BEFORE THE UNITED STATES

ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
Consolidated Edison Company of New York, Inc. (Indian Point Station, Unit No. 2)	)	Docket No. 50-247
	)	
	)	

APPLICANT'S SUPPLEMENTAL BRIEF OPPOSING THE TAKING OF OFFICIAL NOTICE OF CERTAIN HEARSAY DOCUMENTS

I

INTRODUCTION

The Citizens Committee for the Protection of the Environment ("CCPE") has requested the Atomic Safety and Licensing Board ("the Board") in this proceeding to take official notice of parts or all of some thirty documents,* plus the complete transcript of the October 15, 1971 hearing in the Vermont Yankee Proceeding, AEC Docket No. 50-271. Applicant opposes the taking of official notice of all or any of these materials. It so advised the Board in oral

*Applicant is referring to CCPE's letter of December 9, 1971. The precise number and identity of the documents has never been made clear by CCPE. Since October 25, 1971, CCPE has supplied the Board and the parties with four lists of documents, none of which has been the same. Each succeeding list has been longer than its predecessor. Moreover, CCPE has never shown Applicant or the Board a copy of each document which it desires to be officially noticed.

argument on November 12 and December 14, 1971, and in a brief dated December 10, 1971. The Chairman of the Board has requested that Applicant file this supplemental brief in further support of its objections.

If the statements contained in these documents are officially noticed, they are accepted as proven unless the contrary can be shown. The burden of proof with regard to any statements which might be adverse to Applicant's case would therefore be shifted to Applicant. To require Applicant to sift through the thousands of statements contained in these documents and to controvert those which might be adverse would impose an unreasonable burden on the Applicant and would require an unlimited hearing.

For legal and factual reasons set forth infra, Applicant asserts that the taking of official notice of these documents is improper and is not supported by the authority of court or agency decisions. Further, should the Board rely on such documents in reaching its decision, such reliance would constitute reversible error.

II

NO AUTHORITY EXISTS FOR OFFICIAL NOTICING OF THESE APPROXIMATELY 2,000 PAGES OF HEARSAY DOCUMENTS

1. Nature of the Documents. A list of the documents requested to be the subject of official notice is set forth in CCPE's letter of December 9, 1971, and a copy is contained in Appendix A to this brief. For convenience, and in response to the Chairman's suggestion (Tr. 4247), Appendix A also lists, by title and author, those reports which CCPE only identified by number. By Applicant's count, the total number of pages of documents which the Board is asked to officially notice is approximately 2,000.*

Most of the documents listed in Appendix A constitute reports of experiments carried out by certain "national laboratories," i.e., government-owned facilities operated by various private companies such as Union Carbide Corporation - Nuclear Division, Battelle-Northwest Division of Battelle Memorial Institute, and Aerojet Nuclear Corporation (formerly Idaho Nuclear Corporation).** These facilities have been established for the general

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* The WCAP documents listed as item 23 in Appendix A are not included in this discussion (see Ftn. 6 in Applicant's brief of December 10, 1971).

** Items numbered 2, 3, and 27 in Appendix A hereto are nothing more than technical magazine articles. Item numbered 1 is a document prepared under the auspices of a European organization. Item numbered 24 appears to refer to discussions which took place with the Atomic Safety and Licensing Board Panel.

purpose, among others, of performing various technical and scientific experiments under contract with government agencies, particularly the Atomic Energy Commission, in its ongoing search for and dissemination of additional knowledge on nuclear energy. The contracts covering the reports involved here were funded and administered not by the regulatory staff of the Commission but by a branch of the Commission's developmental arm, the Division of Reactor Development and Technology. Once prepared, the documents apparently were generally given a wide distribution both within and outside the developmental and regulatory staff of the Atomic Energy Commission, and to individuals outside the AEC. There is no mechanism of which Applicant is aware (nor has CCPE pointed to any) whereby the accuracy of these reports was ever determined by anyone within the developmental or regulatory staff of the AEC, much less by the Commissioners themselves,* nor were these documents ever "accepted" by the Commission in the sense of approving their reliability.

Furthermore, many of these reports bear the following disclaimer with regard to the contents thereof:

> "This report was prepared as an account of Government sponsored work. Neither the United States, nor the Commission, nor any person acting on behalf of the Commission:

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*Sometimes the reports themselves note that they are preliminary and subject to "revision or correction" (see, for example, items numbered 14, 15, 16, 17, 18 and 19 in Appendix A).

A. Makes any warranty or representation, express or implied, with respect to the accuracy, completeness, or usefulness of the information contained in this report, or that the use of any information, apparatus, method, or process disclosed in this report may not infringe privately owned rights; or

B. Assumes any liabilities with respect to the use of, or for damages resulting from the use of any information, apparatus, method, or process disclosed in this report.

As used in the above, 'person acting on behalf of the Commission' includes any employee or contractor of the Commission or employee of such contractor, to the extent that such employee or contractor of the Commission, or employee of such contractor prepares, disseminates, or provides access to, any information pursuant to his employment or contract with the Commission, or his employment with such contractor."

None of the documents in question was prepared for the purpose of analyzing the Indian Point Unit No. 2 plant, and there is not the slightest evidence in the record that any of the authors of these reports have knowledge of this facility or of the evidence introduced in this proceeding with respect to its characteristics. It is clear, even in the opinion of CCPE's counsel, that the documents are rank hearsay. Yet, despite this fact, the Board is being asked to take them into the record by officially noticing them, that is, to accept their contents as true.*

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* CCPE at one point took the position that a distinction was to be drawn, as far as official notice is concerned, between so-called "Class 1" and "Class 2" data contained in the reports. Applicant regards this distinction as spurious and presumably prompted by CCPE's implicit recognition that under no stretch of the imagination can opinions of the authors of these reports be the subject of official notice. In its supplemental brief served on December 22, 1971, CCPE drops the distinction and treats all the information contained in these documents alike. See also Tr. 4314.

2. The Administrative Procedure Act, and the Commission's Own Rules, Prohibit the Taking of Official Notice of Such Documents. The Commission, in holding this hearing, is governed as to its procedure by both the Administrative Procedure Act (APA), 5 U.S.C. §551 et seq., and by its own rules.

With regard to the taking of official notice, §7(d) of the APA provides:

> "When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary."

The Final Report of the Attorney General's Committee on Administrative Procedure (S. Doc. 8, 77th Cong., 1st Sess.), in outlining the purpose and goals of the APA, discussed Section 7 of the Act, and the problems of presentation of evidence to administrative agencies. Information may be the subject of official notice, stated the Report, if it has been,

> "developed in the usual course of business of the agency, if it has emerged from numerous cases, if it has become part of the factual equipment of the administrators . . . [I]t seems undesirable for the agencies to remain oblivious of their own experience." (p. 72)

Disputed facts, according to the Attorney General's Report, should not be the subject of official notice, but should come into the record pursuant to usual evidentiary procedures.

None of the documents of which the Board is here asked to take official notice meet any of the Attorney General's criteria. They were not disclosed in the "usual course of business of the agency," but rather were developed by its contractors. They have not "emerged from numerous cases," rather, they are put forward for the first time here, as documents whose contents are true, not by the Commission's Staff, but by an intervenor. They are clearly not part of the "factual equipment" of the Commission, since they represent data untested except by their individual authors. They are not part of the Commission's "experience"; they are part only of the experience of the individual authors.

As will be shown below, the major Federal administrative agencies have adhered to the Attorney General's criteria in their use of official notice. Not a single case has been found where a regulatory agency took official notice of documents similar to those here requested. Indeed, in cases where far less flagrant departures from the requirements of Section 7 of the Act were attempted by an agency, the courts have quickly overruled such action.

The Commission's Rules provide:

> "(i) Official notice. Official notice may be taken of any fact of which judicial notice might be taken by the courts of the United States and of any technical or scientific fact within the knowledge of the Commission as an expert body, if (1) the fact is specified in

> the record or is brought to the attention of the parties before final decision, and (2) every party adversely affected by the decision is afforded an opportunity to controvert the fact. Any party may oppose a request that official notice be taken of a fact. If a decision is stated to rest in whole or in part on official notice of a fact which the parties have not had a prior opportunity to controvert, a party may controvert the fact by exceptions to an initial decision or a petition for reconsideration of a final decision, clearly and concisely setting forth the information relied on to show the contrary."*

In Appendix A to its Rules, entitled "Statement of General Policy: Conduct of Proceedings for the Issuance of Construction Permits for Production and Utilization Facilities for Which a Hearing is Required Under Section 189a of the Atomic Energy Act of 1954, as Amended," the Commission has explained and elaborated upon the above rule as follows:

> "(f) Official notice. (1) 'official notice' is a legal term of art. Generally speaking, a decision by a board must be made on the basis of evidence which is in the record of the proceeding. A board, however, is expected to use its expert knowledge and experience in evaluating and drawing conclusions from the evidence that is in the record. The board may also take account of and rely on certain facts which do not have to be 'proved' since they are 'officially noticed'; these facts do not have to be 'proved' since they are matters of common knowledge.

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*The statement that the Commission may take official notice of any "technical or scientific fact" is also contained in the CAB's rules. The language first appeared in an earlier draft of the APA. It was regarded as too restrictive and was revised. 21 Pike & Fisher Ad. L. 2d 262.

> "(2) Pursuant to 10 CFR 2.743(i) 'official notice' may be taken of any fact of which judicial notice might be taken by the courts of the United States and of any technical or scientific fact within the knowledge of the Commission as an expert body, if (1) the fact is specified in the record or is brought to the attention of the parties before the final decision, and (2) every party adversely affected by the decision is afforded an opportunity to controvert the fact. (For example, a board might take 'official notice' of the fact that high level wastes are encountered mainly as liquid residue from fuel reprocessing plants.) Matters which are 'officially noticed' by a board furnish the same basis for findings of fact as matters which have been placed in evidence and proved in the usual sense." (10 CFR 2, App. A)

It is obvious from the most cursory inspection of the documents that they do not contain matters of "common knowledge", but rather set forth inextricably intermingled data and opinion relating to experiments conducted by their authors. Certainly, the Commission's rules do not contemplate the taking of official notice of such voluminous, highly controversial and unproved fact and opinion.

3. No Case Has Been Found Where a Federal Agency Has Taken Official Notice of Any Material Analogous to That Which is the Subject of This Request. The Interstate Commerce Commission, the oldest Federal regulatory agency, has led the way in the use of official notice in agency proceedings.* Its use of that

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* Sigmon, "Rules of Evidence Before the ICC", 31 Geo. Wash. L. Rev. 258 (1962).

doctrine, however, sharply contrasts with the request here. Because of the volume of documentary evidence ordinarily available in proceedings before it, the ICC authorizes the hearing officer to require the party offering numerous documents into evidence, such as freight bills, to abstract the relevant data therefrom, but it requires that the parties must be afforded reasonable opportunity to examine not only the abstract, but the underlying documentary information, which must be available for cross-examination. See Trans-american Freight Lines, Inc., 76 M.C.C. 313 (1958), Emery Transportation Co., 74 M.C.C. 193 (1957); D.C. Hall Co., 70 M.C.C. 233 (1956); Atkinson, 70 M.C.C. 113 (1956); Bonny Master Express, Inc., 68 M.C.C. 303 (1956); Neptune Storage, Inc., 67 M.C.C. 319 (1956). If all underlying documents are not available, then the Commission requires that a witness must be presented who can stand cross-examination on the abstract. Wheaton Van Lines, Inc., 69 M.C.C. 49 (1956).

The ICC also takes official notice of information contained in annual reports of motor carriers which it requires be filed with it. Middlewest Motor Freight Bureau, 62 M.C.C. 300 (1953). However, it requires that such reports be made under two separate oaths, one by the motor carrier's accounting officer, whose duty it is to have supervision of the books of account and to control the manner in which they are kept, who must swear that he knows that the books have been kept "in good faith in accordance

with the accounting and other orders of the ICC," and that to the best of his knowledge and belief the entries contained in the report have been accurately taken from the books of account, and are in exact accord therewith; that he believes that all other statements of fact contained in the report have been accurately taken from the books of account, and are in exact accord therewith; that he believes that every statement of fact contained in the report is true, and that the said report is a correct and complete statement of the business and affairs of the motor carrier. A second oath must be made by the president or chief officer of the motor carrier, to the effect that he believes the statements therein contained are true.

These oaths should be contrasted with the documents herein: not only are such documents not made under oath, but the Commission itself specifically disavows the accuracy or reliability of the contents thereof.

The Interstate Commerce Commission has been upheld by the courts in taking official notice of its own decisions (Waite v. U.S., 161 F. Supp. 856 (W. D. Pa. 1958)), its own previous rulings (Alabama v. U.S., 56 F. Supp. 478 (W. D. Ky. 1944)), its own internal practices and procedures (American Trucking Associations, Inc. v. Fresco Co., 358 U.S. 133 (1958)), and its own expertise in interpreting motor carrier operating authorities which specify,

both by geography and by commodities the service to be performed (Sims Motor Transport Lines, Inc. v. U.S., 183 F. Supp. (N.D. Ill. 1959), affd. 362 U.S. 637 (1960); J.H. Nowinsky Trucking Co. v. U.S., 195 F. Supp. 48, 75 (W.D. Wis. 1961); Ace Motor Lines v. U.S., 197 F. Supp. 591, 596 (S.D. Iowa, 1960)).

The ICC has also taken official notice of the effects of war upon freight car shortages (Charges for Protective Service, 253 I.C.C. 351 (1942)), and of the effects of extreme weather conditions (Commutation Fares, 270 I.C.C. 281, 285).

However, when the ICC undertook to prescribe just, reasonable, and equitable divisions of joint rates between the North and South Divisions of the nation's railroads, and in doing so, relied on its own expertise for a finding that territorial costs were necessarily the same as comparative costs incurred in handling North-South freight traffic, the Supreme Court reversed, on the ground that the record did not reveal the nature or costs of North-South traffic. To hold otherwise, the Court said, would make judicial review impossible, and "administrative expertise would then be on its way to becoming 'a monster which rules with no practical limits on its discretion'. Burlington Truck Lines v. U.S., 371 U.S. 157, 167 . . . That is impermissible under the Administrative Procedure Act." (B & O R.R. Co. v. Aberdeen and Rockfish R.R. Co., 393 U.S. 87 at 93 (1968), rehearing denied, 393 U.S. 1124 (1969)).

The Federal Trade Commission has also made broad use of the doctrine of official notice, but usually* with great care. For instance, the Commission has taken official notice of facts previously found, that the retail grocery business is highly competitive, that price is a highly important factor in enabling a food retailer to compete, and that milk is a staple standardized item sold by virtually all food retailers. Beatrice Foods Co., et al., 19 Pike & Fisher Ad. L. 2d 85 (F.T.C., 1966). However, the Commission declined in that proceeding to take official notice of the statement that,

> "A low price to some, but not all, competing retail stores in a city would normally be expected to hinder competition between them."

because it was not "sufficiently meaningful to warrant the taking of official notice" (at 89). It also declined to take official notice of another sentence from a prior finding on the ground that that sentence decided a major issue in the case, i.e., the probability of competitive injury.

> "Substantial and continuous discrimination in price of a major grocery product, such as milk, creates a probability of competitive injury."

This case is thus in sharp contrast with what the Board is asked to do here. The FTC took judicial notice of two paragraphs from a prior finding, carefully distinguishing among the contents of the various sentences of the paragraphs, and taking

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*See Dayco Corp. case, p. 16, infra.

only the proper parts thereof. Here, the Board is asked to take official notice of approximately 2,000 pages of documents without any real attempt being made to distinguish between fact and opinion, if indeed one could be made.

In Bakers of Washington, Inc., 15 Pike & Fisher Ad. L. 2d 399 (F.T.C., 1964) the Commission's examiner took official notice of certain facts concerning the nature of respondent's business to which respondent objected in its petition for rehearing. The Commission ordered a new hearing.

In Procter & Gamble Co. v. FTC (358 F.2d 74 (6th Cir., 1966)), the court approved of the Commission's use of some 43 extra-record writings dealing with economic, political and social concepts, but not with facts in the case at bar. Rather, such documents were used to demonstrate that its decision comported with economic authortiy. The court noted that the Supreme Court has cited and relied on economic writings in its consideration of anti-trust cases.

It is important to note here that the 43 extra-record writings were not regarded as evidence in the case.

Only in the situation where the documentary evidence has come from the respondent's own files, has the FTC authorized the use of such documents as evidence without authentication. (Lenox, Inc., FTC Docket No. 8718 (1968)).

The proper use of official notice was demonstrated also by the FTC's ruling in Manco Watch Strap Co., 12 Pike & Fisher Ad. L. 2d 184 (FTC, 1962) which involved the packaging of imported merchandise in such a manner as to conceal the place of origin. The Commission took official notice of the fact that the American public prefers goods made in America, a fact which had been proved in numerous cases tried before it.

The National Labor Relations Board overruled its examiner when he took official notice of the fact that it is not unusual for construction work to stop because of weather conditions, and that it is not unusual to terminate construction workers without prior notice, and without assigning reasons for such termination. The Commission held that such matters should be proved in each case, on the grounds that they could be important factors in the decision. Ingalls Steel Construction Co., 126 NLRB No. 60 (1960).

As the above cases demonstrate, official notice has never been taken of the type and volume of material which is the subject of this request.

III
THE RECORD IN ANOTHER PROCEEDING MAY BE OFFICIALLY NOTICED ONLY WHERE ALL PARTIES ARE THE SAME, OR WHERE NO PARTY OBJECTS TO SUCH NOTICE

The intervenors herein also seek to have the Board officially notice the transcript of the October 15, 1971 AEC hearing in the matter of Vermont Yankee, Docket No. 50-271. Such notice would be completely improper, since the Applicant here was not a party to such proceeding and does not consent thereto.

As discussed in our December 10, 1971 brief directed to this point, in Dayco Corporation v. FTC, 362 F.2d 180 (D.C. Cir., 1966), the examiner took official notice of testimony and findings made in a previous case, in which the Commission had prosecuted and convicted a Dallas concern for violations of the antitrust laws. The court found that the examiner's conclusions as to Dayco's guilt were entirely the product of his use of the record in the prior proceeding, in which Dayco was not a party, since he found that the record in the instant proceeding did not establish such guilt. Thus, the examiner used official notice as a substitute for proof, which the court found required vacation

of the order finding Dayco guilty of violating the antitrust laws (at 187).*

In the Pink case cited by CCPE (U.S. v. Pink, 315 U.S. 203 (1940)), the parties had agreed to be bound by the decision in the prior case, to which the United States had also been a party and which decided issues substantially identical to those in Pink.

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*The Board's attention is also directed to U.S. v. Pierce Auto Freight Lines, Inc., 327 U.S. 515 (1945) and N.L.R.B. v. Harrah's Club, 403 F.2d 865 (9th Cir., 1968).

IV
IF THE BOARD RESTED ITS DECISION ON OFFICIAL NOTICE OF THE HEARSAY DOCUMENTS, THE DECISION WOULD NOT BE SUPPORTED BY SUBSTANTIAL EVIDENCE

The executive departments of the government have consistently had their decisions overruled by the courts when they have not been based on evidence of record. While the procedures followed by some of these departments are not governed by the APA, standards of justice and fairness have made the courts examine closely into such decisions to find their bases in the record. The courts have also inquired into the probity and trustworthiness of any matter not proven in the record.

Similarly, as has been discussed above, and as will be further reviewed here, the courts have overturned administrative agency decisions lacking in record support.

In the opinion of at least one authority, the substantial evidence test is the modern substitute for the exclusionary rules of admissibility.*

The Supreme Court has consistently held that substantial evidence is:

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*Gellhorn, "Rules of Evidence and Official Notice in Formal Administrative Hearings", 1971 Duke L.J.1 (1971).

> "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938).

Also see Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939); Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 477-487 (1951); and Consolo v. Federal Maritime Commission, 383 U.S. 607, 619-20 (1966).

When a Department of Health, Education and Welfare examiner referred to, quoted from, and relied on a medical text in denying social security benefits to plaintiff, although the only medical evidence of record indicated that plaintiff had a physical disability, the District Court, affirmed by the Court of Appeals, overruled him and the Appeals Board. (Ross v. Gardner, 365 F.2d 554 (6th Cir., 1966). The decision referred to the Glendenning and Cook cases cited on pages 8 and 10 of Applicant's December 10, 1971 brief herein. And see Sayers v. Gardner (380 F.2d 940 (6th Cir., 1967)).

The Third Circuit Court of Appeals also overruled the Secretary of HEW in Stancavage v. Celebrezze (323 F.2d 373 (3d Cir., 1963)), when the Appeals Council concluded that plaintiff was capable of gainful employment because he could

perform at least 221 jobs listed in "Estimates of Worker Trait Requirements for 4,000 Jobs as Defined in the Dictionary of Occupational Titles". There was no other evidence in the record as to plaintiff's ability. The court held that the evidence was too close to the realm of conjecture and that there was no evidence that plaintiff had a genuine employment opportunity.

A determination of the Secretary of Labor was set aside by the District of Columbia Court of Appeals when it was based upon a summary of a survey conducted by the Bureau of Labor Statistics which was shown to contain error. (Wirtz v. Baldor Electric Co., 337 F.2d 518 (D.C. Cir., 1964)). The Secretary had the burden of proof, and he made no effort to introduce the underlying data or to rebut the demonstrated errors. Thus, his decision could not be sustained.

Based on the above facts and decisions, it is clear that should the Board rely upon official notice of these hearsay documents in reaching its decision, that decision would be overruled as not supported by "reliable, probative and substantial evidence." (10 CFR 2.760(c)).

V

THE DOCUMENTS MAY NOT BE MADE PART OF THE RECORD UNDER THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE

Intervenor has suggested that the documents could properly be admitted here under the business records exception to the hearsay rule. Intervenor is in error, since such exception has been specifically held not to be applicable to reports of scientific research and tests.

The business records exception to the hearsay rule has been codified at 28 U.S.C. §1732.

> "§1732 (a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of such act, transaction, occurrence or event, if made in regular course of any business and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event or within reasonable time thereafter...."*

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*It should be noted that the records which come in pursuant to this exception must be authenticated by either their author or custodian who must show that the record was made by an authorized person, recording information known to him or supplied to him by another authorized person. Moran v. Pittsburgh-Des Moines Steel Co., 183 F.2d 467 (3d Cir., 1950). The technical reports which were ruled admissible in that case had been prepared by a witness therein and referred to the specific gas tank the explosion of which was the subject of the lawsuit.

The question of taking into the record the reports of various scientific experiments was raised in Alpert v. Slatin (305 F.2d 891 (C.C.P.A., App. 1962)). The issue was priority of invention of a process for producing titanium metal, and the plaintiff had the burden of proof. He urged the Board of Patent Interferences to "consider for all they contain" reports by a co-inventor on the basis of the above-quoted business records exception rule.

The court refused to accept the reports as proof of the statements contained therein, holding that 28 U.S.C. §1732 applies to

> "admissibility of routine documents and records which experience has shown to be trustworthy but such records must be weighed against all other circumstances." (at 895)

The court noted that Alpert cited no authority to show that the rule is properly applicable to reports of scientific research and tests and the court could find none. The court also noted that no one had been presented who had first hand information of them, neither the plaintiff's co-inventor, nor his technician, who allegedly had prepared them.

VI

NO WAIVER OF OBJECTION
TO OFFICIAL NOTICE RESULTS
FROM USE OF HEARSAY
DOCUMENTS FOR CROSS-EXAMINATION

During the course of cross-examination by the assistant to CCPE's counsel (Mr. Ford), there were instances in which portions of documents were quoted by Mr. Ford and the witness then was asked if he agreed with the quoted statement. Sometimes a witness would say he agreed with the quoted statement (see Tr. 2392, 2395). In other instances, the witness would state that he disagreed with the statement (Tr. 2554) or that he had no comment on it because of lack of information (Tr. 2439).* The evidentiary status of such interchanges depends, of course, on the particular testimony involved.

Applicant has objected to the reading into the record of a portion of a document (Tr. 2997). However, in view of the fact that Applicant's witnesses are experts, the flexibility afforded by the Atomic Energy Commission's hearing procedures and the need for expediting the hearing, Applicant has not generally objected to the reading of excerpts from documents as a basis for cross-examination of these witnesses. That such recitations by counsel

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* These examples must be distinguished from the numerous occasions on which Mr. Ford drew his own conclusions as to the meaning of a report and then asked a witness if he agreed with those conclusions. (See, e.g., Tr. 2431-32, 2457-58.)

for CCPE and Mr. Ford, like other statements of counsel, do not have any evidentiary value in this proceeding has been confirmed by the Chairman's ruling (In Camera Transcript November 8, 1971, p. 51). Since the documents in question were not being offered in evidence at the time, there was no need for Applicant to seek to cross-examine the authors thereof.

It is now generally accepted that proper cross-examination of experts may be conducted by calling the expert's attention to the opinion of other experts, and inquiring as to whether he agrees or disagrees. See Reck v. Pacific-Atlantic S.S. Co., 180 F.2d 866 (2d Cir., 1950); Dolcin Corp. v. FTC, 219 F.2d 742 (D.C. Cir., 1954); Abrams v. Gordon, 276 F.2d 500 (D.C. Cir., 1960).

However, permitting the use of hearsay opinions of experts for cross-examination in no way waives the right to object to the introduction of such hearsay opinion in evidence. An objection to evidence is properly made only when there is a request to introduce a specific documentary item into evidence. See 1 Wigmore §18.

No cases have been found by either Applicant or CCPE in which a party was held to waive his right to object to the admissibility of documentary evidence because of the fact that the documents were used as a basis of cross-examination, nor, of course, could action or non-action during the interrogation of Applicant's witnesses allow this Board to take official notice of a document

when such action is not permissible under the APA and the Commission's regulations.* In any event, as the Chairman has ruled (Tr. 373-374), a motion to strike evidence will always lie.

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*In its supplemental brief dated December 22, 1971, CCPE cites Safeway Stores, Inc. v. FTC, 366 F.2d 795 (9th Cir. 1966) in support of a waiver. That case has nothing to do with the situation at hand since it involved a failure to take the opportunity to controvert officially noticed facts. As noted above, Applicant objected to these documents being officially noticed in oral argument on November 12 and December 14, in its brief dated December 10, and here.

VII

CCPE HAS MISSTATED THE BASIS FOR APPLICANT'S OBJECTION TO OFFICIAL NOTICE

In the first paragraph of its supplemental brief of December 22, 1971, CCPE reiterates its persistent misstatement of Applicant's objection to taking official notice of the documents. Applicant has never stated that official notice is only appropriate for "indisputable" facts, but rather that it is appropriate for those types of facts contemplated by 10 CFR Part 2, Appendix A, Section III (f). (See Applicant's December 10, 1971 brief, pages 3-4.) Moreover, Applicant's objection to taking official notice of the documents in question is obviously far broader than the absence of a right to cross-examine in such a situation. These documents deal in general terms with matters, such as the effectiveness of emergency core cooling, which are crucial to the Board's decision in this proceeding. Applicant's objection to their being officially noticed goes to the heart of the need for this Board's decision to be supported by reliable, probative and substantial evidence.

In this connection, CCPE's statement on page 2 of its supplemental brief that "Applicant here does not and cannot seriously contend that the national laboratory reports are false . . ." is palpably incorrect. If Applicant had been given a clear idea by CCPE as to which factual statements out of the myriad details

contained in these reports were really in question, it might well have contended that such statements were false.*

CCPE states that Applicant admits that the Board can take account of documents and "request the Applicant to disprove the statement in the document." (p. 1 of CCPE supplemental brief) Applicant has never suggested that the Board can request Applicant to "disprove" a statement in one of these documents. In their present status, it would be improper for the Board to do this. However, it would be proper for the Board to ask for a further evidentiary presentation with respect to the matter in controversy, should the Board believe that this is necessary, in accordance with 10 CFR 2, Appendix A, Section VI (f).

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* It is worthwhile noting that Applicant heretofore offered to make available a competent witness for cross-examination by CCPE with regard to all aspects of Applicant's FSAR, a point which seems to have been overlooked by CCPE on page 3 of its supplemental brief.

VIII

CONCLUSION

CCPE's counsel has suggested that the cost to CCPE of providing competent witnesses who are available for cross-examination is a valid basis for disregarding the requirements of the APA and the Commission's regulations. Apart from the fact that the extensive participation by representatives of CCPE in this proceeding renders such an argument disingenuous, Applicant considers that the basic requirements of fairness built into the principles of administrative law cannot be suspended at the behest of one party to a proceeding.

The APA, the Commission's Rules, and agency and court decisions have all permitted the use of official notice, but there is no authority for officially noticing the thousands of pages of hearsay documents relating to experiments performed by private individuals which are the subject of CCPE's request here. The business records exception to the hearsay rule is not applicable. There has been no waiver of Applicant's objections to the noticing of these documents. Therefore, the Board is requested to deny CCPE's request. To grant it would constitute reversible error.

Respectfully submitted,

LEBOEUF, LAMB, LEIBY & MACRAE
Attorneys for Applicant

By _____
Leonard M. Trosten
Partner

December 27, 1971

APPENDIX A
(Attachment to CCPE's December 9, 1971 Letter)

OFFICIAL NOTICE IS
REQUESTED FOR THE PORTIONS
OF THE DOCUMENTS LISTED

1. Committee on Reactor Safety Technology (Crest). European Nuclear Energy Agency, Water-Cooled Reactor Safety, OECD, Paris, May 1970 - pp. 7 - 54
2. Nuclear Technology, August 1971 -- pp. 473-520
3. Nuclear Safety, September-October, 1971 -- Articles by G.O. Bright and P.L. Rittenhouse

4. IN-1445, February 1971 entire
5. IN-1321, June 1970 entire
6. IN-1387 entire
7. IN-1389 entire
8. IN-1382 entire
9. IN-1386 entire
10. IN-1390 entire
11. IN-1383 entire
12. BNWL-319 - pp. ii, 10, 14, 17, 74
13. ANL-6548 entire
14. ORNL-TM-2742 entire
15. ORNL-TM-3188 entire
16. ORNL-TM-3263, pp. 1-28
17. ORNL-TM-3483, pp. 1-16
18. ORNL-TM-3289, 20 pages entire
19. ORNL-TM-3411, pp. 1-16
20. ORNL-4635 entire
21. ORNL-4647, pp. 1-48

22. Semiscale Tests 845 Through 851, June 29, 1971 - text

23. WCAP 7665; 7379-L (Vol. 1 & 2); 7479-L (Vol. 1 & 2) - Class data only (i.e. test results and descriptions)

24. "Presentation to ASLB on Water-Reactor Safety Program," Idaho Falls, Idaho, July 1, 1971 - entire

25. October 15, 1971 transcript in Vermont Yankee - Evacuation Plans for Vermont, Guilford and Vernon

26. Idaho Nuclear Corporation - Nuclear Safety Program Division - Monthly Reports--Section D - November 1970-September 1971

27. The Calculated Loss of Coolant Accident: A Review - Reporter at American Institute of Chemical Industrial Engineers, San Francisco, Winter Meeting, by L. J. Ybarrondo, C. W. Solbrig, and H. Isbin.

Applicant's Note

For ease of reference, Applicant has numbered each item listed as indicated above in the attachment to CCPE's December 9, 1971 letter. The full titles and authors of those reports listed above as items 4-21 are as follows, together with the number of pages involved in each report:

4. IN-1445; THETA 1-B, A Computer Code for Nuclear Reactor Core Thermal Analysis; Hocevar and Wineinger; 112 pp.

5. IN-1321; RELAP3--A Computer Program for Reactor Blowdown Analysis; Rettig, Jayne, Moore, Slater, and Uptmor; 123 pp.

6. IN-1387; Simulated Emergency Flow Effects Tests (SEFET) Project; Contributors: Griebe, Herzel, Kerscher, Moser, Watson; 37 pp.

7. IN-1389; Brittle Behavior of Zircaloy in an Emergency Core Cooling Environment; R. H. Meservey and R. Herzel; 30 pp.

8. IN-1382, June 1970; Technical Description--Loss-of-Coolant Accident Analysis Program; 49 pp.

9. IN-1386; Pressurized Water Reactor-Full Length Emergency Cooling Heat Transfer (PWR-FLECHT) Test Project; Shumway and Zane; 28 pp.

10. IN-1390, issued September 1970; Experimental Results of the Fuel Heat-Up Simulation Tests (SHUST) Emergency Core Cooling Test Series; R. T. Jensen; 42 pp.

11. IN-1383; Technical Assistance in Reactor Safety Analyses, issued May 1970; 33 pp.

12. BNWL-319; Review of Methyl Iodide Behavior in Systems Containing Airborne Radioiodine; J. Mishima, June 15, 1966, pp. ii, 10, 14, 17, 74.

13. ANL-6548; Studies of Metal-Water Reactions at High Temperatures: III. Experimental and Theoretical Studies of the Zirconium Water Reaction; Louis Baker, Jr. and Louis C. Just; 86 pp.

14. ORNL-TM-2742; Failure Modes of Zircaloy-Clad Fuel Rods, Part 3: Description of the ORNL Program; P. L. Rittenhouse; 42 pp.

15. ORNL-TM-3188; Progress in Zircaloy Cladding Failure Modes Research; P. L. Rittenhouse; 34 pp.

16. ORNL-TM-3263; ORNL Nuclear Safety Research and Development Program Bi-Monthly Reports for November-December 1970; William B. Cottrell; pp. 1-28.

17. ORNL-TM-3483; ORNL Nuclear Safety Research and Development Program Bi-Monthly Report, June 1971; William B. Cottrell; pp. 1-16.

18. ORNL-TM-3289; High Temperature Bursts Strength Ductility of Zircaloy Tubing; R. D. Waddell and P. L. Rittenhouse; 20 pp.

19. ORNL-TM-3411; ORNL Nuclear Safety Research and Development Program Bi-Monthly Report, March-April 1971; pp. 1-16.

20. ORNL-4635; Final Report on the First Fuel Rod Failure Transient Test of a Zircaloy-Clad Fuel Rod Cluster in Treat; Lorenz, Hobson, and Parker; 79 pp.

21. ORNL-4647; Nuclear Safety Program Annual Progress Report, Period ending December 31, 1971; William B. Cottrell; pp. 1-48.

BEFORE THE UNITED STATES

ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
Consolidated Edison Company of New York, Inc. (Indian Point Station, Unit No. 2)	)	Docket No. 50-247

CERTIFICATE OF SERVICE

I hereby certify that I have served a document entitled "Applicant's Supplemental Brief Opposing the Taking of Official Notice of Certain Hearsay Documents" by mailing copies thereof first class and postage prepaid, to each of the following persons this 27th day of December 1971:

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