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

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Docket No. 50-341
(10 C.F.R. 2.206)

Mr. Edward A. Slavin, Jr., Esq.
Government Accountability Project
810 First Street, NE
Suite 630
Washington, DC 20002-3633

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

Dear Mr. Slavin:

This is a followup to my letters to you dated May 18 and 27, 1992, providing a partial response to your letters of April 21 and 23, 1992, seeking enforcement action against the Detroit Edison Company (DECo). As stated in my earlier letters, your request is being treated as a Petition in accordance with 10 CFR 2.206 and was referred to me for decision.

In my letters, while denying your request to be present during all "ex parte" telephone conversations or meetings held between NRC officials and DECo, I delayed a response to two other requests that specifically requested the NRC to take vigorous enforcement action against DECo for the above allegation and hold an enforcement conference with DECo to allow Ms. Larry to be heard.

The Director's Decision Under 10 CFR 2.206 is enclosed. A copy of the Notice, which is being filed with the Office of the Federal Register for publication, and a copy of the Notice of Violation that was issued to Detroit Edison Company in this matter, are also enclosed.

Sincerely,

James Lieberman
James Lieberman
Office of Enforcement

Enclosures:

1. Director's Decision Under 10 C.F.R. 2.206
2. Federal Register Notice
3. Notice of Violation

cc: Detroit Edison Company

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
OFFICE OF ENFORCEMENT
James Lieberman, Director

'92 NOV 25 P3:42

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of)
)
DETROIT EDISON COMPANY) Docket 50-341
(Fermi 2 Nuclear Plant))
) (10 C.F.R. 2.206)

DIRECTOR'S DECISION UNDER 10 C.F.R. 2.206

I. INTRODUCTION

By letters dated April 21 and 23, 1992, Edwin A. Slavin, Jr., requested on behalf of Carolyn Larry (Petitioner) that the Commission take action with regard to Detroit Edison Company (DECo). In the April 21 letter, Petitioner requested that "vigorous" enforcement action be taken against DECo, including assessment of a substantial civil penalty; that Petitioner and her counsel be afforded an opportunity to be present during all enforcement, private, or "ex parte" phone conversations or meetings between NRC officials and DECo; and that reasonable expenses incurred by Petitioner and her counsel relating to the enforcement action be paid by DECo as part of its civil penalty. As bases for the request in that letter, Petitioner asserted that on April 17, 1992, the Court of Appeals for the Sixth Circuit upheld a finding by the Secretary of Labor that DECO intentionally discriminated against Petitioner for raising concerns about breaches of security for safeguards information at the licensee's Fermi 2 facility and deceived her about her rights

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with regard to filing her discrimination complaint with the Department of Labor. In the April 23 letter, Petitioner requested that an enforcement conference that was held between DECo and NRC be reconvened to allow Petitioner and her counsel to attend and participate.

In a letter dated May 18, 1992, the Director, Office of Enforcement responded to the Petitioner, denying the request that the Petitioner and her counsel be allowed an opportunity to be present during all enforcement, private, or "ex parte" phone conversations or meetings, while deferring a decision on the other issues until completion of the staff's consideration of enforcement on these matters.¹

II. DISCUSSION

This case arises out of an allegation in February 1986 from Petitioner that DECo had provided false information to an NRC inspector. Following her contact with the NRC, Petitioner was transferred to another job that she asserted was a lesser position. Petitioner filed a complaint with the Department of Labor based upon this action and the Secretary of Labor determined that discrimination was a factor in the action and found, further, that DECo had misled Petitioner and distracted her from pursuing other recourse, including filing a complaint

¹ On May 27, 1992, another letter was sent to the Petitioner to forward a corrected copy of the notice of receipt of the petition that was filed with the Office of the Federal Register, deleting the erroneous reference in the heading of the Federal Register Notice that the May 18th letter constituted a "Partial Director's Decision".

with the Department of Labor. The Secretary's order was later affirmed by the Court of Appeals.²

The NRC first became aware of the complaint of discrimination in April 1986 when Petitioner informed NRC Region III staff. Since Petitioner had also filed a complaint with the Department of Labor, and since the NRC normally withholds enforcement action until the completion of the DOL process, the NRC did not initiate its own investigation on this subject. Following receipt of the June 28, 1991 Order by the Secretary of Labor, the NRC conducted an Enforcement Conference on August 22, 1991 with Detroit Edison Company to discuss the Secretary's findings, DECo's corrective actions and efforts to prevent other employees from being chilled by the threat of adverse action, and the potential for enforcement action still to be taken by the NRC. As the Secretary's Decision was appealed by DECo to the United States Court of Appeals for the Sixth Circuit, this enforcement action was deferred pending the Court of Appeals decision. This decision, affirming the Secretary of Labor's

² Specifically, the Secretary of Labor and the Court of Appeals found that when the Petitioner visited DECo's Equal Employment Opportunity (EEO) office regarding filing a complaint, she was misled in that: (1) the EEO specialist never told her that she (the EEO specialist) represented the interests of DECo; (2) although the EEO specialist assured the Petitioner that she would keep any disclosures in confidence, she subsequently discussed the case with DECo's legal department; (3) although the EEO specialist promised to pursue the Petitioner's grievance, she made almost no discernible progress in the four weeks after the Petitioner contacted her; and (4) although the EEO specialist admitted that she was aware that the Petitioner expressed confusion over when her 30-day filing period with DOL would begin to run, she did not attempt to clear up the Petitioner's confusion.

decision, was issued on April 17, 1992.

After consultation with the Commission, the staff issued a Notice of Violation to DECo on October 23, 1992 for discriminating against the Petitioner. The citation in the Notice of Violation was categorized at Severity Level II in accordance with the "General Statement of Policy and Procedure for NRC Enforcement Actions," 10 CFR Part 2, Appendix C (1986). A Severity Level II violation is one of very significant regulatory concern and normally results in a civil penalty. A civil penalty was not proposed in this case only because the act of discrimination occurred more than five years ago. Were it not for the age of this issue, a substantial civil penalty would have been imposed upon DECo because the act of discrimination was committed by a senior plant manager of DECo and because the active attempts to mislead the Petitioner and cause her to file with DOL after the filing deadline had passed are considered particularly egregious.¹

The staff has determined that an additional enforcement conference is not necessary in this case since enforcement action has already been taken based on a decision by the Department of Labor (86-ERA-032) and additional information is not necessary. Therefore, the Petitioner's request to attend such a conference

¹ While in the past, the NRC waited for the completion of the Secretary of Labor's review of a case before taking enforcement action, recent changes in the NRC's approach regarding the taking of enforcement action in such cases will result in enforcement action being taken in appropriate cases following the issuance of a Recommended Decision and Order by a DOL Administrative Law Judge.

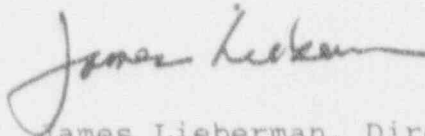
is moot.

III. CONCLUSION

Petitioner requests that the NRC take "vigorous" enforcement action against DECo, in the form of assessing a substantial civil penalty. To the extent that the Petitioner requests that the NRC take enforcement action, the Petition is granted, in that a Notice of Violation, Severity Level II, was issued to DECo for discriminating against Ms. Larry on October 23, 1986. For the reasons explained above, to the extent that the Petitioner requests that a substantial civil penalty be assessed against DECo, the Petition is denied. To the extent that the Petitioner requests that an enforcement conference be reconvened, the Petition is also denied.

A copy of the Petition is available for inspection at the Commission's Public Document Room at 2120 L Street, NW, Washington, DC 20555.

FOR THE NUCLEAR REGULATORY COMMISSION

A handwritten signature in dark ink, appearing to read "James Lieberman", is written over a horizontal line.

James Lieberman, Director
Office of Enforcement

Dated in Rockville, Maryland
this 25th day of November 1992

DOCKETED
USNRC

DD-92-08

U.S. NUCLEAR REGULATORY COMMISSION

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DOCKET NO. 50-341

DETROIT EDISON COMPANY

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ISSUANCE OF DIRECTOR'S DECISION UNDER 10 C.F.R. 2.206

Notice is hereby given that the Director, Office of Enforcement, has issued a decision concerning a Petition filed by letters dated April 21 and 23, 1992 submitted by Edward A. Slavin, J. s counsel for Carolyn Larry (Petitioner). The Petition requested that "vigorous" enforcement action be taken against Detroit Edison Company including a substantial civil penalty, that Petitioner and her counsel be afforded an opportunity to be present during all enforcement, private, or "ex parte" phone conversations or meetings between NRC officials and DECo, that reasonable expenses incurred by Petitioner and her counsel relating to the enforcement action be paid by DECo as part of its civil penalty, and that an enforcement conference be reconvened with Detroit Edison Company so that Petitioner and her counsel can attend and participate. As bases for this request, Ms. Larry asserts that on April 17, 1992, the Court of Appeals for the Sixth Circuit upheld a finding by the Secretary of Labor that DECo intentionally discriminated against Ms. Larry for raising concerns about breaches of security for safeguards information at the licensee's Fermi 2 facility and deceived her about her rights with regard to filing her discrimination complaint with the

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Department of Labor.

By letters dated May 18 and 27, 1992, while denying the request for Petitioner to be present during all "ex parte" telephone conversations or meetings held between NRC officials and DECo, a response to the other requests concerning vigorous enforcement action and scheduling of an enforcement conference with DECo was deferred to allow further NRC consideration.

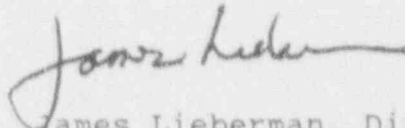
On October 23, 1992, a Notice of Violation was issued to Detroit Edison Company, citing DECo for a violation of 10 C.F.R. 50.7 at Severity Level II, for the discriminatory action taken against Petitioner. Although a violation at this Severity Level would normally be assessed a civil penalty, in this case a civil penalty was not assessed due to the time that has expired since the violation occurred.

The Petition is granted with respect to the request for enforcement action against Detroit Edison Company, but is denied with respect to the issuance of a civil penalty and the scheduling of an enforcement conference. The reasons for this denial are explained in the "Director's Decision Under 10 C.F.R. 2.206" (DD-92-08) which is available for public inspection in the Commission's Public Document Room at 2120 L Street NW, Washington, D.C. 20555.

A copy of this Decision will be filed with the Secretary for the Commission's review in accordance with 10 C.F.R. 2.206. As provided by this regulation, the Decision will constitute the final action of the Commission 25 days after the date of issuance of the Decision unless the Commission on its own motion institutes a review of the Decision within that time.

Dated at Rockville, Maryland
this 25th day of November 1992

FOR THE NUCLEAR REGULATORY COMMISSION

A handwritten signature in dark ink, appearing to read "James Lieberman", with a long horizontal flourish extending to the right.

James Lieberman, Director
Office of Enforcement



UNITED STATES
NUCLEAR REGULATORY COMMISSION
REGION III
799 ROOSEVELT ROAD
GLEN ELLYN, ILLINOIS 60137

October 23, 1992

Docket No. 50-341
License No. NPF-43
EA 91-100

The Detroit Edison Company
ATTN: W. S. Orser
Senior Vice President
Nuclear Operation
6400 North Dixie Highway
Newport, Michigan 48166

Dear Mr. Orser:

SUBJECT: NOTICE OF VIOLATION
(U. S. DEPARTMENT OF LABOR CASE NO. 86-ERA-32)

This refers to a decision by the Secretary of Labor issued on June 28, 1991, which was affirmed by the United States Court of Appeals for the Sixth Circuit on April 17, 1992, which held that one of your employees was discriminated against at the Fermi 2 Nuclear Plant during April 1986 in violation of Section 210 of the Energy Reorganization Act. Specifically, the Secretary and the Court of Appeals held that a Nuclear Security Specialist (NS Specialist) employed by Detroit Edison was discriminated against for talking to the NRC in that this individual was transferred from her position to a position of Nuclear Security Officer, a lesser position.

By way of background, during an NRC Region III security inspection at the Fermi 2 Nuclear Plant, conducted from November 12 through December 27, 1985, a number of violations of NRC security requirements were identified. On May 20, 1986, the NRC issued Enforcement Action (EA) 86-66 for a Severity Level III problem involving 13 violations of NRC security requirements for which a \$50,000 civil penalty was proposed and later paid by Detroit Edison on June 19, 1986. Included among the 13 violations was a violation for the failure to adequately protect Safeguards Information processed in an unsecured computer.

The NS Specialist read a copy of the NRC Inspection Report (No. 50-341/85047) and, on February 24, 1986, informed Region III that false information had been provided to the NRC by the Director of Nuclear Security during the inspection. The NRC Office of Investigations (OI) investigated this allegation and concluded that the Director of Nuclear Security had known that questions existed regarding the suitability of using the computer system for processing Safeguards Information, and that his statement to the inspector, which implied his lack of knowledge, was false and

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October 23, 1992

an attempt to mislead the NRC inspector. (A copy of the investigation report summary was mailed to the Detroit Edison Company on April 20, 1989.)

As a result of the OI investigation, on February 12, 1990, the NRC issued another Notice of Violation, citing a violation categorized at Severity Level II, for the material false statement made by the Director of Nuclear Security in violation of Section 186 of the Atomic Energy Act of 1954, as amended. In addition, an Order Modifying License was issued requiring the Detroit Edison Company to provide 30 days notice to the NRC prior to returning the Director of Nuclear Security to safety-related activities under the Fermi operating license (EA 88-106). The NRC noted that the Detroit Edison Company had previously removed the individual from his position of Director of Nuclear Security at the Fermi Plant. This same individual is the one primarily responsible for the subject discrimination violation.

On April 15, 1986, the same NS Specialist informed Region III that Detroit Edison had discriminated against her for talking to the NRC, and on May 19, 1986, the NS Specialist filed a complaint of employment discrimination with the U.S. Department of Labor (DOL). In her complaint, the NS Specialist alleged that on April 23, 1986, the Detroit Edison Company transferred her from the NS Specialist position to a former position of Nuclear Security Officer, a lesser position. On October 17, 1986, a DOL Administrative Law Judge (ALJ) found in his [Recommended] Decision and Order that the Detroit Edison Company had discriminated against the NS Specialist and that she was entitled to be reassigned to her former position, ruling that the licensee's reasons for transferring her to the position of Nuclear Security Officer were pretextual. On June 28, 1991, the Secretary of Labor issued a Decision and Order, agreeing with the ALJ, and further concluded that through its Equal Employment Opportunity (EEO) process, the licensee had misled the NS Specialist and diverted her from filing a complaint with the DOL.

On August 22, 1991, an enforcement conference was held in the NRC Region III office between you and members of the NRC staff to discuss the Secretary's finding. A copy of the enforcement conference report was mailed to you on August 28, 1991.

On August 17, 1991, Detroit Edison Company appealed the Secretary of Labor's Decision, and on April 17, 1992, the United States Court of Appeals for the Sixth Circuit affirmed the Decision and Order of the Secretary of Labor, finding unlawful retaliation against the employee for engaging in protected activity. In addition, the Court affirmed the Secretary of Labor's finding that Detroit Edison's conduct was misleading, causing the NS Specialist to delay filing her complaint. Specifically, the Court of Appeals found that when the NS Specialist visited

October 23, 1992

Detroit Edison's Equal Employment Opportunity (EEO) office with regard to filing a complaint, she was misled by Detroit Edison's EEO specialist in that: (1) the EEO specialist never explained to the NS Specialist that she represented the interests of Detroit Edison; (2) although the EEO specialist assured the NS Specialist that she would keep any disclosures in confidence, she subsequently discussed the NS Specialist's case with Detroit Edison's legal department and turned over the NS Specialist's document to that department; (3) although the EEO specialist promised to pursue the NS Specialist's grievance, she made almost no discernible progress in the four weeks after the NS Specialist contacted her; and (4) although the EEO specialist admitted that she was aware that the NS Specialist expressed confusion over when her 30-day filing period with DOL would begin to run, she did not attempt to clear up the NS Specialist's confusion. Therefore, after reviewing the established record, the NRC has found that a violation of the Commission's regulations has occurred.

Based on the Court of Appeals Decision and the Decision and Order of the Secretary of Labor, the NRC concludes that this action was an act of discrimination in retaliation for informing the NRC of the problems associated with protecting Safeguards Information in the computer system and for pointing out potentially false information provided to the NRC inspector by the Director of Nuclear Security. This is a violation of Section 210 of the Energy Reorganization Act (ERA) of 1974, as amended, and of 10 CFR 50.7.

The enclosed Notice of Violation describes the violation. Discrimination by a Commission licensee or its contractor against an employee for engaging in protected activities is prohibited. Discrimination may include discharge and other actions, including reassignment, that relate to compensation, terms, conditions, and privileges of employment. The activities which are protected include, but are not limited to, reporting of quality discrepancies and safety and safeguards concerns by an employee to his employer or the NRC. Discrimination by a member of plant management above first-line supervision against employees engaging in protected activities is a very significant regulatory concern. Therefore, in accordance with the "General Statement of Policy and Procedure for NRC Enforcement Actions," (Enforcement Policy), 10 CFR Part 2, Appendix C (1986), the violation is classified as a Severity Level II violation.

The actions of the former Director of Nuclear Security and other representatives of Detroit Edison Company could have had a significant effect on the willingness of individuals to raise concerns, thereby denying management the involvement of its employees in an aggressive, proactive approach to the identification and resolution of concerns at an incipient

October 23, 1992

stage to preclude later problems. Therefore, a civil penalty would normally be assessed to address the need for you to ensure that: (1) your supervisors and managers do not take discriminatory actions against employees for bringing forward safety or safeguards concerns; and (2) your employees feel free to bring such concerns to the attention of management. A substantial civil penalty would have been warranted to emphasize the unacceptability of Detroit Edison's action. Specifically, the act of discrimination committed by a senior manager, and the active attempts to mislead the NS Specialist and cause her to file with DOL after the filing deadline, were particularly egregious. Such actions do not encourage employees to raise safety issues. However, a civil penalty is not being proposed because the violation occurred more than five years ago.

Nevertheless, the right of any licensee employee to raise concerns directly with the NRC is very important to the Commission's mission to protect health and safety. While all discrimination against those engaged in protected activities is prohibited, discrimination by a senior manager at a nuclear power plant is especially unacceptable. Normally, the NRC would also consider ordering a licensee to remove a senior manager from participating in activities under the NRC license for having engaged in discriminatory actions. However, in this instance, Detroit Edison Company has already removed the individual from the position of Director of Nuclear Safety and the NRC's Order Modifying License mentioned above requires the Detroit Edison Company to provide the NRC with 30 days notice should the Detroit Edison Company decide to return the individual to activities under the Fermi operating license in the future.

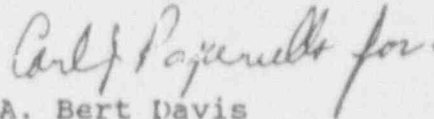
You are required to respond to this letter and should follow the instructions specified in the enclosed Notice when preparing your response. In your response, you should document the specific actions taken and any additional actions you plan to prevent recurrence, including actions taken to ensure that this employment action has not had a chilling effect in discouraging other licensee or contractor employees from raising perceived safety or safeguards concerns. Your response should address actions taken to assure that complaints are properly handled, including counseling on where complaints are to be filed, policies on confidentiality, and policies on encouraging individuals to raise, and respecting individuals for raising, safety and safeguards issues. After reviewing your response to this Notice, including your proposed corrective actions and the results of future inspections, the NRC will determine whether further NRC enforcement action is necessary to ensure compliance with NRC regulatory requirements.

October 23, 1992

In accordance with 10 CFR 2.790 of the NRC's "Rules of Practice," a copy of this letter and its enclosure will be placed in the NRC Public Document Room.

The response directed by this letter and the enclosed Notice are not subject to the clearance procedures of the Office of Management and Budget as required by the Paperwork Reduction Act of 1980, Pub. L. No. 96-511.

Sincerely,



A. Bert Davis
Regional Administrator

Enclosure: Notice of Violation

cc w/enclosure:

D. R. Gipson, Assistant Vice
President & Manager Nuclear
Production
John A. Tibai, Supervisor
of Compliance
P. A. Marquardt, Corporate
Legal Department
DCD/DCB (RIDS)
OC/LFDCB
Resident Inspector, RIII
James R. Padgett, Michigan Public
Service Commission
Harry H. Voight, Esq.
Michigan Department of
Public Health
Monroe County Office of
Civil Preparedness
Fermi, LPM, NRR

The Detroit Edison Company

October 23, 1992

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EA File

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SLO:RIII

PAO:RIII

IMS:RIII

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NOTICE OF VIOLATION

Detroit Edison Company
Fermi 2 Nuclear Plant

Docket No. 50-341
License No. NPF-43
EA 91-100

Based on the results of an investigation and hearing conducted by the U. S. Department of Labor (DOL) (DOL case number 86-ERA-32), the resulting Decision and Order by the Secretary of Labor issued on June 28, 1991, and the subsequent affirmation of that Decision by the U.S. Court of Appeals for the Sixth Circuit dated April 17, 1992, the NRC has determined that a violation of its regulations has occurred. In accordance with the "General Statement of Policy and Procedure for NRC Enforcement Actions," 10 CFR Part 2, Appendix C (1986), the violation is set forth below:

10 CFR 50.7 prohibits discrimination by a Commission licensee, or a contractor or subcontractor of a licensee, against an employee for engaging in certain protected activities. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, and privileges of employment. The protected activities include, but are not limited to, providing the NRC with information about possible violations of NRC requirements.

Contrary to the above, on April 23, 1986, a Nuclear Security Specialist employed by the Detroit Edison Company was unlawfully discriminated against by the Detroit Edison Company in that the Nuclear Security Specialist was reassigned from that position to the lesser position of Nuclear Security Officer in retaliation for having engaged in certain protected activities.

Those activities included: (1) providing information to the Nuclear Regulatory Commission during the period of November to December 1985 indicating that the Detroit Edison Company was not in compliance with the NRC requirements regarding the protection of Safeguards Information processed by and stored in a computer; and (2) providing information on February 24 and April 15, 1986, indicating that the Detroit Edison Company's then-Director of Nuclear Security at the Fermi 2 Nuclear Power Plant provided false or misleading information to an NRC inspector regarding the Nuclear Security Director's knowledge of the use of that computer to process and store Safeguards Information.

This is a Severity Level II violation (Supplement VII).

Pursuant to the provisions of 10 CFR 2.201, the Detroit Edison Company (Licensee) is hereby required to submit a written statement or explanation to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, within 30 days of the date of this Notice of Violation (Notice). This reply should be clearly marked as a "Reply to a Notice of Violation" and should include for each alleged violation: (1) admission or denial of the alleged violation, (2) the reasons for the violation if admitted,

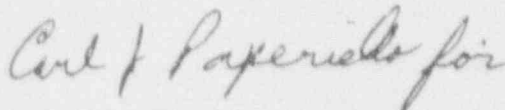
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October 23, 1992

and if denied, the reasons why, (3) the corrective steps that have been taken and the results achieved, (4) the corrective steps that will be taken to avoid further violations, and (5) the date when full compliance will be achieved. If an adequate reply is not received within the time specified in this Notice, an order may be issued to show cause why the license should not be modified, suspended, or revoked or why such other action as may be proper should not be taken. Consideration may be given to extending the response time for good cause shown. Under the authority of Section 182 of the Act, 42 U.S.C. 2232, this response shall be submitted under oath or affirmation.

The Reply to Notice of Violation should be addressed to: Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, ATTN: Document Control Desk, Washington, D.C. 20555 with a copy to the Regional Administrator, U.S. Nuclear Regulatory Commission, Region III and a copy to the NRC Resident Inspector at Fermi 2.

FOR THE NUCLEAR REGULATORY COMMISSION

A handwritten signature in cursive script, appearing to read "A. Bert Davis".

A. Bert Davis
Regional Administrator

Dated at Glen Ellyn, Illinois
the 23rd day of October 1992