

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of
CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC.

(Indian Point Station, Unit
No. 2)

2-15-72.
Docket No. 50-247

SECOND SUPPLEMENTAL BRIEF OF AEC REGULATORY STAFF
OPPOSING OFFICIAL NOTICE OF CERTAIN DOCUMENTS

The Atomic Safety and Licensing Board (Board) has raised various questions regarding the propriety of taking official notice of certain documents as requested by the Citizens Committee for the Protection of the Environment (Citizens Committee). The AEC regulatory staff (staff) has responded to most of these questions in its two prior briefs.

However, the Board has raised the question of whether failure to object to cross-examination on the basis of documents for which official notice is later sought constitutes a waiver of objection either to official notice or admission into evidence of such documents. (Tr. 4625).

The staff does not believe that the failure to object to cross-examination on the basis of certain documents constitutes a waiver of the objection either to the admission into evidence or the official notice of such documents.

If no objection is raised to cross-examination on the basis of certain documents, there may be a waiver of the right to object to the

8111030643 720215
PDR ADOCK 05000247
G PDR

Mooring

existence or authenticity of such documents when their admission into evidence is sought thereafter. This may arise from the necessity of laying a foundation for use of such documents on cross-examination and from the fact that counsel should object to cross-examination of his witness on the basis of documents when there are questions as to their existence or authenticity. However, the existence and the authenticity of the documents for which official notice is sought in this proceeding has never been questioned.

However, in regard to the admission into evidence for the truth of the matters asserted in documents used on cross-examination, failure to object to cross-examination using such documents is irrelevant. The reason is that, given the proper use of such cross-examination, there is no basis for objection.

The purpose of, and reason for, allowing cross-examination of expert witnesses on the basis of documents such as those involved in this proceeding is solely to test the credibility, reliability and expertise of an expert's testimony. Cross-examination thus is properly used to weaken the evidence of the proponent of the witness; however, it is not properly used for the submission of the direct evidence of the cross-examiner. Nor do the assertions contained in documents referred to or read in cross-examination come in as substantive evidence of the matters asserted.

The Citizens Committee has attempted to distinguish cases holding that assertions in documents used in cross-examination do not come in as substantive evidence for the truth of such assertions on the ground that they were not using such documents in cross-examination to test the truthfulness or reliability of the witness' testimony, but rather "...to bring into the open all of the information bearing on the ECCS..." Apparently by this, the Citizens Committee means that they were attempting to offer direct evidence to substantiate their positions on cross-examination.

The reason behind the liberality of cross-examination rules, such as allowing reference to hearsay documents, arises only because the purpose of cross-examination is limited to weakening the persuasiveness of a witness' testimony. The fallacy in the Citizens Committee's attempted distinction can be seen in cases upholding the limitation of cross-examination because it is being improperly used as a means of submitting direct evidence.

In an annotation on cross-examination of expert witnesses, it states

...the trial court has substantial discretion to control the scope of a cross-examination based upon learned treatises, and it has frequently been held that action in restraining the use of such publications was justified where it appeared that the cross-examiner was attempting to get the contents of the treatise before the jury as substantive evidence rather than to use it for the proper purpose of contradicting or discrediting the witness. (Annot., 60 ALR 2d 77 at 105 (1958); see cases cited therein at 105-109.)

In Farmers Union Federated Coop. Ship. Association v. Melthesney, the court held that it was error not to sustain an objection to cross-examination of an expert witness and to permit extensive reading of a scientific article because, in so acting, the cross-examiner was using cross-examination as a subterfuge for presenting a direct case (251 F.2d 441, 8th Cir.-1958). The court stated,

There was no attempt to introduce the unknown volume itself, and of course the great weight of authority would prohibit the introduction of medical books or treatises even if it were established that such were recognized standard authorities on the subject, the reason, among others, being that the authors are not present and subject to cross-examination. (citations omitted)...The effect here was to do indirectly that which plaintiff's counsel could not do directly...(251 F.2d at 445)

The citations above indicate that it is improper to use cross-examination as a means of submitting the cross-examiner's direct evidence. In addition, it is clear that failure to object to cross-examination using documents is irrelevant to the question of whether such documents should be admitted into evidence thereafter. Unless the cross-examiner clearly indicates that he is using the documents on cross-examination to present his direct case, which is clearly improper, there is no basis for objection to what appears to be proper cross-examination, the purpose being to test the credibility of the witness. One cannot object on grounds that the documents are hearsay because, even in judicial proceedings, where hearsay rules are strictly adhered to, these documents are not being offered for the truth of the matter asserted therein when cross-examination is properly used.

In regard to official notice, it should be even clearer that failure to object to cross-examination on the basis of certain documents does not constitute a waiver of objection to taking official notice of them. If such waiver occurred, it would mean that one could properly object to cross-examination on the basis of all documents except those in the limited category for which official notice is appropriate, which would result in a severe restriction on this type of cross-examination of expert witnesses.

Respectfully submitted,



Mary M. Thorkeison
Counsel for AEC Regulatory Staff

Dated at Bethesda, Maryland,
this 15th day of February, 1972.

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC.

(Indian Point Nuclear Generating
Unit No. 2)

2-15-72,

Docket No. 50-247

CERTIFICATE OF SERVICE

I hereby certify that copies of "Second Supplemental Brief of AEC Regulatory Staff Opposing Official Notice of Certain Documents," dated February 15, 1972, in the captioned matter, have been served on the following by deposit in the United States mail, first class or airmail, this 15th day of February, 1972:

Samuel W. Jensch, Esq., Chairman
Atomic Safety and Licensing Board
U. S. Atomic Energy Commission
Washington, D. C. 20545

Anthony Z. Roisman, Esq.
Berlin, Roisman and Kessler
1712 N Street, Northwest
Washington, D. C. 20036

Dr. John C. Geyer, Chairman
Department of Geography and
Environmental Engineering
The Johns Hopkins University
Baltimore, Maryland 21218

Honorable William J. Burke
Mayor of the Village of
Buchanan
Buchanan, New York

Mr. R. B. Briggs, Director
Molten-Salt Reactor Program
Oak Ridge National Laboratory
P.O. Box Y
Oak Ridge, Tennessee 37830

Paul S. Shemin, Esq.
New York State Attorney
General's Office
80 Centre Street
New York, New York 10013

J. Bruce MacDonald, Esq.
New York State Atomic Energy
Council
112 State Street
Albany, New York 12207

Leonard M. Trosten, Esq.
LeBoeuf, Lamb, Leiby & MacRae
1821 Jefferson Place, N.W.
Washington, D. C. 20036

Angus Macbeth, Esq.
Natural Resources Defense
Council, Inc.
36 West 44th Street
New York, New York 10036

Nathaniel Goodrich, Esq., Chairman
Atomic Safety & Licensing Board
Panel
U. S. Atomic Energy Commission
Washington, D. C. 20545

Algie A. Wells, Esq., Chairman
Atomic Safety and Licensing Appeal
Board
U. S. Atomic Energy Commission
Washington, D. C. 20545

Mr. Stanley T. Robinson, Jr.
Chief, Public Proceedings Branch
Office of the Secretary of the
Commission
U.S. Atomic Energy Commission
Washington, D. C. 20545


Myron Karman
Counsel for AEC Regulatory Staff