UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

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

ANSWER OF AEC REGULATORY STAFF TO REQUEST FOR FURTHER BRIEFS ON OFFICIAL NOTICE

On December 9, 1971, the AEC regulatory staff (staff) filed an answer to the motion of the Citizens Committee for the Protection of the Environment (Citizens Committee) that official notice be taken of certain documents. On December 10, 1971, the Atomic Safety and Licensing Board (Board) requested further briefs regarding the Citizens Committee's motion, with references to decisions rather than secondary sources.

The staff opposes the motion to take official notice of data within the documents specified because, first, such data do not constitute generally-accepted matters of common knowledge to experts in the area. This is one criterion for both official and judicial notice, the main distinction being that, in an administrative proceeding, technical and scientific facts may constitute matters of common knowledge among experts in an area which are not matters of common knowledge to non-experts and thus, would not be appropriate for judicial notice.

One federal court has stated the test of the propriety of official notice in this way:

> Important in resolving [the question of the propriety of official notice] is the nature of the evidence thus noticed. Are the noticed evidential facts ones of relatively wide knowledge consisting of general or universal propositions, on the one hand, or specific proof relating only to the case under consideration and asserting a particular proposition, or a series of them, on the other hand? A court or administrative agency may properly take official notice of a depression or decline in market values, but not the precise extent of such decline as it affects value of particular property of a utility company in a proceeding to fix a fair rate.1/

That official notice is limited to generally accepted propositions which it is reasonable to presume are true and noncontroversial is evident from the types of facts which have been held to be proper to be officially noticed in agency and court decisions.

In Beatrice Foods Co. et al.,2/ the FTC held that it was proper to officially notice the facts that the retail grocery business was highly competitive, net profits were low, pricing was important in ability to compete, that low wholesale prices to some groceries but not all hurt those not granted low prices, that milk was a staple, highly standardized and sold by almost all food retailers. The Commission stated,

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1/ U.S. ex rel. Dong Wing et al. v. Shaughnessy, 116 F.Supp. 745, 749 (S.D.N.Y.-1953).

2/ 19 Ad L 2d 85 (1966).

> [The Commission] is entitled to rely on established general facts within the area of its expertise subject to a respondent's right to rebut.3/

In Manco Watch Strap Co., Inc. et al.,4/ the FTC upheld official notice that a substantial segment of the public assumes that unmarked watch-bands are American-made and prefers such domestically-made bands because such fact had been found to be true in "scores, if not hundreds," of other cases before the agency.

In Brite Manufacturing Co. et al. v. FTC,5/ the Court of Appeals for the District of Columbia upheld official notice that a substantial number of Americans prefer American products and that the public presumes a product to be of domestic origin when foreign origin is not disclosed, repeating the statement in Manco that the FTC "...was entitled to rely on established general facts within the area of its expertise..."6/

It is to be emphasized that in all these cases where use of official notice was upheld because the noticed facts were generally accepted propositions, the opponents of official notice still had an opportunity to rebut those facts after notice, even though the agency properly determined that they were well-established.

3/ Id at 86.

4/ 12 Ad L 2d 184 (1962).

5/ 347 F.2d 477 (1965).

6/ Id at 478.

It seems clear from the type of facts held officially noticeable in the foregoing cases that, to use official notice, the facts must be general and well-established propositions, widely accepted as true among experts because of their experience in the field concerned.[7] From these cases and the cases which follow it is clear that when the facts are either somewhat more specific, adjudicative, or critical to the resolution of an issue, or when a presiding officer has no basis in experience to presume the truth of a proposition, official notice is improper.

In Cook v. Celebrezze,[8] a federal court held that it was improper for a hearing examiner in a disability benefit case to take official notice of an electroencephalographic report, stating,

> ...If the examiner's opinion is founded on special study, reading or consultation not in the record, the hearing examiner has made use of extra-record information, not a matter of common knowledge, from unspecified sources... Administrative agents and agencies are not privileged to take [official] notice of evidentiary material which is not a matter of common knowledge...
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> In an administrative hearing where the facts, as in the case at bar, are (1) adjudicative, (2) disputed, and (3) critical, nothing less than submission through evidence, subject to cross-examination and rebuttal, will normally suffice. 2 Davis, Administrative Law Treatise § 15.10, p. 403.[9]

7/ An example of this type of fact is given in Appendix A, § III(f)(2) of 10 CFR Part 2: "...a board might take 'official notice' of the fact that high level wastes are encountered mainly as liquid residue from fuel reprocessing plants." Certainly this is not the type of fact judicially noticeable, since it is not a matter of common knowledge among laymen. Rather, it is an example of a general and well-established scientific fact within the common knowledge of the Commission as an expert body in the field of atomic energy.

8/ 217 F. Supp. 366 (W.D.Mo.-1966).

9/ Id at 368.

In Ingalls Steel Construction Co., et al.,[10] the NLRB held that it was improper to take official notice that it is not unusual for construction work to stop because of weather conditions or that it is not unusual to fire construction workers without prior notice and without reasons assigned, saying

> ...such a matter should be proven in each case, as it may well be an important factor in the ultimate decision.[11]

In Beatrice Foods Co. et al.,[12] described above, the FTC held that it would be improper to take official notice of the fact that substantial and continuous discrimination in price of a major grocery product, such as milk, creates a probability of competitive injury, because this was a major issue in the case.

In Whitney Telephone Answering Service,[13] the FCC held that the absence of existing service in an area was not the type of information which could be officially noticed to support a finding of need for service required in license hearings.

In Baltimore & Ohio R. Co. v. Aberdeen & Rockfish R. Co.,[14] the Supreme Court affirmed a district court reversal of an ICC rate division

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10/ 9 Ad L 2d 1044 (1960).

11/ Id at 1045-46.

12/ 19 Ad L 2d 85 (1966).

13/ 20 Ad L 2d 72 (1966).

14/ 393 US 87, 21 L Ed 2d 219, 89 S Ct 280 (1968).

order because there was no substantial evidence for their finding that territorial average costs were the same as comparative costs incurred in handling North-South freight traffic. Although not phrased in terms of official notice, the Court said,

> ...If we were to reverse the District Court, we would in effect be saying that the expertise of the Commission is so great that when it says that average territorial costs fairly represent the costs of North-South traffic, the controversy is at an end, even though the record does not reveal what the nature of that North-South traffic is... Administrative expertise would then be on its way to becoming 'a monster which rules with no practical limits on its discretion'.15/

In J. B. Williams Co., Inc. et al.,16/ agency counsel sought official notice of over 100 pages of an HEW publication concerning mortality trends in cancer in a proceeding before the FTC. The hearing examiner denied the request on the ground that

> ...the motion in question involves difficult, scientific, factual concepts, which we believe have not often, if ever, been before the Commission in their present context. We believe therefore that the Commission would not consider such matters within its "...accumulative experiences and knowledge..." The material in question is clearly, therefor, not a proper subject for the taking of "official notice."17/

15/ 21 L Ed 2d 224.

16/ 13 Ad L 2d 660 (FTC-1963).

17/ Id at 663.

In dicta, the examiner stated,

> It appears from the language of the Administrative Procedure Act, that, when "official notice" is taken of the existence of certain facts, the burden of ultimate persuasion, or the burden of ultimate proof, as to the truth of those facts, is shifted to the party who would "show the contrary." That there is such a shift of the burden of proof is shown by the fact that, unless the contrary is shown, the fact of which "official notice" has been taken will control. Obviously the procedural effect of taking "official notice" can have serious consequences in that the party against whom noted facts are directed is deprived of the opportunity to see, to hear, and to cross-examine the witness, who has established the facts in question.
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> As we have observed, the accumulative experiences and the sense of justice of the common law trial judge require that he avoid such an injustice to the party adversely affected by the fact to be noted by declining to take "judicial notice" unless the material to be noted is "...beyond the realm of dispute." We believe that there is sufficient analogy between the practice of taking "judicial notice", and the practice of taking "official notice", to require that "official notice," like "judicial notice", be not taken in doubtful cases. Such, we believe, has been the practice of the Commission in the past.18/ (emphasis added)

In Dayco Corporation v. FTC,19/ the Court of Appeals for the Sixth Circuit held that the FTC's use of official notice of extensive testimony and findings which the FTC had taken and made in a previous case involving a different automotive parts jobber as a substitute for proof in a later proceeding was impermissible. The Court stated,

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18/ Id at 662-3.

19/ 362 F.2d 180 (1966).

We find the following dispositive here:

> "It needs no argument to demonstrate that agencies may not take notice of the 'litigation facts' involved in a particular case; to do so would be to shift the burden of proof and make a mockery of the hearing procedure. The doctrine of notice should be limited to facts of a general nature, representing generalizations distilled from repeated demonstrations." 20/ (emphasis added)

From the foregoing cases, it is evident that official notice is used very sparingly, being limited to notice of general propositions not constituting ultimate issues in the proceeding which are generally accepted among experts in the field. The data which the Citizens Committee requests notice of is clearly not of this type. It is very specific in nature and the Commission has no basis in experience for knowing whether it is accurate and true. Notice of it is sought so that this data can be a basis of a finding on the issue of whether there is adequate assurance that the plant can operate safely.

Use of official notice in this case should be sharply distinguished from use of official notice to become familiar with background materials in the field not used as the basis for finding of a material fact.

An example of the latter occurred in Proctor & Gamble Co. v. FTC.[21/] In this case, the petitioner challenged official notice of 43 extra-record writings on economic, political and social issues, cited in the Commission's decision. The Court upheld such notice, stating,

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20/ Id at 186.

21/ 18 Ad L 2d 894 (6th Cir.-1966).

> These cited writings are general in nature. None of them dealt with the facts in the present case. At no place in its opinion did the Commission regard the citations as evidence... The Commission apparently cited these writings to demonstrate that its decision comported with economic authority.22/ (emphasis added)

Clearly, the use of official notice sought by the Citizens Committee is not the same as in the Proctor case. In Proctor, these documents cited in the Commission's opinion were informative, but unnecessary to support the finding based on evidence submitted in the proceeding. Here, the Citizens Committee seeks to have the data noticed treated as evidence and to have it be the basis of a finding on an ultimate issue in the case.

* * * * *

In its request for further briefs, the Board expressed particular interest in the "objection that the Commission should not notice results prepared by its laboratories." The truth of "any technical or scientific fact" contained in these reports does not become "within the knowledge of the Commission" as stated by 10 CFR § 2.743(i) merely because of the fact that these reports were prepared under contract with the AEC. "Within the knowledge of the Commission" means generally accepted as within the knowledge of experts such as the Commission, from whatever source derived. The Commission is not required to assume the truth of all data prepared for the AEC; nor is it limited to such data in taking official notice.

The official notice provision in 10 CFR 2.743(i) is neither unique nor broader than that of other agencies. Rather, the authority to take

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22/ Id at 897.

official notice of technical or scientific facts within the knowledge of an agency, as an expert body, is at least implicit in the authority of other administrative agencies.

The provision on official notice in the AEC's regulations parallels those in the preliminary drafts of the Administrative Procedure Act.[23] In the State Judiciary Committee Print of June, 1945 on the final version, it is stated that the rule of official notice is that recommended by the Attorney General's Committee, particularly the provision on notice and rebuttal.[24] The recommendation of the Attorney General's Committee pointed out

> ...that the process of official notice should not be limited to the traditional matters of judicial notice but extends properly to all matters, as to which the agency by reason of its functions is presumed to be expert, such as technical and scientific facts within its specialized knowledge.[25]

Most agencies' regulations, like the APA itself, do not indicate when official notice is appropriate. However, some agencies have provisions similar to the AEC's rule. The Federal Maritime regulation states:

> Official notice may be taken of such matters as might be judicially noticed by the courts, or of technical and scientific facts within the general knowledge of the Commission as an expert body...[26]

The FPC regulation formerly provided that official notice may be taken of "...technical or scientific facts of established character

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23/ Legislative History: Administrative Procedure Act, Appendix, Sen. Doc. No. 248, p. 131, 79th Cong., 2nd Sess. (1946).

24/ Id at p. 32.

25/ See Attorney General's Manual on the Administrative Procedure Act, pp. 79-80 (1947).

26/ 46 CFR 502.226(a).

The Revised Model State Administrative Procedure Act provides:

> Notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge... 28/

In a treatise explaining the Model Act,29/ the author states,

> [Given that agencies can notice that which courts can, the] problem arises...in connection with the question how much beyond these limits the agencies may go in relying on conclusions developed as a result of their intensive experience in their specialized fields of activity, as a basis for making factual findings as to matters of a general nature which their experience has taught them to be true.
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> The rule is now clearly emerging that an administrative agency may take official notice of any generally recognized technical or scientific facts within the agency's specialized knowledge.... 30/

Thus, it is apparent that all agencies have implicit authority to take official notice of technical or scientific facts within their specialized knowledge and that the authority of the AEC to take official notice is no broader than that of other agencies.

Respectfully submitted,

Mary M. Thorkelson

Mary M. Thorkelson
Counsel for AEC Regulatory Staff

Dated at Bethesda, Maryland,
this 30th day of December, 1971.

28/ This provision or very similar provisions appear in the administrative procedure acts of at least eight states. See Cooper, State Administrative Law, Vol. 1, p. 414 (1965).

29/ Cooper, State Administrative Law (1965). In the Dayco case (supra n. 19), the Sixth Circuit said

> We believe that the most enlightening discussion of the question [of official notice] ...is contained in a recent treatise by Frank E. Cooper, a distinguished practitioner of the Detroit Bar and Professor of Law at the University of Michigan. While his two-volume work bears the title "State Administrative Law," his observations are relevant to the entire field of official notice." (emphasis added) Id at 186.

30/ Cooper, at p. 412.

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NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with § 2.713, 10 CFR Part 2, the following information is provided:

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Mary Thorkelson
Mary Thorkelson
Counsel for AEC Regulatory Staff

Dated at Bethesda, Maryland,
this 30th day of December, 1971.

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "Answer of AEC Regulatory Staff to Request for Further Briefs on Official Notice" and "Notice of Appearance" filed by Mary Thorkelson, both dated December 30, 1971, in the captioned matter have been served on the following by deposit in the United States mail, first class or airmail, this 30th day of December, 1971:

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