
7 issued yet, and the authority to grant a request to  
8 withdraw the application does rest at this time with  
9 the Staff, and the Staff has acted pursuant to its  
10 understanding of the law and has granted the request  
11 to withdraw the application. The case law cited by  
12 the Applicant in its motion, I believe they cite the  
13 same three cases in both the Motion to Hold Proceeding  
14 in Obedience as well as the Motion to Dismiss, their  
15 citation of that case law is correct.

16 There are many other cases which hold the  
17 same thing and which indicate that the proceedings  
18 should be dismissed as moot where the application has  
19 been withdrawn and a Notice of Hearing has not yet  
20 been issued. And if required to respond to the Motion  
21 to Dismiss, we'll cite that case law to you. I would  
22 note that this is long-standing judicial practice and  
23 precedent on the point. I'm looking at cases  
24 published by the Commission or by Licensing Boards  
25 dating back 15 or 20 years already, so there's quite

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1 a bit of case law on that point.

2 The second point I would like to make is  
3 that what Mr. Saporito is asking you to do is not to  
4 function as a Licensing Board with respect to the  
5 license amendment application that was submitted, but  
6 rather to act as essentially a board with plenary  
7 powers to go into matters that exceed the license  
8 amendment request. In effect, he would ask you to  
9 become the Commission for all purposes, and I believe  
10 you're correct that Mr. Saporito has filed a petition  
11 under 2.206 which goes to the Commission, and that is  
12 the proper avenue for him to raise these concerns once  
13 the license amendment proceeding is withdrawn. And I  
14 think that's where he would obtain his relief, if any,  
15 rather than asking the Board to act upon matters that  
16 don't relate to any existing license amendment  
17 request, because there is no existing license  
18 amendment request.

19 JUDGE YOUNG: All right. Does that  
20 conclude your argument?

21 MR. TURK: Yes, Your Honor.

22 JUDGE YOUNG: Give us one second, please.

23 (Judges confer.)

24 JUDGE YOUNG: Mr. Matthews, did you have  
25 anything further to say?

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1 MR. MATTHEWS: No, Your Honor.

2 JUDGE YOUNG: All right. We have  
3 conferred, and we have read the case law, and, Mr.  
4 Saporito, we understand your argument that you would  
5 like us to, on our own, sort of take the authority to  
6 overrule the Staff on approving the withdrawal, but we  
7 do not find that we have the legal authority to do  
8 that. And so as soon as we get the transcript back to  
9 make sure that we have correctly understood and stated  
10 all your arguments, we would grant the Motion to  
11 Terminate.

12 Mr. Saporito, your Section 2.206 petition  
13 to the Commission, in effect, from what I understand,  
14 addresses the same concerns that you have about the  
15 issues that surround the pertinent inspection of the  
16 steam generator tubes, and I don't know whether the  
17 Staff, when you address those issues generically, will  
18 be providing for a period of public comment, but  
19 certainly if the Staff gets to the point of a new  
20 rulemaking, there would be an opportunity for public  
21 comment. And Mr. Turk might be able to enlighten you  
22 as to whether there would be any other opportunity in  
23 that generic process. Hello?

24 MR. SAPORITO: Yes, yes. I understand,  
25 Your Honor.

1 JUDGE YOUNG: Mr. Turk?

2 MR. TURK: Yes.

3 JUDGE YOUNG: Is there anything that you  
4 can explain with regard to the generic process so that  
5 if Mr. Saporito wanted to provide a comment --

6 MR. TURK: Yes, Your Honor. There really  
7 are two different things happening right now. Mr.  
8 Saporito has submitted his petition under 10 CFR  
9 2.206, which the Staff is evaluating, and the Staff  
10 will be in communication with him about his petition.  
11 So the very issues that he raises will be discussed  
12 with him by the appropriate people in the Staff. So  
13 he will have input that way.

14 The generic communication that is being  
15 developed right now I do not believe provides for  
16 prior comments by the public. I think it's something  
17 that would be issued and if people have comments about  
18 it, they can always submit comments. But I think his  
19 best avenue at this point would be to discuss his  
20 2.206 petition with the Staff. And, in addition,  
21 whenever the generic communication is issued, he'll be  
22 able to see that and he can provide comment on that if  
23 he'd like.

24 JUDGE YOUNG: Okay. Mr. Saporito, I think  
25 Mr. Turk has explained that fairly well, so I would

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1 encourage you, and I think the other members of the  
2 Board would join me in encouraging you to work with  
3 the Staff with regard to your 2.206 petition on these  
4 issues. And an order will be issued in the near  
5 future by granting the Motion to Terminate the  
6 Proceedings. Are there any other outstanding issues  
7 that any party would like us to address?

8 MR. MATTHEWS: Your Honor, just for  
9 clarification, I assume at this point then you do not  
10 require a written response from the Staff on the  
11 Motion to Dismiss?

12 JUDGE YOUNG: Motion to Terminate?

13 MR. MATTHEWS: Right.

14 JUDGE YOUNG: No.

15 MR. MATTHEWS: Okay. Thank you.

16 JUDGE YOUNG: Any other party have  
17 anything that you'd like to say?

18 MR. MATTHEWS: Nothing from the Applicant,  
19 Your Honor.

20 JUDGE YOUNG: And, Mr. Saporito, you  
21 understood our references to your 2.206 petition and  
22 encouragement that you work with the Staff on that.

23 MR. SAPORITO: Yes, Your Honor, I  
24 understand.

25 JUDGE YOUNG: Great. Okay. Well, thank

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you all. That would conclude this call.

(Whereupon, at 11:44 a.m., the Telephone  
Conference Call was concluded.)

CERTIFICATE

This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of:

Name of Proceeding: Arizona Public Service  
Company Palo Verde Nuclear  
Generating Station, Unit 1

Docket Number: 50-528-OLA

Location: (Telephone Conference)

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken by me and, thereafter reduced to typewriting by me or under the direction of the court reporting company, and that the transcript is a true and accurate record of the foregoing proceedings.

1st Gary Cross

Gary Cross  
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