

RAS 5165

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**DOCKETED 12/30/02**  
**SERVED 12/30/02**

## ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Ann Marshall Young, Chair  
Dr. Richard F. Cole  
Thomas D. Murphy

In the Matter of

ARIZONA PUBLIC SERVICE COMPANY

(Palo Verde Nuclear Generating Station,  
Unit 1)

Docket No. 50-528-OLA

ASLBP No. 03-804-01-OLA

December 30, 2002

ORDER  
(Terminating Proceeding)

This proceeding was initiated after the National Environmental Protection Center (NEPC) filed a Request for Hearing and Petition to Intervene on October 14, 2002, in response to an October 3, 2002, notice of opportunity for hearing, 67 Fed. Reg. 62, 079 (Oct. 3, 2002), regarding the Arizona Public Service (APS) Company's September 26, 2002, request to amend the operating license for the Palo Verde Nuclear Generating Station, Unit 1 (Palo Verde), by changing a facility technical specification to revise the scope of the required inspection of the tubes in the steam generator tubesheet region. APS filed a motion to terminate the proceeding on November 22, 2002, based upon its November 19 withdrawal of its license amendment request (LAR), and the NRC Staff's November 22 approval of the withdrawal. Argument on this motion was heard during a telephone conference held November 25, 2002, after discussion of various circumstances preceding and leading up to the LAR withdrawal and filing of the motion to terminate. See Tr. 1-30.

The regulation governing withdrawal of applications, 10 C.F.R. § 2.107(a),<sup>1</sup> draws a distinction between withdrawals filed prior to and after issuance of a notice of hearing, with the Commission retaining authority to permit withdrawals prior to issuance of a notice of hearing but delegating to presiding officers authority to prescribe terms of any withdrawal after issuance of a notice of hearing. The Commission has delegated its own authority to the Staff to address withdrawals of applications prior to issuance of a notice of hearing. See *Vermont Yankee Nuclear Power Corporation* (Vermont Yankee Nuclear Power Station), CLI-93-20, 38 NRC 83, 85 n.2 (1993); *GPU Nuclear Corporation* (Oyster Creek Nuclear Generating Station), CLI-99-29, 50 NRC 331, 332 (1999).<sup>2</sup> The Commission has also indicated that, in such circumstances, presiding officers and licensing boards have a duty to terminate cases in which a withdrawal has rendered a case moot. *Vermont Yankee*, 38 NRC at 85.

In light of this controlling precedent, and given that we have not granted or issued a notice of hearing in this proceeding, we find unpersuasive various arguments made by the Petitioner, see Tr. 17-24, that this Board should take upon ourselves the authority to disapprove the LAR withdrawal in this case. We note the Petitioner's assertion of "significant public policy safety issues," *id.* at 24, and of "an issue outstanding . . . which should go to hearing" involving alleged ambiguity in relevant technical specifications and alleged questions about the operability of the Palo Verde Unit 1 steam generator. *Id.* at 17-18. The triggering factor that provided an opportunity to request a hearing in this case was, however, the LAR, which has

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<sup>1</sup>10 C.F.R. § 2.107(a) provides as follows:

(a) The Commission may permit an applicant to withdraw an application prior to the issuance of a notice of hearing on such terms and conditions as it may prescribe, or may, on receiving a request for withdrawal of an application, deny the application or dismiss it with prejudice. Withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.

<sup>2</sup>During the November 25 conference, the Staff, in response to questioning from the Board, indicated that the Commission delegation to the Staff of authority to address withdrawals prior to issuance of notices of hearing is a standing and current delegation. Tr. 1155.

now been withdrawn. The Staff has approved this withdrawal under the authority delegated to it by the Commission, and under the precedent cited above this Board has no jurisdiction to overrule the Staff's approval. The result is that there is no LAR to contest at this point.

The appropriate avenue for raising the safety issues argued by the Petitioner, which have not demonstrated to us that *this case* should not be regarded as moot as result of the approved LAR withdrawal, is through NEPC's petition to the Commission under 10 C.F.R. § 2.206, which is an ongoing matter. See Tr. 26-28. In addition, the Staff has indicated that it will be addressing some of the underlying issues related to the original LAR generically. See *id.* at 27-28; NRC Staff's Response to Request for Hearing and Petition for Leave to Intervene filed by the National Environmental Protection Center, Nov. 4, 2002, Attachment 1.

For the foregoing reasons and based upon the preceding analysis, it is, this 30<sup>th</sup> day of December, 2002, ORDERED that:

1. This proceeding is *terminated*, the approved withdrawal of the LAR that triggered it having rendered the case moot.

2. Within fifteen (15) days of this decision, any party may file a petition for review with the Commission on the grounds specified in 10 C.F.R. § 2.786(b)(4). The filing of a petition for review is mandatory in order for a party to have exhausted its administrative remedies before seeking judicial review. Within ten (10) days after service of a petition for review any party to the proceeding may file an answer supporting or opposing Commission review. Any petition for review and any answers shall conform to the requirements of 10 C.F.R. § 2.786(b)(2)-(3).

THE ATOMIC SAFETY AND LICENSING BOARD<sup>3</sup>

*/RA/*

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Ann Marshall Young, Chair  
ADMINISTRATIVE JUDGE

*/RA/*

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Dr. Richard F. Cole  
ADMINISTRATIVE JUDGE

*/RA/*

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Thomas D. Murphy  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
December 30, 2002

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<sup>3</sup>Copies of this Order were sent this date by Internet e-mail or facsimile transmission, if available, to all participants or counsel for participants.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER (TERMINATING PROCEEDING) (LBP-02-26) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Docket No. 50-528-OLA  
LB ORDER (TERMINATING PROCEEDING)  
(LBP-02-26)

[Original signed by Evangeline S. Ngbea]

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 30<sup>th</sup> day of December 2002