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

August 26, 1992

Andrea Larry, Esq.
U.S. Department of Justice
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044

Dear Ms. Larry:

Thank you for your August 5, 1992 letter informing us that you have assumed responsibility for *In re: El Paso Electric Company* and that the EPEC has filed a second motion to extend time to assume or reject the leases for Palo Verde Units 2 and 3. We have also received your letter of August 10, 1992, asking for this office's position on the debtor's and, impliedly, the trustee's obligations.

As we responded in our earlier letter of June 11, 1992, the NRC's interest in this bankruptcy proceeding is based on the Atomic Energy Act (AEA), Sections 101 and 103, 42 U.S.C. §§ 2131 and 2133; 182, 42 U.S.C. § 2232; and 184, 42 U.S.C. § 2234, as the EPEC is an NRC-licensed entity with ownership and lease interests in Palo Verde.

In its motion, the EPEC's indication that it will likely reject the leases appears to be in direct conflict with the statutory provisions, and NRC regulations that govern the transfer, assignment and disposition of NRC licenses. Section 101 of the AEA, 42 U.S.C. § 2131, provides that it is unlawful for anyone in the United States to transfer, acquire, possess or use any nuclear utilization facility such as Palo Verde, without a license issued by this Commission. See also AEA § 103, 42 U.S.C. § 2133. Section 184 of the AEA, 42 U.S.C. § 2234, specifically provides:

No license granted hereunder and no right to utilize or produce special nuclear material granted hereby shall be transferred, assigned or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of any license to any person, unless the Commission shall, after securing full information, find that the transfer is in accordance with the provisions of this Act, and shall give its consent in writing. The Commission may give such consent to the creation of a mortgage, pledge, or other lien upon any facility or special nuclear material, owned or thereafter acquired by a licensee, or upon any leasehold

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or other interest in such facility, and the rights of the creditors so secured may thereafter be enforced by any court subject to rules and regulations established by the Commission to protect public health and safety and promote the common defense and security.

Note that this section applies to involuntary and indirect transfers of NRC licenses and rights thereunder, as well as to voluntary direct transfers. Further, this section recognizes that the rights of creditors of those operating under NRC licenses may be enforced in court subject to the rules and regulations established by the NRC to protect the public health and safety and to promote common defense and security. That is, NRC licenses are inalienable without the specific written permission of the NRC. See also, 10 C.F.R. § 50.80(a).

The rights of the creditors secured by a mortgage, pledge, or other lien upon any facility owned by a licensee, or upon any leasehold or other interest in such facility, may be exercised only in compliance with and subject to the same requirements and restrictions as would apply to the licensee pursuant to the provisions of the license. 42 U.S.C. § 2234; See also, 10 C.F.R. § 50.81(a)-(d). That is, all creditors will be subject to the NRC's rules and regulations. These regulations were established by the Commission based on the AEA, to protect public health and safety and to promote the common defense and security. See also, 10 C.F.R. § 50.54(cc), 52 Fed. Reg. 1292 (January 12, 1987).

The Commission, in *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Unit 1), CLI-85-17, 22 NRC 875, 876 (1985), specifically determined that its creditor regulations in 10 C.F.R. § 50.81 will be fully applicable to lessors in sale and leaseback transactions. The specific licenses for Units 2 and 3 particularly provided and gave notice to the lessor and lessee, that the sale and lease-back arrangements were subject to the Commission's creditor regulations. See License NPF-51 (Article 2.B(7)(a) and (b)), and License NPF-74 (Article 2.B(6)(a) and (b)). These licenses and a copy of the Commission's opinion are enclosed.

It should also be noted that the bankruptcy laws do not appear to be in conflict with the AEA or NRC regulations. The bankruptcy provision, 11 U.S.C. § 365(c)(1)(A) & (B), which concerns the assumption or rejection of executory contracts and unexpired leases provides that:

(c)The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if--

(1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance to an entity other than the debtor or the debtor in possession whether or not such contract, or lease, prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment.

The Commission's regulations at 10 C.F.R. §§ 50.80 and 50.81, which implement Sec. 184 of the AEA, 42 U.S.C. § 2234, are applicable to any action which may result in the transfer, assignment, disposition or change in control of a license, including the exercise of creditors' rights with regard to NRC licenses. Thus, the AEA provisions and NRC's regulations in conjunction with this bankruptcy provision preclude an assumption or assignment of the leases without the NRC's approval. See, *In re Braniff Airway, Inc.*, 700 F.2d 935, 943 (5th Cir. 1983), *reh'g denied*, 705 F.2d 450 (5th Cir. 1983); *In re Pioneer Ford Sales*, 729 F.2d 27, 29 (1st Cir. 1984) (both holding that a lease or contract may not be rejected or assigned where the assignee cannot take the lease under applicable law which excuses a party from taking the lease or contract).

Moreover, a trustee appointed in any proceeding must manage property "according to the requirement of the valid laws of the State in which such property is situated," 28 U.S.C. § 959(b). Such includes both valid state and Federal law in effect in the State involved (e.g., the aforementioned provisions of the AEA and the regulations of the NRC). Based on this bankruptcy provision as well, the trustee may not assume or reject the Palo Verde licenses without the NRC's express permission.

Finally, in *Midlantic Nat'l Bank v. New Jersey Dep't of Environmental Conservation*, 474 U.S. 494, 507 (1986), the Supreme Court held that a trustee may not abandon its interest in property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards, as Congress did not intend for 11 U.S.C. § 554(a) to pre-empt all state and local laws. It recognized that bankruptcy courts do not have power to authorize abandonment without formulating conditions that will adequately protect the health and safety.¹ Similarly, 11 U.S.C. § 365(a)

¹ Later, the Supreme Court in *Kelly v. Robinson*, 479 U.S. 36, 46-47 (1986), held that the bankruptcy code did not abrogate an established judicial exception to discharge for state criminal
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Andrea Larry, Esq.

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cannot be interpreted to allow an assignment or rejection of a lease of a nuclear facility unless the NRC determines that such action would not adversely affect the public health and safety.²

For all of the reasons included herein, the trustee cannot exercise any powers under 11 U.S.C. § 365 over the Palo Verde leases without specific permission from the NRC.

Again, please keep us advised of the status of the proceedings. Thank you for your time and attention to this matter.

Sincerely,



Edwin J. Reis
Deputy Assistant General Counsel
for Hearings and Enforcement

Enclosures:

1. Unit 2 License
2. Unit 3 License
3. CLI-85-17, NRC Case

² Under 11 U.S.C. § 362(b)(4), a petition in bankruptcy does not affect the rights of governmental units in the exercise of their police and regulatory powers.

