BEFORE THE
UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	Docket No. 50-247
CONSOLIDATED EDISON COMPANY	)	
OF NEW YORK (Indian Point,	)	2-7-72.
Unit No. 2)	)	
	)	

FURTHER BRIEF OF
CITIZENS COMMITTEE FOR THE PROTECTION
OF THE ENVIRONMENT IN SUPPORT OF
REQUEST FOR OFFICIAL NOTICE OF CERTAIN DOCUMENTS

I. Summary of Citizens Committee Position with Respect to Official Notice

The Citizens Committee for the Protection of the Environment has requested the Board to take official notice of certain documents, a list of which was provided to the Board and the Applicant. The request was made to assure that the Board would have a full presentation of the facts and opinions before it reached a decision on the proposed ECCS for Indian Point, Unit No. 2.

The documents requested fall into three readily discernible categories: 1) technical or scientific data contained in papers and reports prepared by national research laboratories under contract with the AEC, 2) the opinions of the authors of these

leaving

papers and reports, and 3) materials in the October 15, 1971 transcript in the Matter of Vermont Yankee (Docket No. 50-271) concerning the emergency and evacuation plans for the State of Vermont and the towns of Vernon and Guilford in the event of an accident at the Vermont Yankee Plant.

Our position on the matter of official notice can be stated quite briefly. Our earlier submissions substantiate our reasoning and conclusions.

1. Official notice as practiced by administrative agencies is far broader than judicial notice as practiced by the courts. The agency has an affirmative duty to gather all of the relevant information, whether supplied by the parties or not, to insure that the record upon which it bases a decision is complete. This is quite different from the passive role of a court which decides the matter before it solely on the presentation of the parties. As Davis has noted in his article, "Official Notice", 62 Harvard L. Rev. 537 (1949), there is a tendency for agencies to "succumb to the persuasions of powerful groups that are supposed to be regulated. This is aggravated if the agency must decide the case on materials supplied only by private interests." (62 Harvard L. Rev. at 543). The Applicant has acknowledged that Administrative official notice is not restricted to "indisputable" facts. The cases cited in our earlier briefs, and indeed in the Applicants own presentation of December 27,

1971 indicate that official notice has been taken of a wide variety of information, in widely differing contexts. Thus it is available in the present situation.

2. The documents for which we seek official notice meet the requirements of the rules of the Commission.

The Commission's rules state that "official notice may be taken . . . of any technical or scientific fact within the knowledge of the Commission as an expert body . . . "

The documents requested were prepared by national research laboratories which are, in the Applicant's own words, "government owned facilities operated by various private companies . . . established for the purpose . . . of performing technical and scientific experiments under contract with government agencies". (Applicants brief of December 27, 1971, p. 3)

They meet both the reliability and the "written knowledge of the Commission as an expert body" tests. The reports were specifically requested by and submitted to the Commission. The laboratories receive payment upon completion of the terms of the contract. It is absurd to maintain that, under these circumstances, the Commission has no knowledge of the information contained in the documents, or that the Commission would permit questionable information to stand without challenge. A substantial amount of Commission research is carried on in these "government owned", privately operated laboratories. If the Commission does not know what is being done there, it is sadly in default of its responsibility to protect the health and safety of the public.

The Applicant itself has indicated its belief in the reliability of documents of this kind, although it protests a good deal to the contrary. In its list of documents included in the Additional Testimony on the ECCS submitted in evidence on October 5, 1971 are ASME publications, ANL reports, magazine articles, books and journals and proceedings of conferences -- the same kind of "unreliable" and "vague" materials for which we have asked official notice (Additional Testimony, pp. 22, 23, 32).

3. The documents requested may not be excluded as hearsay. It is our position that they fall under the business records exception to the hearsay rule since they were all prepared in the normal course of business of the laboratories, or other sources. The fact that the documents include opinions in no way changes their admissibility. The expression of opinions is an integral part of the normal business of the preparer of the report.

Furthermore, the opinions and conclusions of the authors of the reports are not excludable as hearsay because they are not offered to prove the truth of the matters asserted, but only to show the existence of doubts about the safety of the ECCS. These doubts are expressed, not by persons with no knowledge or experience in the field, but by men and women of recognized prominence who were directly involved in the conduct of the technical and scientific inquiries contracted for by the Commission. In requesting that these be a part of the record CCPE is fulfilling

its legal responsibility as an intervenor. The Applicant throughout this proceeding has the burden of proving that the plant can be operated safely. CCPE need only demonstrate that doubts exist. The opinions of the authors of the technical and scientific reports make this demonstration.

4. The portions of the Vermont Yankee transcript are appropriate for official notice. They form part of the records of the Commission, it is well established that an agency may take notice of its own files and records.

II. The Applicant has Waived its Right to Object to Official Notice of Certain Documents

Two questions of concern remain to be considered, one of which was considered in Applicant's Second Supplemental Brief submitted on February 4, 1971 -- the question of waiver.

It is Applicant's position that, although it permitted extensive use of the documents for which official notice is requested during cross-examination, it did not waive its right to object to official notice being taken of these documents. This position is based on Applicant's failure to grasp the critical distinction between testing the credibility or demonstrating the expertise of a witness by referring to articles or treatises, not in evidence, during cross-examination, and the attempt to bring forward all of the relevant issues in the matter at hand. Reference to the documents by counsel for CCPE during cross-examination was not designed to see what the witness had or had not read. Its purpose was much more basic -- to bring into the

open all of the information bearing on the ECCS, information contained in materials that were an integral, but unrecognized part of the proceedings.

The cases cited by the Applicant in its brief of February 4 illustrate its misunderstanding of CCPE's purpose in referring to the documents. In the Strottlemire case, 215 F. Supp. 266 (E.D. N.Y., 1963), portions of a text on medical remedies were read to test the reliability of the witness. In the Hallworth case, 153 Ohio 349, 91 N.E. 2d 690 (1950), extracts from a medical text were offered to prove the truth of the statements contained therein.

This is quite different from our purpose in using the documents. The materials referred to during cross-examination, without objection from the Applicant, were not unknown, unrelated treatises or textbooks. They were reports used by the Applicant in presenting its own case, and contracted for and relied on by the Commission.

The remaining cases cited in support of Applicant's position in its brief of February 4, 1972 can also be dismissed. In the Brown case, for example, 419 F. 2d 337 (8th Cir. 1969), the extracts from medical texts were excluded simply because no foundation had been laid for their use and they were not dispositive of the issue in the case.

As for Reilly v. Perkins, 338 U.S. 269 (1949), it speaks out strongly against restricting the scope of cross-examination by limiting the materials which can be brought in, and cites the Federal Rules provision which states that the rule of evidence "most favorable" to the admissibility of challenged evidence should be chosen over a more restrictive one. While this is not precisely relevant to the issue at hand, it does indicate a willingness on the part of the courts to permit expansion of the record whenever the additional material would serve to promote a more complete hearing. In fact, the court in the Dolcin case, 219 F. 2d 742 (CA D.C. 1954) cited by Applicant, stated, "We think authoritative scientific writing can -- and should -- be freely used by administrative agencies" (219 F. 2d at 749).

Perhaps of even greater importance on the matter of waiver is the fact that the Applicant used and relied on these documents, or similar ones, in developing and testing the Indian Point ECCS. The list in the Additional Testimony, referred to on page 4 of this brief is remarkably similar to CCPE's official notice request.

Applicant has thus waived any objection to noticing these documents.

III. The Documents for Which Official Notice is Requested are a Part of the Record, and Should be Recognized as Such

The documents for which CCPE requests official notice constitute a considerable portion of the material upon which the Board will decide the question of the safety of the ECCS at

Indian Point Unit No. 2. The cases, including several cited by the Applicant in its brief of December 27, 1971, make it clear that in the interests of fairness and full disclosure such documents must be acknowledged and on the record. For example, in Ohio Bell Telephone v. Public Utilities Commission of Ohio, 301. U.S. 292 (1937) the Supreme Court ruled that the Commission's judicial notice of yearly fluctuations in the values of land, labor, buildings and equipment should have appeared on the record since the information was the basis of the Commission's determination that the phone company had to refund its excess earnings.

IV. The Commission's Actions With Regard to ECCS make Official Notice Mandatory

On January 12, Chairman Jensch raised the question of the effect on this proceeding of the Commission's establishment of interim criteria for ECCS and the holding of national hearings (Tr. 4604). This question was not addressed by the Applicants in its latest brief, but we think it is a critical one, and closely related to the problem of waiver. It is our position that the Commission's actions make a recognization of the documents mandatory. These materials were used by the Commission in developing the ECCS criteria -- this can be simply demonstrated by comparing the list of documents relied on by the ECCS Task Force and the CCPE official notice list. A large number of documents appear in both places. The national labs performed technical and scientific

studies on ECCS. The authors of the studies will be testifying at the hearings.

The cases cited in Sec. II support our position that the documents are already an integral part of this proceeding. To deny recognition of this fact is to fail to present a full record. Whether the CCPE requested official notice or not, the Commission has a responsibility to marshall all of the information bearing on the ECCS. If it had done its task properly there would be no need for the CCPE to point out the documents it overlooked, and there would be no need for this legal hassling between the parties.

V. Due Process is Safeguarded by the Opportunity to Controvert

The Applicant maintains that its objection to official notice of these documents is the absence of an opportunity to properly controvert them. The Applicant seems to fail to realize the safeguards built into official notice. One of the advantages of administrative official notice is the extent of the opportunity for challenge. As Davis noted in his article "Official Notice", supra, this challenge may go as far as necessary to insure fairness to the opponents, including, if required, the opportunity for cross-examination. The Applicant has yet to point to one single section or document which it wishes to controvert.

As we have pointed out, many of the documents will be in evidence in the national ECCS hearings, and their authors on the witness stand. Both the Applicant and CCPE are parties to those proceedings. Official notice might be taken of the proceedings, if it would quiet Applicant's unease about lack of due process.

VI. Conclusion

As the Applicant has acknowledged, there are a number of methods, other than official notice, for bringing these materials into the proceeding. We have requested official notice because the documents are an important part of the record and should be recognized as such, and because all the parties are using and relying on them.

However, official notice is but one mechanism for their introduction. CCPE has no objection to the use of any other method which would meet the objections of the Applicant.

The Commission has a duty to develop a full record. It cannot do that without these documents. (The brief of the Hudson River Fisherman's Association of December 27 offers an excellent discussion of this point.) Our interest is in insuring their presence in the record.

The Applicant has requested that we list the specific portions of the documents for which we desire official notice. Our Proposed Findings of Fact and Conclusions of Law, to be filed February 8, 1972 contain such specific references.

Respectfully submitted,

Karin P. Sheldon

Anthony Z. Roisman
Karin P. Sheldon
1712 N Street, N. W.
Washington, D. C. 20036

February 7, 1972