

BEFORE THE UNITED STATES
ATOMIC ENERGY COMMISSION

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

2-4-72.

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

ALLOWING USE OF DOCUMENTS AS A BASIS
FOR CROSS-EXAMINATION DOES NOT WAIVE
APPLICANT'S OBJECTION TO SUCH DOCUMENTS
BECOMING EVIDENCE IN THIS PROCEEDING

In its discussion of concerns relating to taking official notice of documents as proposed by the Citizen's Committee for the Protection of the Environment ("CCPE"), the Board has inquired whether there has been a waiver of objection to the admission of documents into evidence because these documents were used in cross-examining Applicant's technical experts (Tr. 4609, 4664). Such use of these documents does not waive Applicant's objection to their admission in evidence.

As indicated in our brief filed on December 27, 1971, the use of quoted passages from documents during cross-

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examination for the purpose of testing the knowledge, accuracy and credibility of the witness as well as for ascertaining whether or not the witness agrees or disagrees with the opinions expressed is well established.^{1/} The cases also hold that extracts from documents quoted during such cross-examination may not be used as evidence of the truth of the statements contained therein.^{2/}

Thus, in Stottlemire v. Cawood, the court stated:

"It is the rule in the Federal courts that on cross-examination an expert witness may be interrogated concerning his knowledge of textbooks, treatises, articles, and other publications in his field, and that he may be confronted with extracts from them and asked whether he is familiar with them and whether he agrees with them. . . . The rationale of the rule is that such cross-examination tests the expert witness' credibility and reliability by enquiring as to the extent of his familiarity with authorities in his specialty and by asking him whether he agrees with them. The extracts with which the witness is confronted on cross-examination do not, however, become affirmative evidence in the case."^{3/}

^{1/} E.g., Reilly v. Pinkus, 338 U.S. 269 (1949).

^{2/} E.g., Brown v. United States, 419 F.2d 337 (8th Cir. 1969); Stottlemire v. Cawood, 215 F.Supp. 266 (E.D.N.Y. 1963); Bowles v. Bourdon, 148 Tex. 1, 219 S.W.2d 779 (1949).

^{3/} 215 F.Supp. at 267-68.

The fact that Applicant did not object to the use of these documents during cross-examination does not alter the principle that the documents cannot be admitted into evidence as proving the truth of the matters asserted. In Hallworth v. Republic Steel Corporation^{4/} plaintiff questioned defendant's expert medical witness concerning a particular medical text during cross-examination. In addition, plaintiff read portions of this text to the witness and asked whether the witness agreed with the quoted conclusions. No objection was made by the defendant to the use of the medical text during cross-examination. At the conclusion of cross-examination plaintiff offered the text into evidence. At this time defendant objected. In determining that it was error to admit portions of this book into evidence, the court made the following statements:

"The great weight of authority holds that medical books or treatises, even though properly identified and authenticated and shown to be recognized as standard authorities on the subjects to which they relate, are not admissible in evidence to prove the truth of the statements therein contained.
[Citations omitted.]

^{4/} 153 Ohio 349, 91 N.E.2d 690 (1950).

"Even where such a book or treatise merely recites facts observed by the writer and the opinions of the writer, admission in evidence of such a book or treatise or any part thereof would, in effect, admit into evidence the testimony of the author of the book without affording to opposing counsel any opportunity to cross-examine him. Furthermore, the court would, in effect, be allowing the author to testify without having required him to take the usual oath required of a witness.

"If the book or treatise, or the portion thereof admitted in evidence, contained unsound conclusions or inaccurate statements as to facts observed, how could a party show that? Even if he could, efforts to do so would result in side issues as to the merits or demerits of the author of the book, as to the soundness of his conclusions and as to the accuracy of his observations.

"If this kind of evidence were admitted, a party could find a book which supported his case and, by introducing it or a part of it in evidence, have a witness in the jury room on his side of the case, even though such witness had not been under oath and had not been subject to cross-examination."^{5/}

The above cases demonstrate that the use of documents as a basis for cross-examination of Applicant's witnesses by the Citizen's Committee for the Protection of the Environment

^{5/} Id. at 693.

does not result in such documents becoming evidence in this proceeding or waive Applicant's objection thereto.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a document entitled "Applicant's Second Supplemental Brief Opposing the Taking of Official Notice of Certain Documents" by mailing copies thereof first class and postage prepaid, to each of the following persons this 4th day of February 1972:

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