

May 29, 2009

MEMORANDUM TO: James A. Gavula
Mechanical Engineer
Office of Nuclear Reactor Regulation

FROM: Mark A. Satorius */RA/*
Regional Administrator

SUBJECT: DIFFERING PROFESSIONAL OPINION DECISION (DPO-2008-002)

On October 15, 2008, you submitted a Differing Professional Opinion (DPO) regarding whether a violation of 10 CFR 50.9 occurred when First Energy Nuclear Operating Company (FENOC) omitted a certain document from its May 2, 2007, response to a Request for Information (RFI). You disagreed with the conclusion of two Allegation Review Boards (ARBs) in case number RIII-2007-A-0046, which found that the omission did not render the RFI response materially incomplete or inaccurate.

A panel was appointed on November 18, 2008, to review your DPO. Members of the panel met with you on December 4, 2008, to discuss your DPO and develop a statement of your concern. On December 11, 2008, you approved the statement of the concern developed by the panel.

After reviewing the panel's report and associated background information, and after considering information you provided to me directly, I support the panel's findings. The panel found that the ARBs reasonably decided not to pursue a violation of 10 CFR 50.9 against FENOC for omitting a document from its RFI response because the omitted document was not material to the NRC.

The decision not to pursue a violation of 10 CFR 50.9 notwithstanding, significant enforcement action was taken against FENOC on this matter. The NRC issued a Confirmatory Order to FENOC on August 15, 2007, which required FENOC to address many questions regarding the adequacy of its processes for communicating with the NRC. I believe the Confirmatory Order was very effective in that regard, and achieved corrective actions that would have been expected had a violation of 10 CFR 50.9 occurred.

In addition to finding that no violation of 10 CFR 50.9 occurred, the panel noted three areas of improvement for consideration. The panel's recommendations pertain largely to the conduct of ARBs. I have tasked the Region III Enforcement and Investigations Coordination Staff (EICS) to assess the panel's recommendations and report back to me by July 15, 2009, whether any changes are needed as a result of the panel's findings. You will be copied on the EICS report.

Finally, during the course of its review, the panel questioned whether it should evaluate another opinion you expressed regarding decisions made by a different ARB. According to the panel, you were concerned that certain actions assigned by the ARB in allegation number RIII-2006-A-0030 had not been completed before the allegation file was closed. I directed that the panel not evaluate your opinion regarding RIII-2006-A-0030 at this time because no final staff position has yet been reached. The Division of Reactor Projects, in coordination with EICS, recently reopened allegation file RIII-2006-A-0030 to evaluate whether additional actions need to be taken. An evaluation plan regarding RIII-2006-A-0030 will be presented to a new ARB, which may or may not take an action that would address your concern. Once a final staff position is reached, you may file a new DPO regarding that position if you wish.

Thank you for your willingness to use the DPO process. The quality of the agency's decision-making improves when all views are openly expressed and fairly considered. A summary of your DPO and its resolution will be included in the Weekly Information Report to advise interested employees of the outcome when the case is closed. If you have any questions or would like to discuss the matter further, please do not hesitate to contact me.

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J. Gavula

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