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January 11, 1978

\* RESIDENT PARTNERS WASHINGTON OFFICE  
\* ADMITTED TO THE DISTRICT OF COLUMBIA BAR

Mr. Edson G. Case  
Acting Director  
Office of Nuclear Reactor  
Regulation  
U.S. Nuclear Regulatory  
Commission  
Washington, D.C. 20555

Dear Mr. Case:

By letter dated November 19, 1977, Dr. Robert G. Asperger requested that the Director of Nuclear Material Safety and Safeguards, the Director, Office of Inspection and Enforcement, and the Director of Nuclear Reactor Regulation "immediately suspend and, after appropriate hearings, revoke" Construction Permit No. CPPR-87 issued to The Detroit Edison Company for the Enrico Fermi Atomic Power Plant, Unit No. 2 ("Fermi 2").<sup>1/</sup> Dr. Asperger's claim is based on the argument that Detroit Edison has violated specific Commission regulations by a "sale" of an undivided 20% ownership interest in Fermi 2<sup>2/</sup> to Northern Michigan Electrical Cooperative, Inc. and Wolverine Electric Cooperative, Inc. ("the Cooperatives").

<sup>1/</sup> Although Dr. Asperger refers in his request to "Fermi #1", we assume he is referring instead to Fermi 2.

<sup>2/</sup> This transaction is fully described in the document, "Participation agreement between The Detroit Edison Company and Northern Michigan Electric Cooperative, Incorporated and Wolverine Electric Cooperative, Incorporated", Feb. 1977 ("Participation Agreement") filed with the Commission on May 6, 1977.

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Dr. Asperger's request places primary reliance on 10 C.F.R. § 50.80 (1977). We respectfully submit that § 50.80 does not support Dr. Asperger's request, and accordingly, his request should be denied.

Section 50.80(a) provides:

No license for a production or utilization facility, or any right thereunder, shall be transferred, assigned, or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of the license to any person, unless the Commission shall give its consent in writing.

In our view, this section applies to the transfer of operating licenses and rights derived therefrom. It has no application to the present situation which involves a conditional sale of minority ownership interests in a yet-to-be completed power reactor. Unlike § 185 of the Atomic Energy Act, 42 U.S.C. § 2235 (1970), which deems a "construction permit . . . to be a 'license'",<sup>3/</sup> Part 50 of the Commission's regulations, does not similarly define the word "license". To the contrary, Part 50 makes specific and separate references to construction permits and operating licenses. Compare 10 C.F.R. § 50.10(a) with § 50.10(b); § 50.22 with 50.23; see §§ 50.30(a), 50.90. Where the Commission meant to include "construction permit" within the term "license", it did so explicitly. See 10 C.F.R. § 2.4(i). The fact that the Commission specifically defined the word "license" to include "construction permit" in the very next section of its regulations following § 50.80 emphasizes this distinction. See 10 C.F.R. § 50.81(d) (1).

Section 50.80 finds its statutory base in § 184 of the Atomic Energy Act, 42 U.S.C. § 2234 (1970). Where relevant, § 184 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

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<sup>3/</sup> The Atomic Energy Act does not provide, however, that a "license" includes a "construction permit".

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.

Thus, the "right" referred to in 10 C.F.R. § 50.80(a) is a shorthand expression for the "right to utilize . . . special nuclear material." The right to utilize special nuclear material in a reactor simply does not arise under a construction permit. To the contrary, it cannot be conferred until the award of an operating license. Manifestly, no such right in Fermi 2 was or could now be transferred by Detroit Edison to the Cooperatives.

Regardless of the definitions of "license" and "right" in 10 C.F.R. § 50.80(a), the regulation proscribes only the transfer of such license or right "through [the] transfer of control of the license." Similarly, § 184 of the Act proscribes the "transfer of control of any license". The Joint Committee on Atomic Energy report on this section explained that "[s]ection 184 prohibits any license from being transferred . . . unless the Commission finds that the transfer is in accordance with the provisions of the Act." S. Rep. No. 1699, 83d Cong., 2d Sess. 28 (1954), reprinted in I Legislative History of the Atomic Energy Act of 1954 749, 776 (1955). The Commission has on at least one occasion emphasized that § 184 is concerned with the control of the license. See letter from Ernst Volgenau, Director, Office of Inspection and Enforcement to Mr. George G. Zipf, Chairman and President, Babcock and Wilcox Co. (May 9, 1977).

Whatever minority ownership interests in Fermi 2 will ultimately be transferred to the Cooperatives,<sup>4/</sup> it is clear that such interests extend only to the facility itself and not to the "license". See Participation Agreement, ¶¶ 2.1, 2.3, 2.4. The Participation Agreement expressly provides that Detroit Edison will have sole responsibility

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<sup>4/</sup> The Participation Agreement (¶ 9.5) contains a specific condition subsequent which will void the entire transaction if the Cooperatives fail to obtain required Commission "licenses". Because the issue of amending Construction Permit CPPR-87 to include the Cooperatives as partial co-owners of Fermi 2 is now pending before the Atomic Safety and Licensing Board, this condition to the transfer has not yet been satisfied.

for the construction and licensing of Fermi 2. Id., ¶ 5.3.1.  
Accordingly, there has been no transfer of control of the  
facility and more importantly, no transfer of control of the  
"license".

Dr. Asperger's request is without merit and should  
be denied.

Respectfully submitted,

By Eugene B Thomas, Jr.  
Partner

LEROEUF, LAMB, LEIBY & MACRAE

Attorneys for The Detroit  
Edison Company