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

Re: Consolidated Edison Company of New York (Indian Point, Unit No. 2)
Docket No. 50-247

Dear Mr. Chairman:

We have just received the Applicant's Supplemental Brief Opposing the Taking of Official Notice of Certain Hearsay Documents, and wish to make the following brief comments:

1. The applicant continues to misunderstand the nature of hearsay. We have made abundantly clear that each of the documents which we are asking the Board to notice has been written by those same individuals who performed the tests and did the research supporting the conclusions reached. Thus, the documents themselves are the product of those scientists and researchers whose studies and experiments they describe. In the Proposed Findings of Fact, to be submitted January 11, we will detail those specific portions of the documents upon which we place special reliance.

2. Applicant cites ICC cases on pages 11-12 of its brief. Each of these cases are cited for the proposition that Court approval has been given to the ICC practice of allowing official notice to be taken of its own decisions, its own previous rulings, its own internal practices and procedures, and its own expertise in interpreting motor carrier operating authorities. These items are not unlike the very documents we are asking the Board to officially notice, and we submit that these citations fully support our request. Moreover, the one instance in which the ICC was overruled in this regard (Burlington Truck Lines v. U.S., 371 U.S. 157) was not because the ICC affirmatively took official notice, but rather because the ICC attempted to hide its actual reasoning processes behind the cliche of "administrative

expertise", thus shielding its rate determinations from judicial scrutiny. The Court was concerned about examining the agency's reasoning and assumptions, upon which it based its "expertise", in order to make appellate review more meaningful. Cf. Davis, Official Notice, 62 Harv. L. Rev. 537 (1949). This is precisely the goal we seek here. By asking the Board to take official notice of these documents, the record then contains all the relevant data on which decisions may be based, and the Board then avoids the proscribed reliance on secret documents and reports to which only some have access.

3. In argument IV, applicant argues that the taking of official notice would in some unexplained manner undermine the existence of substantial record evidence. It is very hard to comprehend this line of reasoning. The official record evidence would be expanded -- not limited -- by noticing these documents. Whatever decisions are made by the Board, and ultimately by the Commission, would rest on an evidentiary record which is enlarged to include the documents for which we request official notice. The cases cited by applicant were all subject to the same infirmity: the lack or inadequacy of substantial evidence on the record. Clearly, expanding the record to include these documents can only help, not hinder, the building of a substantial record on which the final administrative determination will rest.

4. Applicant suggests throughout its brief that we are dealing with documents which are inherently unreliable or unauthenticated. We believe that by using the procedural mechanism of official notice, the Board could avoid getting enmeshed in time-consuming technicalities. We have no doubt that the Commission could officially certify, for the record, that these documents were prepared pursuant to contract with the AEC, that such contracts have been fulfilled by virtue of the completion of the documents, that payment was made evidencing satisfactory completion, etc. In short, we trust that at some point the applicant would be willing to accept the truthfulness of representations from appropriate Commission personnel that these documents are what they purport to be -- namely technical and scientific reports prepared, under contract, for the use of the Commission, other government agencies and the scientific community.

5. Finally, substantial progress is being made to make the Commission's ECCS hearings, to commence in Washington on January 28, adjudicatory-type hearings with relevant witnesses, cross-examination, and production of documents prior to hearing. The underlying issue in dispute here -- the reliability of the emergency core cooling system to be installed and used at this plant -- will be resolved during the ECCS hearing, and that record should be completed by the end of March. It is our understanding that the Commission's case and cross-examiantion of its witnesses -- including the authors of these reports -- will be completed by mid-February. The applicant is entitled to intervene in the ECCS proceeding where it would have full rights of cross-examination. Thus, unless it fails to intervene, the applicant would have the full opportunity to cross-examine the authors of these documents during the conduct of the ECCS hearing. In order to avoid duplication of time and resources, CCPE is prepared to have the Board take official notice of and incorporate into these proceedings those portions of the ECCS hearing transcript which covers examination and cross-examination of the authors of or contributors to these documents. We submit that adoption of this procedure would cure all of applicant's objections to the Board's official notice of these documents in the present proceeding.

Sincerely,

BERLIN, ROISMAN AND KESSLER

By Gladys Kessler
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CC: All Parties of Record