UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. (Indian Point Station, Unit No. 3)	)	Docket No. 50-286

APPLICANT'S RESPONSE TO MEMORANDUM OF NEW YORK STATE ATOMIC ENERGY COUNCIL CONCERNING OFFICIAL NOTICE

At the oral argument conducted by the Atomic Safety and Licensing Appeal Board ("the Appeal Board") on July 9, 1975, counsel for the New York State Atomic Energy Council ("the State") urged the Appeal Board to look beyond the adjudicatory record made by the Atomic Safety and Licensing Board ("the Licensing Board") in the above-captioned proceeding in determining whether certain features of the Licensing Board's Memorandum and Order of June 12, 1975, LBP-75- , NRCI-75/6- (June 12, 1975), were supported by "reliable, probative, and substantial evidence," as required by the Commission's Rules of Practice. 10 C.F.R. § 2.760(c)(1975). Tr. 46-48, 103-04. In particular, the State submitted that

the Licensing Board as well as the Appeal Board could look to documents filed with the Commissioners as to certain seismic and geologic contentions, even though such documents were never made a part of the Licensing Board record or subjected to cross-examination. The summary of the State's position, as stated on page 2 of its Memorandum of July 24, 1975, was that the Board (presumably the Appeal Board), "must consider information which extends beyond the official record (i.e., transcript and exhibits) in this proceeding."

This contention by the State flies in the face of the Administrative Procedure Act and the regulations of the Nuclear Regulatory Commission, and is certainly not supported by the lengthy and entirely inapposite extracts from Professor Davis' treatise on administrative law.

The Commission's Rules of Practice expressly require that an initial decision be "based on the whole record, and supported by reliable, probative, and substantial evidence." 10 C.F.R. § 2.760(c)(1975). Although the Regulatory Staff has contended to the contrary, it is plain that the Licensing Board's action of June 12, 1975 was an initial decision for purposes of the Rules of Practice.

It is, of course, within the province of a licensing board to take official notice of certain matters, but (a) that

power does not extend to the matters on which the State would have the initial decision rest, and (b) that power has not been exercised by the Licensing Board below.

Section 2.743(i)(1) of the Rules of Practice describes the matters that may be the subject of official notice:

> "The Commission or the presiding officer may take official notice of any fact of which a court of the United States may take judicial notice or of any technical or scientific fact within the knowledge of the Commission as an expert body."

It is plain that the information sought to be relied on by the Atomic Energy Council falls within none of these categories. Indeed, there are here no "facts" of which official notice could be taken. The only fact is that the State has filed certain pleadings with the Commission. The contents of those pleadings are not facts, but mere allegations.

It is also clear that the Licensing Board did not attempt to take official notice of any "facts". Section 2.743 (i)(1) requires that:

> "Each fact officially noticed under this subparagraph shall be specified in the record with sufficient particularity to advise the parties of the matters which have been noticed or brought to the attention of the parties before final decision and each party adversely affected by the decision shall be given opportunity to controvert the fact."

Neither the Licensing Board nor the Atomic Energy Council has ever "specified [facts] in the record with sufficient particularity to advise the parties of the matters which have been noticed." Nor was Applicant given the opportunity to controvert each fact noticed.

With regard to the extracts from Professor Davis' distinguished treatise, only a little more need be said. There is, of course, a distinction between adjudicatory and legislative facts. The distinction is perhaps more difficult to apply than to state. It is clear, however, that the State's conception of adjudicatory facts of which an agency may take official notice is completely without support. With the ease of a magician taking a rabbit from his hat, the Atomic Energy Council has concluded that the "facts" which purportedly bolster the seismic condition precedent imposed by the Licensing Board were legislative in character, rather than adjudicatory.

This is not a legislative proceeding, and the issues before the Licensing Board and this Board are not legislative in character. The seismic "issue" is whether this plant, at this site, is subject to such particular seismic concerns as to call into question the desirability of issuing an operating

license for significant power levels. This is a far cry from the process of determining "the content of law and of policy," to quote Professor Davis. The State urges that the "Board may consider extra-hearing record legislative facts in fashioning remedies and deciding matters of policy and law." (Page 4) What issue of "policy" did the Licensing Board rule on? What issue of "law" was before it that called for an extraordinary reference to materials that were before the Commissioners?

The question here is whether the Licensing Board (or, for that matter, this Board) can rely on pleadings and other documents filed with the Commissioners, when those documents have never been the subject of an adjudicatory hearing within the meaning of § 189 of the Atomic Energy Act and the Rules of Practice. In Applicant's view, reliance on such materials (if it occurred, for the Licensing Board's decision does not clarify the point) is clearly improper.

For the foregoing reasons, the Appeal Board should decline, in the circumstances of this case, to countenance

the use of official notice as support for the seismic condition precedent imposed by the Licensing Board.

Respectfully submitted,

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August 4, 1975

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CERTIFICATE OF SERVICE

I hereby certify that I have this 5th day of August, 1975, served the foregoing document entitled "Applicant's Response to Memorandum of New York State Atomic Energy Council Concerning Official Notice" by mailing copies thereof, with first class postage prepaid, and properly addressed, or by hand delivery, to the following persons:

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