



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

1313

Dr. Robert G. Asperger
12 Dennis Court
Midland, Michigan 48640

Dear Dr. Asperger:

This is in reference to your letter dated November 19, 1977, in which you requested pursuant to 10 CFR §§2.206 and 2.202 of the Commission's regulations that the Nuclear Regulatory Commission (NRC) immediately suspend and after appropriate hearings, revoke the construction permit of Detroit Edison Company for the Enrico Fermi Atomic Power Plant Unit 2. You also requested that civil penalties be assessed against Detroit Edison Company, its officers, directors and management, and the similar members of Northern Michigan Electric Cooperative, Inc., and Wolverine Electric Cooperative, Inc., (Cooperatives). Your request has been assigned to my office for action.

Notice of your request was published in the Federal Register at 42 FR 64159 (December 22, 1977) and a copy of your request was sent to the Licensee on December 14, 1977. The attached letters were received in response to your request.

The reason stated for your requested action was that Detroit Edison had carried out an illegal sale of a 20% undivided interest in the Fermi 2 facility. You contend the sale was illegal because the transfer took place before written consent was given by the Commission and before the technical and financial qualifications of the proposed transferees were established. You further contend such action is prohibited by 10 CFR 50.80(a-c).

Section 50.80 has not been violated by Detroit Edison. This section which implements section 184 of the Atomic Energy Act of 1954, as amended, (Act), provides in pertinent part that "no license for a production or utilization facility, or any right thereunder, shall be transferred, assigned or in any manner disposed of...through transfer of control of the license to any person, unless the Commission shall give its consent in writing".

In the circumstances of this transaction, the Detroit Edison Company has not transferred control of its license to any person. By the

10/73

terms of the Participation Agreement between the Detroit Edison Company and Northern Michigan Electric Cooperative, Inc., and Wolverine Electric Cooperative, Inc. (Agreement), February 8, 1977, the Cooperatives are to acquire a 20% undivided interest in Fermi 2 (Article 2.1) and in "the capacity and net energy output of Fermi 2." (Article 2.2). However no transfer of control of the licensee or any activity thereunder will take place as a result of the Agreement. Detroit Edison has sole responsibility for construction of the plant (Article 5.3.1), and sole authority to manage, control, maintain and operate Fermi 2 (Article 6.1). Furthermore, the Cooperatives have irrevocably appointed Detroit Edison as their agent to act on their behalf in the planning, design, licensing, construction, completion, operation, maintenance, retirement and disposal of Fermi 2. (Article 9.1). Thus, as no transfer of control has taken place by the execution of this Agreement between Detroit Edison and the Cooperatives, the requirements of 10 CFR 50.80 are not applicable.

While 10 CFR 50.80 is not applicable to this transaction, your petition raises a question concerning the Cooperatives acquiring an interest in the Fermi facility, a utilization facility. Section 101 of the Act and 10 CFR 50.10 prohibits a person from acquiring an interest in a utilization facility except under and in accordance with a license of the Commission.*/ The question of whether Commission approval is required

*/ Unlike section 101 of the Act which involves transfer (etc.) of facilities, section 184 involves transfer of licenses. In other words, section 101 prohibits transfers of a physical facility without the requisite authorization while section 184 prohibits the transfer of the requisite authorization itself. Thus, section 184 is designed to ensure that a person cannot, without application to and permission from the Commission, obtain a license merely by acquiring control of a licensee. See decision of Director of Inspection and Enforcement, dated May 9, 1977, denying Request for Emergency action by Babcock and Wilcox Co. pursuant to 10 CFR 2.206 filed in Docket Nos. R-47, CX-10, SNM-778, SNM-1168, SNM-145, SNM-42, SNM-414, 45-00105-04, 37-7031-1, 37-04456-01, 37-04456-03, and SNB-502. Therefore, a person who acquires an ownership interest in a licensed facility without also acquiring control of the license for that facility does not violate section 184.

May 3 1978

by section 101 of the Act and 10 CFR 50.10 prior to a change in ownership which does not involve a change in the control of a licensed activity is an issue of first impression before the Commission.*/

The Agreement between Detroit Edison Company and the Cooperatives provides that the Cooperatives will own an undivided interest in Fermi 2 as tenants in common. (Article 2.1). The Agreement also states in Article 9.9 entitled "Condition Precedent to the Respective Obligations of Edison and Northern and Wolverine" that the transfer of ownership is subject to necessary governmental approval.

Article 9.9 may be an appropriate method to comply with section 101 of the Act. However, in this case the actions of Detroit Edison Company and the Cooperatives suggest otherwise. Specifically, (1) a limited warranty deed was filed by Detroit Edison Company on February 8, 1977 conveying a 20% interest in the Fermi 2 facility to the Cooperatives, (2) the Cooperatives as of October 12, 1977 have made payments to Detroit Edison Company pursuant to the Agreement of at least 94 million dollars, (3) the Detroit Edison Company has stated in a prospectus, dated October 12, 1977 that it has sold a 20% undivided interest in the Fermi 2 facility, and (4) the Detroit Edison Company has stated in a prospectus, dated October 12, 1977 that should approval from NRC of this transaction not be obtained, the Detroit Edison Company is obligated to repurchase the Cooperatives' interest. (See attached letter from Detroit Edison dated January 11, 1978.)

These actions of Detroit Edison Company and the Cooperatives indicate that a present interest has been acquired, prior to Commission approval, by the Cooperatives notwithstanding the fact that the interest is subject to repurchase if NRC approval is not given. Therefore, under the circumstances of this case, article 9.9 of the Agreement, although labeled as a condition precedent, does not appear sufficient to insulate the companies involved from violating section 101 of the Act because that section requires Commission approval

*/ The Detroit Edison Company by amendment #8, dated May 3, 1977 requested amendment of Construction Permit CPPR-87 to include the Cooperatives as co-owners of the Fermi 2 facility. This amendment did not request that the co-owners become co-licensees. Article 9.5 of the Agreement provides for co-licensing if required.

before and not after an ownership interest is acquired. Accordingly, section 101 of the Act appears to have been violated by this transaction.*/

Having found that under the above circumstances a violation appears to have occurred, the appropriate enforcement action was considered. Sections 161, 186, 232 and 234 of the Act provide the necessary authority for appropriate enforcement action. However, none of these sections of the Act require any specific enforcement action. Generally, a determination regarding the enforcement action to be taken depends, under applicable law, on the exercise of sound discretion by the responsible official. Under 10 CFR Part 2, Subpart B of the Commission regulations, I am the responsible official delegated to make the appropriate determination regarding enforcement action under the circumstances present in this matter.

In exercising this discretionary authority in the instant matter I have reviewed the Commission's "Criteria for Determining Enforcement Action and Categories of Noncompliance with AEC Regulatory Requirements - Modifications", dated December 31, 1974 (40 FR 820, January 3, 1975). Under these criteria enforcement actions available include Orders to Cease and Desist, Orders for Suspension, Modification, or Revocation of a License, Civil Monetary Penalties and Written Notices of Violation. I have found the following factors relevant to this determination:

- (1) This transaction does not involve immediate threats to the public health, safety or common defense and security.
- (2) The Commission has received the necessary information from Detroit Edison Company to make a determination as to whether to approve the above-described transaction including a statement concerning foreign domination and control, financial qualifications of the Cooperatives, and antitrust information required under 10 CFR 50.33(a).

*/ We disagree with the argument that section 101 of the Act has not been violated because an interest in a utilization facility under construction has been acquired rather than an interest in a completed utilization facility. This distinction between construction and completion is not relevant here because the agreement clearly contemplates acquiring both an interest in the plant under construction and the completed plant. Thus, an interest in a completed utilization facility has been, in fact, acquired.

Moreover, it has been the long standing practice of the Commission to consider a utilization facility under construction to be a utilization facility. Therefore, in our view a right to own a utilization facility under construction is a right to own a utilization facility if completed.

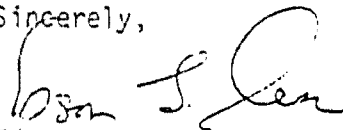
DEC 10 1978

- (3) There appears to be no deliberate attempt to violate the Act. The question of whether co-owners under the Act must be licensees of the Commission has been disputed, and only recently the Atomic Safety and Licensing Appeal Board ruled that co-owners must be co-applicants. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB 459 (February 16, 1978).
- (4) The violation is not serious. If the change in ownership is not approved, the Commission has an adequate remedy in that it could require the Cooperatives to sever any relationship with Detroit Edison Company relating to the ownership of the Fermi 2 facility.
- (5) The Cooperatives will be required to submit applications to become co-licensees of the Fermi 2 facility prior to issuing the amendment related to the change in ownership of the Fermi 2 facility.

After carefully reviewing these factors and the circumstances of the transaction at issue, I have issued the attached Notice of Violation and determined that the enforcement action you requested is neither necessary nor appropriate. Accordingly, your request is denied.

A copy of this determination will be placed in the Commission's Public Document Room at 1717 H Street, N.W., Washington, D.C. 20555, and the local Public Document Room for the Fermi Nuclear Plant. A copy of this decision will also be filed with the Secretary of the Commission in accordance with 10 CFR 2.206(c) of the Commission's regulations. Under that provision, the Commission may on its own motion review this determination.

Sincerely,



Edson G. Case, Acting Director
Office of Nuclear Reactor Regulation

Enclosures:

1. Letter from E.Thomas to E.Case, dtd 1/11/78.
2. Letter from P.Marquardt to J.Lieberman, dtd 1/11/78.
3. Relevant pages from prospectus, dtd 10/12/77.
4. Limited warranty deed, dtd 2/8/77.
5. Notice of Violation (w/out enclosure)