7-24-75

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.	)	DOCKET NO. 50-286
	)	
(Indian Point Station, Unit No. 3)	)	

NEW YORK STATE ATOMIC ENERGY COUNCIL'S
MEMORANDUM DISCUSSING MATTERS CONCERNING
OFFICIAL NOTICE

On June 12, 1975 the Licensing Board in this proceeding issued a Memorandum and Order which, among other things, referred a stipulation entered into among the parties to this Appeal Board for review and approval, and, subject to determination made by the Commission on pending seismic matters, authorized the Director of Nuclear Regulation to issue to the Applicant a full-term, full-power license.

On June 20, 1975, this Board ordered briefing and oral argument by the parties to assist it in ascertaining what, if any, justification the record contained for authorizing the plant to load, test and operate without any seismic pre-condition at steady state power up to 91% for an indefinite term and on the other hand for placing a seismic pre-condition on a full-term, full-power operating license.

Two days prior to oral argument, the Applicant filed exceptions to the Memorandum and Order for the Licensing Board which, among other things, alleged that the record in this proceeding did not support the seismic condition precedent which had been imposed on the full-term operating license imposed. This exception will be addressed in a companion pleading.

In oral argument held in Washington, D.C. on Wednesday, July 9, 1975, the Applicant took the position that the record in the proceeding lacked evidentiary

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basis to support a seismic condition precedent. In rebuttal, the Council took the position that the Board, in reaching a decision on certain of the matters which were before it, must consider information which extends beyond the official record (i.e., transcript and exhibits) in this proceeding. This memorandum is submitted in support of such a proposition.

ISSUE

IN MAKING DECISIONS ON MATTERS IN ISSUE IN INDIVIDUAL LICENSING PROCEEDINGS, TO WHAT EXTENT MAY THE COMMISSION OR LICENSING BOARD WHICH SERVE THEM NOTICE MATTERS BEYOND THE OFFICIAL RECORD TO ASSIST THEM IN DECIDING MATTERS OF FACT, POLICY, AND LAW?

> "Among all the major problems of administrative law, none is so misunderstood as the problem of use of extra record information or understanding in an adjudication. The problem is to reconcile the needs of procedural fairness with the need for adequate use of administrative expertness, including knowledge and experience of the agency's staff and including the storehouse of information which is already available to the typical agency." (Davis, Administrative Law Treatise, Vol. 2, p. 431)

This quotation, taken from the 3 volume, Administrative Law Treatise of Professor Kenneth Culp Davis, succinctly described the problem which is before this Board for resolution.

Professor Davis' Treatise presents an excellent analysis of the state of the law on this subject and is drawn upon through this memorandum.

The Applicant in pleadings entitled "Applicant's Memorandum in Response to Order of June 20, 1975", dated June 30, 1975, and "Applicant's Brief in Support of Exceptions", dated July 7, 1975, has in essence argued that this Board's task is identical to the traditional fact-finding task of a court in that the Board is limited in making determinations to the evidence brought before it on the official

record no matter what other relevant evidence may be available on issues of fact. Throughout this proceeding, the Applicant has seen the Licensing Board's role as passive, it not being the function of the trier of fact to either know or discover the truth, but merely to settle the dispute between litigants.[1] Were this premise correct, then Applicant's perception of the accustomed scope of administrative notice in this proceeding, i.e., limitation of notice to common knowledge and readily accessible facts, would logically follow.

We feel the Applicant's perception of the principle of notice as embodied in administrative law is unduly archaic, restrictive, and overly simplistic. Congress has assigned this agency the responsibility of licensing only those production and utilization facilities which meet the stringent requirements of the Atomic Energy Act of 1954. This agency's responsibilities extend beyond settling disputes between litigants in individual licensing proceedings, and where matters which have or could have potential safety implications are involved, it is this Board's duty to secure all relevant information whether produced by the parties or not. This premise is recognized by the Commission (RAI-74-7, p. 7). Inherent in the very creation of this agency is the need to provide effective representation of the public interest which may not always be fully represented in individual proceedings; a need for which the courts, because of their passive character, cannot supply. Congress intended the Commissioners and the members of this Board to use and be guided by the unique technical knowledge and backgrounds which they bring to their positions and by the

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[1]That proposition was put in issue and decided by the Commission against the Applicant. (See RAI-74-7, p. 7)

experience which they have gained in the agency, no matter how oblique this knowledge and experience may be to the issues which they have before them.* The responsibilities to use all agency information that can be brought to bear on an issue is one of the basic cornerstones of the administrative process.

Of course, these responsibilities must be exercised in accordance with and attendance to the principle of due process and procedural fairness. What matters not subject to an opportunity for cross-examination and rebuttal may then be considered by the Licensing Board? The Board may consider extra-hearing record legislative facts in fashioning remedies and deciding matters of policy and law.

> "The cardinal distinction which more than any other governs the use of extra record facts by courts and agencies is the distinction between legislative facts and adjudicative facts. When a court or an agency finds facts concerning the immediate parties - who did what, where, when, how and with what motive or intent - the court or agency is performing an adjudicative function and the facts are conveniently called adjudicative facts. When a court or agency develops law or policy, it is acting legislatively;...and the facts which inform the tribunal's legislative judgment are called legislative facts....Legislative facts are the facts which help the tribunal determine the content of law and of policy and help the tribunal to exercise its judgment or discretion in determining what course of action to take....the tribunal's findings of adjudicative facts must be supported by evidence, but findings or assumptions of legislative facts frequently need not be, frequently are not, and sometimes cannot be supported by evidence." (Davis, Administrative Law Treatise, Vol. 2, p. 353)

The distinction between and different procedural requirements for use of adjudicatory and legislative facts has been recognized by Congress, the courts and this agency.[2] The Applicant failed to perceive this distinction or that the

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[2]Fed. Rules Evid. Rule 201, 28 U.S.C.A. with Notes of Committee on the Judiciary, House Report No. 93-650 and Notes of Advisory Committee on Proposed Rules; 10 CFR 2.743(i). See also Davis, Administrative Law Treatise, 1970 Supplement pages 506-27.

*One notes that over the past 5 years Licensing Board Chairman Jensch and Dr. Briggs have undoubtedly acquired a great deal of extra record experience with the litigants and issues relating to the Indian Point units.

Licensing Board's decision in attaching a pre-condition to the issuance of a full-term license was a decision of law and policy and that the Board is not restricted to a consideration of adjudicatory facts in making such a decision.

Indeed, inherent in the exercise of its jurisdiction is the responsibility to notice legislative facts which contribute to a sound result, subject, of course, to basic principles of procedural fairness. The Applicant has had an opportunity to comment in an appropriate fashion on the legislative material which may have influenced the Licensing Board's decision.[3] Cross-examination on the record or through the submission of exhibits introduced into evidence is not required. The Board in its Memorandum and Order did not decide any seismic matters on the merits.[4] Although not specifically expressed in their decision, we feel that the Board considered in a legislative fashion the existence of and to some extent the allegations being put forward in many of the pleadings (including Staff and Applicant responses thereto) and reports which are contained in the docket files for the Indian

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[3]Tr. 362-3, 376-7, 452-3, 545-9. See also, "Con Edison Response to Request for Review of Denial of Petition for an Order to Show Cause", February 7, 1975, and "Reply of Consolidated Edison Company of New York, Inc. to Response and Request of New York State Atomic Energy Council", May 8, 1975 (Docket Nos. 50-3, 50-240, 50-281).

[4]LBP-75-31 Slip Opinion at 19; NRC 1-75/6.

Point units and which relate to seismic issues.[5]

CONCLUSION

If it were Applicant's position that nothing short of an opportunity for full cross-examination and presentation of rebuttal evidence is required when making decisions with respect to adjudicatory facts which are disputed and at the center of controversy, we would agree. However, the Licensing Board, in its Memorandum and Order, has not decided the seismic issues on the merits,[6] but simply made use in a legislative fashion of information within agency files to assist them in making decisions of policy and law.[7]

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[5]Procedural fairness does not require a listing by the Licensing Board in their Memorandum and Order of specific briefs and pleadings in the Indian Point 1, 2 or 3 docket files which were legislatively used, as the Applicant had full opportunity to reply to such briefs. However, if the Licensing Board made use of information in agency files but not in the Indian Point docket files without affording opportunity for comment, Applicant's rights would have been abridged. Because the Licensing Board did not mention the use of this type of information, we assume consideration of it did not enter into their decision. (Information outside the Indian Point dockets which relates to the particular seismic issue addressed does exist; see:

1. Staff analysis of seismicity for Seabrook station found in Appendix C of Supplement 2 of the "Safety Evaluation Report by the Directorate of Licensing, U.S. Atomic Energy Commission in the Matter of Public Service Company of New Hampshire Seabrook Station Units 1 and 2", dated October 8, 1974, specifically pages C-5, C-6; and transcript of hearing Public Service Co. of New Hampshire, et al, Docket Nos. 50-443-444 held in Nashua, New Hampshire, June 12, 1975, specifically NRC Staff Testimony Regarding Seismic Design of the Proposed Seabrook Station, pages 2 and 7 (follows Tr. 2812) and Tr. 2856-7, 2868-76, 2893-4; and compare with

2. Analysis for Indian Point station found in transcript of hearing Consolidated Edison Company of New York, Inc., Docket No. 50-286, held on April 1, 1975 in Montrose, New York, specifically Tr. 389-429 and parts of Safety Evaluation referred thereto, both staff analyses being for reactors located in same techtonic province.)

[6]LBP-75-31 Slip Opinion at 19.

[7]Most of this information of which the Licensing Board may have made legislative use having developed within the Commission's files in a manner which has afforded the Applicant the opportunity for a full and complete comment.

Respectfully submitted,

J. Bruce MacDonald, Deputy
Commissioner and Counsel

C. J. Clemente, Assistant Counsel
Of Counsel

DATED: July 24, 1975
Albany, New York

7-25-75

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "New York State Atomic Energy Council's Memorandum Discussing Matters Concerning Official Notice", dated July 24, 1975, and "New York State Atomic Energy Council's Brief in Opposition to Certain of Applicant's Exceptions", dated July 25, 1975, in the above captioned matter, have been served on the following by deposit in the United States mail, first class or air mail, this 25th day of July, 1975:

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