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LICENSING STANDARDS FOR ATOMIC ENERGY LICENSES

ALFRED AVINS*

1. THE SITUATION BEFORE 1954

During World War II, when the first practical application of atomic energy took place, in the production of the atomic bomb, "probably the largest calculated risk anyone ever took" (Smyth Report) was being undertaken."¹ At that time, the entire project, and indeed, the whole field of atomic energy, was a complete governmental monopoly. As the court said in *Young v. Kellex Corporation*:²

"As near as a thing could be so made, the atomic bomb was produced by the United States as a government and a people. Its making was financed by the government. Title to basic material and finished product was at all times in the government.

". . . Though for reasons deemed sufficient to the government, private corporations were employed in construction and production processes, the sovereign was always present as a general owner, directing the work, directly or indirectly paying all bills, receiving the finished product into its exclusive custody."

It is therefore not surprising that the Atomic Energy Act of 1946³ continued that governmental monopoly. The field of atomic production was new. It had been developed at an enormous government expense. Much of the "know-how" was classified as secret, hidden from the gaze of ordinary businessmen. There were national defense overtones running throughout this entire field. The attendant hazards to the public were unknown. Few investors were willing to risk their funds in such an uncertain field.

Between 1946 and 1954, however, the picture changed materially. As the House report stated:⁴

"The organic law makes the production and use of fissionable material a Government monopoly. Private industry is permitted neither to own nor possess such material, nor to own or operate atomic reactors or other facilities capable of producing or utilizing these same materials. . . .

"This report has already summarized the considerations underlying the stringent prohibitions of the Atomic Energy Act of 1946 against private participation in atomic energy. It has also made

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1. *Carbide and Carbon Chemicals Corp. et al. v. Carson*, 192 Tenn. 150, 239 S.W.2d 27 (1951), aff. sub. nom. *Carson v. Roane-Anderson Company et al.*, 342 U.S. 232, 72 S.Ct. 257, 96 L.Ed. 257 (1952).
2. 82 F.Supp. 953 (U.S. Dist. Ct., E.D. Tenn., 1948).
3. 42 U.S.C.A. § 1801 et seq.
4. H. R. Rep. No. 2181, 83rd Cong., 2d Sess. 8-9 (1954).

clear that changing conditions now not only permit but require a relaxation of these prohibitions if atomic energy is to contribute in the fullest possible measure to our national security and progress.

"The recommended legislation therefore permits the Commission to license private industry to possess and use special nuclear materials. The United States Government, however, would retain title to such materials. The legislation also permits private persons, under license of the Commission, to own reactors intended to produce and utilize such materials."

There was increasing pressure from private industry to liberalize the government's policy and permit private companies to build their own reactors between 1946 and 1954, as the feasibility of using atomic power became more and more evident. At first, of course, private companies were reluctant even to spend sufficient funds in the area to carry on preliminary research and surveys, but by the time hearings were held on the 1954 Act, some pioneering companies had actually formulated concrete plans to use atomic power commercially. Thus the Joint Committee could report that:⁵

"Moreover, the atomic-reactor art has already reached the point where atomic power at prices competitive with electricity derived from conventional fuels is on the horizon, although not within our immediate reach.

". . . The Westinghouse Electric Corp. and the Duquesne Power & Light Co. are now constructing the nation's first large-scale atomic-power reactor, which will generate 60,000 kilowatts of electricity—an amount sufficient to furnish light and power for a sizeable city.

"Many technological problems remain to be solved before widespread atomic power, at competitive prices, is a reality. It is clear to us that continued Government research and development, using Government funds, will be indispensable to a speedy and resolute attack on these problems. It is equally clear to us, however, that the goal of atomic power at competitive prices will be reached more quickly if private enterprise, using private funds, is now encouraged to play a far larger role in the development of atomic power than is permitted under existing legislation. In particular, we do not believe that any developmental program carried out solely under governmental auspices, no matter how efficient it may be, can substitute for the cost-cutting and other incentives of free and competitive enterprise."

And the editor of the first magazine devoted to nuclear energy, in taking a poll of its readers, found that:⁶

"Of 10 provisions in the bill upon which specific comment was invited, the most popular was that authorizing the AEC to license private industry to own nuclear reactors and other facilities

5. *Ibid.*, p. 3-4.

6. Hearings before the Joint Committee on Atomic Energy on H.R. 8862 and S. 3323 to Amend the Atomic Energy Act of 1946 (hereinafter referred to as the 1954 Hearings), 83rd Cong., 2d Session, 1954, p. 26. Statement of Jerome D. Luntz, Editor, Nucleonics (McGraw-Hill Publishing Co., Inc., New York City, N.Y.).

utilizing or producing nuclear fuels. Everyone expressing an opinion favored that change."

However, in spite of the general sentiment in favor of licensing industry to build and operate its own nuclear reactors, there were a number of problems which the Joint Committee had to face in permitting widespread industrial participation in the program, due to the unique features of the atomic industry. For example, it was the first instance of government regulation of industry in a field where much of the necessary information was clothed in official secrecy. It was probably the first attempt at comprehensive regulation of an industry that has hardly gotten started; normally the regulation of business follows, rather than precedes its establishment. The new industry was dependent on the Government for much in the way of services, materials, and information, and the field was full of technological uncertainties.⁷ And, in addition, there was even some reluctance to break the government's monopoly, on the theory that it had done well so far, and that letting private industry in after the government had spent so much for research would constitute a "give-away". For example, Congressman Holifield⁸ said:⁹

"Industrial spokesman for changes in the Atomic Energy Act sound this refrain: Atomic power and other industrial advances in atomic power will be brought about only by the aggressive, dynamic activity of private enterprise; progress is held back by the heavy hand of Government monopoly. It sounds good, but there is more fancy than fact in the assertion. . . .

"The blunt fact is that existing atomic energy legislation—Government monopoly and all—has provided the framework for great progress in this field."

It was therefore within this framework of a desire upon the part of the Joint Committee to move forward, tempered by the knowledge of the uncertainties surrounding just how that forward move should be made, that the debate as to what standards the Atomic Energy Commission should use in licensing private companies to come into this field was carried on.

2. THE DEBATE ON STANDARDS

Having agreed that private companies should be licensed to own and operate nuclear reactors for commercial purposes, the next problem that the Joint Committee had to face was: What standards should be used for the granting or denial of a license to a private company by the Atomic Energy Commission?

The original draft of the 1954 Act contained no specific standards. A member of the New York law firm of Sullivan and Cromwell criticized it as follows:¹⁰

7. See Bureau of National Affairs, *Atomic Industry Reporter*, No. 13, August 31, 1955, p. 1:100. Statement of Harold Price, Director of the Division of Civilian Application of the Atomic Energy Commission.
8. A Democrat from California and a Member of the Joint Committee on Atomic Energy.
9. 1954 Joint Committee Hearings, p. 21.
10. *Ibid.*, p. 113. Statement of Paul W. McQuillen.

"There does not seem to be any standard for the granting or denial of licenses or for the terms and conditions to be imposed, nor any requirement of uniformity of basic materials for all licenses, although that may be expected to result.

"It is suggested in this connection that, . . . statutory standards governing their issuance be set forth in definite terms, providing for common defense and security, and the protection of public health and safety. It should be possible for an applicant to obtain a single license covering all the aspects of whatever is the particular atomic energy business into which that applicant proposes to enter."

Criticism of this lack of specific standards for the issuance of licenses also came from a company which had been actively studying the possibility of using a nuclear reactor for commercial power purposes. Walker L. Cislser, President of the Detroit Edison Company, told the Joint Committee:¹¹

"The licensing provisions which I referred to earlier are confusing, in part because the proposed law does not establish standards or minimum requirements,

"There must be assurance that the owner can use its facilities without interruption for long periods of time, and the license must not be subject to revocation except by reason of failure to observe the terms of the license. Such assurances should be a matter of law rather than left to the discretion of an administrative body."

Labor¹² also agreed with this view, as the AFL's representative stated:¹³

"Thus, the private developers would hold title only on the basis of a license granted by the Atomic Energy Commission. We think it quite important that that licensing arrangement be maintained and that the act spell out clearly the conditions, standards, and requirements under which the license is granted."

As the hearings continued, two specific issues were drawn as to the standards which the Atomic Energy Commission should use in determining whether a particular applicant should or should not receive a license. The first was whether the Commission could discriminate between applicants on account of the nature of their ownership, and the second was whether it could discriminate on the basis of whether the Commission considered the applicant's project feasible or not.

Congressman Holifield¹⁴ was in the forefront of those who feared that the Commission might discriminate among applicants in favor of giant corporations. He said:¹⁵

11. *Ibid.*, p. 77.

12. As represented by former Congressman Andrew J. Biemiller, Democrat of Wisconsin, and a member of the National Legislative Committee of the AFL.

13. 1954 Joint Committee Hearings, p. 272.

14. Democrats on the Joint Committee did not all seem to share Congressman Holifield's belief.

15. 1954 Joint Committee Hearings, p. 186.

"If this Atomic Energy Commission wanted to favor certain great corporate groups to the disadvantage of others, under this act they could do so, could they not? By the very rights we give them to exercise administrative discretion, in this bill that we are considering, the Cole-Hickenlooper bill?"

He also feared that the Commission would favor private corporations as against public power groups, and desired to prevent such discrimination. He said:¹⁶

"They (public agencies) could operate provided they were granted licenses by the Atomic Energy Commission. But if the Atomic Energy Commission, in line with the general purport of this bill, should direct its licenses to private enterprise, . . . by the very virtue of the fact that they denied those licenses it would make it impossible for municipal public-power groups or rural cooperative groups or any other kinds of public projects to obtain access to the source material which is owned by the Government, and will continue to be owned by the Government under the bill, and, therefore, they would be helpless in the case of such an administrative decision."

On the other hand, most of the witnesses before the Joint Committee, as well as most of the other members of the Joint Committee, had no such fear. They did not see any necessity for spelling out this in the Act. Typical of their reactions to this was the following statement:¹⁷

"Mr. Holifield, I did not comment on it, because it did not seem to me at this particular juncture the problem of discrimination was a real one. Any licensing system, I suppose, automatically infers the power to exclude, and that some people would not be able to get licenses. I assume that the Commission would give licenses, or exclude people from licenses only in accordance with standards which were set up in the law and which were fair standards or required by the situation which may exist from time to time.

". . . I think the suggestion for a review board or special court to pass upon the licenses is an excellent one, and I personally would endorse it. . . ."

As the licensing section of the 1954 Act was finally passed,¹⁸ it contained no provision specifically preventing the Commission from discriminating between large and small corporations or between private corporations and public power groups or rural cooperative groups. However, this omission is probably due not to the desire of the committee to let the Commission have such a power of discrimination, but rather to the belief that, as the bill stood, the Commission had no such power. This view is fortified by the following statement of one of the Atomic Energy Commissioners made to the Point Committee:¹⁹

16. *Ibid.*, p. 187.

17. *Ibid.*, pp. 407-8.

18. Pub. L. No. 703, 83rd Cong., 2d Sess. (Aug. 30, 1954). 68 Stat. 919, 42 U.S.C. Sec. 2011 et seq., Sec. 103.

19. 1954 Joint Committee Hearings, p. 600. (Statement of the Atomic Energy Commission, by its Commissioners, all being present, Commissioner Campbell reading).

"Once the Commission finds that any particular type of reactor has been sufficiently developed to be of practical value for industrial or commercial purposes, another set of licensing criteria are called into play—those prescribed in section 103. These criteria are quite explicit, and afford assurance that any qualified applicant seeking to use such a reactor could obtain a license to engage in that use, subject, of course, to the availability of special nuclear material and to appropriate safety and security safeguards."

The second major issue as to what standards the Atomic Energy Commission should use in determining whether an applicant should be given a license was whether the Commission should have the power to deny a license to an applicant because it felt that his project was not practical and beneficial to the public interest, as distinguished from the negative consideration, which all agreed it should determine, that his project was not detrimental to national security or public health and safety.²⁰ The Atomic Energy Commission had felt that it should have the power to deny an applicant a license if his project was not practical, as the above statement shows. This position was strongly criticized by representatives of industry as allowing the Commission too great an opportunity to decide what projects should be carried on and what activities could not be undertaken. For example, General Electric's representative told the Joint Committee:²¹

"To turn to specifics, I would like to comment on some of the more important tests and conditions which must be met in order to obtain a license. These provisions are obviously of transcendent importance since they will determine private entry into the field of atomic energy. . . .

" . . . The dangers inherent in making any new use run the gauntlet of administrative and legislative approval are obviously considerable.

"The history of industrial progress records instance after instance where no one except an inventor and a very small group of backers were convinced of the 'practical value' of a new idea. Industrial progress would certainly have been very much slower if a governmental finding of practical value had been a condition precedent to the introduction of every new idea.

" . . . Our aim here is not criticize a legitimate concern with future uncertainties, but only to indicate the danger to industrial progress involved. In line with the objective of encouraging widespread participation by private enterprise, we hope that maximum reliance shall be placed on willingness to risk capital in determining whether a new idea is of practical value. Except where there are overriding considerations of health, safety, or national security, we think the market should determine whether an idea is of 'practical value.'

"(2) The useful purpose standard: Section 103, under which all utilization facilities must be licensed, provides as one of its standards that the applicant's 'proposed activities will serve some

20. See Sec. 103d, Atomic Energy Act of 1954.

21. 1954 Joint Committee Hearings, p. 326. Statement of Francis K. McCune, General Manager, Atomic Products Division, General Electric Company.

useful purpose proportionate to the quantities of special material to be consumed.' This test raises problems similar to those of the practical-value test. Unlike the practical-value test, the useful purpose test must be met for each individual license, not merely for types of uses. The concept of 'useful purpose' is certainly very amorphous. If such a standard is necessary, we hope that you may be able to give some indication in the act what kind of factors the applicant for license should be able to show, and how the Commission should make its determination. We hope, however, that the standard may be eliminated entirely, in view of the fact that the practical value of that type of use has already been approved by the Commission, the President, and by the Congress at least by inaction.

"At most, we feel that a useful purpose test should give the Commission an opportunity to prevent special material from being wasted on clearly frivolous uses. Where the special material is available, and the use does not involve dangers to security, health, and safety, the Commission should not be permitted to ban it because it disagrees with the applicant as to whether the particular activity serves a useful purpose."

Likewise, bar association representatives criticized these provisions as allowing the Commission to take too cautious an attitude in licensing applicants. They felt that all applicants should be licensed unless such licensing would cause a positive detriment to the national security or public health and safety. For example, the Special Committee on Atomic Energy of the Association of the Bar of the City of New York had this to say:²²

"We fear, moreover, that the 'practical value' test, particularly when combined with the criterion of 'usefulness' in section 53b, and the other broad powers and responsibilities of the Commission under the bill, may unduly retard atomic development when the supply of nuclear materials becomes 'adequate.' If the Commission is put in the position of passing judgment on the wisdom and utility of each proposed new venture in atomic energy as a condition of the granting of the necessary licenses, a strong atomic-energy industry will be slow and hard to develop."

Although the "practical value" and "useful purpose" tests were left in the act as it finally passed, in spite of the criticism of them,²³ the Commission's discretion in determining the presence or absence of these factors is considerably narrower than would appear from the statements quoted above. For example, Congressman Holifield stated that he believed that the word "practical" had a very broad connotation.²⁴ And the Joint Committee Chairman, Congressman Cole,²⁵ makes clear that the word "practical" has a very broad meaning in the following exchange:²⁶

22. *Ibid.*, p. 413.

23. Sec. 102 and 103 (b), Atomic Energy Act of 1954.

24. 1954 Joint Committee Hearings, p. 47.

25. Republican of New York.

26. 1954 Joint Committee Hearings, pp. 431-2. The "Mr. Cohen" is Karl P. Cohen, Vice President, Walter Kidde Nuclear Laboratories, Inc.

"Chairman COLE: Mr. Cohen, during these hearings, Mr. Holifield has been apparently disturbed about what he fancies to be the eventual development where the Commission will have to pick and choose between applicants for licensing. Frankly, I cannot visualize that development. I want to seek your judgment based on your consideration of this problem and your experience and your knowledge.

"Now assuming that all applicants are qualified and that their proposal as a sound one—of course, the Commission must evaluate the character and financial stability and the feasibility of application before it will grant a license, but assuming that those are uniform among applicants, and disregarding the security requirements, then I cannot see whether it would be necessary for the Commission to select among the applicants.

"I wonder if I am right in that or not. Is it not possible for the Commission to grant licenses to anybody who applies, any applicant who is qualified, who has a good sensible program—that the Commission will grant him a license."

"Mr. COHEN. That is certainly my interpretation of the licensing clauses and is one of the reasons that we are in favor of this revision of the act.

"I think under the present bill the Commission, instead of having to examine in its heart and soul each time an applicant comes up, what will he contribute to the Commission's program, would then have an entirely different criterion—what harm will be done if we give the applicant the license? And if we cannot find any harm, then we give it to him."

Thus, the intention of Congress was to allow the Commission to deny an applicant a license only if his project was clearly fantastic, one which constituted a frivolous waste of special nuclear material. Any sensible project would have to be licensed by the Commission, without the right to exercise discretion on its part as to whether the applicant would make a profit on the project or not.

Furthermore, the Commission has no right to pick and choose among applicants as to which ones can produce a more practical type of project. The act specifically provides that licenses shall be issued on a "non-exclusive basis,"²⁷ a provision probably designed to carry out the intention of Congress that applicants not be treated as contractors. This feeling that the widest possible licensing should obtain is illustrated by the following statements of Karl P. Cohen, Vice President of Walter Kidde Nuclear Laboratories and Congressman Holifield:²⁸

"Under the present program of industrial power participation, for example, and under the program of development of atomic reactors for power which is now proceeding, the Commission has the unenviable job of picking among a number of candidates for various tasks and choosing the one, or the numbers of them, which they think should be the proper ones to carry it on,

27. Sec. 103 (b), Atomic Energy Act of 1954.

28. 1954 Joint Committee Hearings, pp. 426-7.

and they have to use some criteria. I pointed out in my last testimony that on this basis, if you tried to decide who is going to build automobiles, you never would pick Henry Ford, but you would pick two railroad companies and a carriage manufacturer. This is because the only criterion that a Government agency can use is past performance, and this means that you are always going to pick some company or companies to participate in your program or to develop the reactors for you who have done something in some other field. I merely point out that this is unique, this is an economic monstrosity."

"Representative HOLIFIELD: I will admit that it is going to be a very difficult problem to license these companies and to choose between the many applicants as to which ones shall get the license. I agree with the validity of your point on that part of it. . . .

"I certainly agree with you that the widest possible licensing should obtain. . . .

"We must also consider the financial ability of the individual that wants to go into this program, and it does take companies with very large capital to go into the reactor-development field, construction field particularly."

Finally, to encourage the widest possible licensing consistent with the preservation of national security and public health and safety, the Joint Committee declined even to require that the Commission find that the project contemplated by the applicant was beneficial to the public interest. In reporting the bill to Congress, the Joint Committee said:²⁹

"Section 103: This section specifies the conditions for the issuance of licenses for types of utilization of production facilities that have been found to be of practical value. For each such type, the Commission is required to issue licenses to all qualified applicants without other discretion on its part. The licensed operations are subject to regulation by the Commission in the interest of the common defense and security and in order to protect the health and safety of the public. The Commission is authorized to issue licenses for specified periods up to 40 years. Licenses cannot be granted to any person where the issuance of such a license would be inimical to the common defense and security or the health and safety of the public."

This failure to require that the issuance of the license by the Atomic Energy Commission be based not only on the negative consideration that no harm will come to the public but also on the positive consideration that the public will benefit was sharply criticized by two minority members of the Joint Committee. Congressmen Holifield and Price, in presenting their views to Congress in an opinion dissenting on this point, said:³⁰

"The Federal Power Commission observed further that—
". . . the grant of the (license) privilege should depend not solely on the negative consideration that national defense will

29. H.R. Rep. No. 2181, 83rd Cong., 2d Sess. 19-20 (1954).

30. *Ibid.*, p. 123.

not be harmed, but on the affirmative ground of benefit to the public interest in electric power and other products of the operation of nuclear reactors as well (p. 1128, hearings).

"Unfortunately, the present bill reflects nothing of this advice from the Nation's outstanding independent power agency, but relies mainly on negative considerations in licensing. The analysis of the Federal Power Commission is sufficient to indicate that the bill is still incomplete, so far as it comes within the scope of power policy."

Thus, if the project contemplated by the applicant is a reasonable one, if it does not present a hazard to public health and safety, and is not detrimental to national security,³¹ and if it does not tend to the creation of a monopoly in violation of the anti-trust laws,³² the Commission must issue a license to the applicant to build the nuclear reactor. It is therefore clear that the Joint Committee adopted a liberal approach in dealing with the granting of licenses.

3. THE ACT IN PRACTICE

The Atomic Energy Act requires that "Such licenses shall be issued . . . subject to such conditions as the Commission may by rule or regulation establish to effectuate the purposes and provisions of this act."³³ Congress contemplated that the Atomic Energy Commission would, shortly after the act was passed, issue regulations prescribing the requirements for licensing. But this did not happen immediately. Instead, it took the Commission 6 months to issue a statement saying that they were not yet prepared to issue the regulations. The reason for this is stated by Congressman Holifield as follows:³⁴

" . . . The fact that it has taken 6 months now for the Atomic Energy Commission to come up with the statement that they are not yet ready to reveal the terms and conditions and regulations for licensing industry indicates to me that they are in a strange

31. Sec. 103b (2) . In its report to the Congress, the Joint Committee said:

Section 182 sets forth the information that the Commission may require in any application for a license so as to assure the Commission of adequate information on which to fulfill its obligations to protect the common defense and to protect the health and safety of the public. H.R. Rep. No. 2181, 83rd Cong., 2d Sess. 28 (1954) .

32. Sec. 105 provides that licenses are not to be granted if the licensee is enabled to build up a monopoly pattern in violation of the anti-trust laws. And the following exchange during the 1954 Joint Committee Hearings (p. 629) between Congressman Holifield and the Chairman of the Atomic Energy Commission, Admiral Strauss, shows that it was the intent of the Joint Committee that licenses should not be issued where such issuance would be inconsistent with the anti-trust laws:

Representative HOLIFIELD. "Yes, I am aware of the whole section and that takes place after a monopoly forms. Its effect is upon a monopoly after it is formed and it does not contain the language to admonish this Commission to let licenses in such a way that the monopoly pattern will not form."

Mr. STRAUSS. "I could only speak personally at this point since this is a matter not considered by the Commission . I should certainly not mind an admonition to avoid the creation of a monopoly, nor do I believe that any of my colleagues would take any different viewpoint."

33. Sec. 103a, Atomic Energy Act of 1954.

34. Hearings before the Joint Committee on Atomic Energy of the Congress of the United States, 84th Congress, 1st Session, on the Development, Growth, and State of the Atomic Energy Industry (January 31, February 1, 3, and 4, 1955) (hereinafter referred to as the 1955 Hearings), p. 559.

field which is foreign from their former functions, and that this is opening up a completely different function for the Atomic Energy Commission than any function they have had before; and it is going to be a much broader field, a field which is going to require a lot of quasi-judicial and quasi-regulatory powers and rulings."

Since the regulations had not yet come out, private industry could not know what criteria the Atomic Energy Commission would use in deciding whether an applicant would get a license or not. A number of spokesmen for private industry were still apprehensive that the Atomic Energy Commission would adopt the approach of issuing regulations only for projects of which they approved. Probably the clearest statement of their position was made by a representative of General Electric Co. He said:³⁵

"... An equally basic problem is raised by the scope of the Commission's power to grant licenses and to control the activities of licensees. In discharging its responsibilities under the licensing provisions of the act, how much control is the Commission required to exercise over who is permitted to enter into the atomic business, and what is done by the participants?"

"Under the language of the act the Atomic Energy Commission has very broad discretion. The statutory licensing standards provide little in the way of specific, detailed guidance. The Atomic Energy Commission could use its power to grant or withhold licenses and to supervise the operation of licensees so as to retain in effect a central planning role in the development of the atomic-energy industry. The crucial issue is whether the Commission, in fulfilling its obligation must introduce its own conception of what is 'practical' or 'desirable' into the licensing process. In other words, must the Commission insist on the right to evaluate the merits of a project before deciding whether to license it?"

"We come back here to the same question discussed in relation to the adequacy of information: Will initiative for atomic development be centralized or individualized? Either a liberal or a restrictive approach can be adopted. By a restrictive approach I mean granting materials and operating licenses only to projects which the Commission deems desirable. By a liberal approach, I mean granting licenses for any project in which an applicant has sufficient confidence to be willing to risk his own money, without an evaluation by the Commission of the particular merits of the project.

"If the first course is adopted, the result will be to stifle industry initiative. There would be little practical change from the situation under the old act where the Commission, as a matter of administrative decision, decided what projects were necessary or desirable, and then let contracts to companies willing to carry out such projects.

"We urge the adoption of a very liberal approach. As a general policy, we believe that all applicants should be licensed as long as the materials are available, and the proposed use does not involve dangers to security, health, or safety. . . .

35. *Ibid.*, pp. 545-6. Statement of Francis K. McCune, Vice President, General Electric Co.

“. . . Except in line with the broad standard of avoiding a completely frivolous use of material, the Commission should not be expected to concern itself with whether it considers a particular project desirable or even workable. That decision should be left solely and exclusively to the applicant. I would prefer running the risk of wasting some nuclear material, to requiring new ideas to run the gauntlet of administrative value judgments. The history of industrial progress records innumerable instances where no one except an inventor and a very small group of backers had faith in a particular project. Industrial progress would certainly have been very much slower if an official Government determination that the idea is practical or desirable had been a condition precedent to the introduction of new ideas.

“. . . Licensees should not simply be treated as a slightly different breed of contractors. We should recognize the basic fact that the licensee has the right to make his own decisions, and that he must be given some elbowroom. . . .”

Finally, about nine months after the Atomic Energy Act of 1954 was passed, the Atomic Energy Commission issued the regulations entitled: “Licensing of Production and Utilization Facilities.”³⁶ This regulation retains the requirement that the Commission find that the applicant’s facility has a “practical value for industrial or commercial purposes.”³⁷ The applicant must inform the Commission of his technical and financial qualifications for carrying on the particular project for which he is applying for a license,³⁸ and when he proposes to complete it.³⁹ The applicant must also inform the Commission of sufficient facts to enable it to evaluate the hazards to be expected from operation of the facility,⁴⁰ including a detailed description of its location in relation to the surrounding area,⁴¹ and what precautions have been taken in case of accident.⁴² As its standard for issuing licenses, the Commission requires that the facility will not endanger the health and safety of the public,⁴³ that the issuance of the license will not be inimical to national defense and security,⁴⁴ and that the applicant is financially responsible and technically competent to carry out the project.⁴⁵ The Commission also requires that the activities serve a useful purpose⁴⁶ and that the issuance of the license would not create a situation inconsistent with the antitrust laws.⁴⁷

36. 10 CFR Part 50, 20 Fed. Register 2486, April 15, 1955. CCH Atomic Energy Law Reporter, Paragraph 9705.

37. Sec. 50.22. And see the address of Harold Price, Director, Division of Civilian Application, AEC, delivered before the Section of Public Utility Law, American Bar Association, Aug. 23, 1955. CCH Atomic Energy Law Reporter, Paragraph 2033.

38. Sec. 50.33 (b).

39. Sec. 50.33 (c).

40. Sec. 50.34 (a).

41. Sec. 50.34 (b) and (c).

42. Sec. 50.34 (e), (f) and (g).

43. Sec. 50.40 (a).

44. Sec. 50.40 (c).

45. Sec. 50.40 (b). And see the remarks of Mr. Charles G. Manley, Division of Civilian Application, AEC, July 27, 1955. CCH Atomic Energy Law Reporter, Paragraph 2032.

46. Sec. 50.42 (a).

47. Sec. 50.42 (b).

In addition, the Commission has issued several regulations which pertain to licenses, such as one governing the licensing of facility operators,⁴⁸ one governing special nuclear material,⁴⁹ and one designed to protect public health and safety.⁵⁰ Appropriate forms have also been issued for licenses.⁵¹

By the time one year after the Atomic Energy Act of 1954 had elapsed, only nine requests for licenses by private industry or educational institutions had been received by the Atomic Energy Commission. These requests came from Consolidated Edison Co. of New York, Armour Foundation of the Illinois Institute of Technology, Battelle Memorial Institute, Naval Research Laboratory, University of California at Los Angeles, University of Michigan, Metals and Controls Corp., Pennsylvania State University, and Commonwealth Edison Co., of Chicago. Probably the most significant of these requests for licenses came from Consolidated Edison Co. of New York, which applied for a license to construct and operate, for a period of 40 years, a nuclear power reactor of the pressurized water type, using fully enriched uranium 235 as a fuel and thorium as a blanket.⁵² This company, which supplies electricity to New York City, proposed to build the reactor from its own funds. It is to be located about 30 miles from the New York City limits, on the Hudson River, and is to be used to generate electric power for normal use by consumers. This application is under consideration.⁵³

4. ATTITUDE OF THE COURTS

During the hearings on the Atomic Energy Act of 1954, it was feared that the Atomic Energy Commission might arbitrarily refuse to issue a license to an applicant. In such a case, the applicant would undoubtedly want to obtain a review of its determination by the courts. As Congressman Holifield asked a witness:⁵⁴

"Assuming again that there might be 50 people waiting to go into this business and assuming only 10 licenses were granted, it would be evident that there would be a limited licensing of reactors.

"Therefore, we would be faced with what the other 40 might consider a discriminatory allocation of licenses, would we not?"

48. 10 CFR Part 55, released June 27, 1955, 20 Fed. Register 4658, June 30, 1955. CCH Atomic Energy Law Reporter, Paragraph 9710.

49. 10 CFR Part 70, 20 Fed. Register 2491, April 15, 1955. CCH Atomic Energy Law Reporter, Paragraph 9715.

50. 10 CFR Part 20, released July 11, 1955. 20 Fed. Register Number 138, Page 5101, July 16, 1955. CCH Atomic Energy Law Reporter, Paragraph 9701.

51. For example, see AEC-378 (Application for Access Permit); AEC-2 (Application for License to Transfer Uranium or Thorium Source Material); AEC-3 (Monthly Report of Uranium Producers); AEC-4 (Report of Processors); AEC-5 (Report of Distributors); AEC-6 (Report of Consumers); AEC-7 (Export License Application); AEC-8 (Application to Receive Excess Source Material); AEC-250 (Export License).

52. Bureau of National Affairs, Atomic Industry Reporter, Number 9, August 3, 1955, p. 1:62.

53. The author wishes to express his thanks to Mr. A. Bryan Marvin, Assistant Director of Public Information of the Consolidated Edison Company of New York, for the opportunity of seeing the company's application for a license to build a nuclear reactor.

54. 1954 Joint Committee Hearings, p. 231.

"If you were among that 40, would you not want to have the right of appeal to an objective and independent board to see why you were disqualified and a competitor was given the license?"

He further pointed out:⁵⁵

"If opportunities are to be opened up to private enterprise in the atomic-energy field, Government controls necessary for maintaining security, health, safety, and other basic measures should be administered in a fair and impartial manner. I deem it essential that persons or firms who have grounds for believing fair treatment has been denied them in regard to licensing or other actions should be accorded the right of appeal to an independent review board or tribunal apart from the Atomic Energy Commission itself."

The Atomic Energy Act of 1954 gives an applicant the right to have the determination of the Atomic Energy Commission as to whether he should be issued a license or not reviewed by the courts. The section dealing with licenses⁵⁶ requires that they be issued in accordance with Chapter 16 of the Act. Section 181 of Chapter 16 makes the Administrative Procedure Act⁵⁷ applicable to the Atomic Energy Commission.

No cases have arisen in the courts wherein the determination by the Atomic Energy Commission that an applicant should not receive a license has been challenged. The reason for this is undoubtedly due to the fact that the licensing provision was so recently added. However, there have been a few cases wherein, directly or indirectly, the action of the Atomic Energy Commission was challenged. The courts, in such cases, have been uniformly reluctant to overturn a determination of the Atomic Energy Commission.⁵⁸ For example, in *United Electrical, Radio, and Machine Workers of America, et al. v. Lilienthal, et al.*,⁵⁹ the court said:

"The action of AEC of which the plaintiffs complain was authorized by the Atomic Energy Act, 42 U.S.C.A. § 1801 et seq.; the court lacks jurisdiction over the subject matter of the action in that the complaint seeks to control executive action committed by law to the discretion of the Atomic Energy Commission, and this court will not interfere with the exercise of such discretion; the complaint contains no sufficient allegation that the action of AEC, complained of, was arbitrary, capricious, or an abuse of discretion; no substantial constitutional question is presented; the Administrative Procedure Act, 5 U.S.C.A. § 1001 et seq., is not applicable to the case."

*National Coal Association et al. v. Federal Power Commission*⁶⁰ is to the same effect. In that case, the National Coal Association filed a petition

55. *Ibid.*, p. 23.

56. Sec. 103a.

57. 60 Stat. 237, 5 U.S.C. 1001, 5 U.S.C.A. § 1001 et seq. And see CCH Atomic Energy Law Reporter, Paragraph 2028.

58. See: *Fletcher et al v. Watson*, 204 F.2d 68 (D.C. Cir. 1953); *Fletcher v. United States Atomic Energy Commission*, 192 F.2d 29 (D.C. Cir. 1951); *U.S. v. Hodge et ux.*, 89 F.Supp. 25 (Dist. Ct. E.D. Tenn., 1949); *U.S. v. 40.75 Acres of Land*, 76 F.Supp. 239 (Dist. Ct. N.D. Ill., 1948).

59. 84 F.Supp. 640 (D.C. Cir. 1949).

60. 191 F.2d 462 (D.C. Cir. 1950).

to review an order of the Federal Power Commission granting a certificate of convenience and necessity for construction of a gas pipeline to supply the Atomic Energy Commission's plant at Oak Ridge, Tennessee. The court held that the record sustained the grant of the certificate. Writing for the majority, Judge Hazen said:

"It is enough to say that the Commission properly assessed great weight to the Atomic Energy Commission's view that the safety and well-being of the nation required use of natural gas as a fuel at its Oak Ridge plant, and that the proposed pipeline would adequately provide the gas needed for the manufacture of fissionable materials."

And in a concurring opinion, Judge Clark went even further. He said:

"It must be remembered that no seller or producer of coal or any other fuel or of railroads or any other form of transportation has a vested right to force consumers to retain dependence on a fuel or form of transportation in which they have lost confidence. If they lose business it is largely because of their own antics in creating frequent crises, by way of strikes or threats of strikes, which leave the users at the mercy of their whims."

"Moreover in this case there is a special consideration in so far as public convenience and necessity is concerned. The Record shows that the Oak Ridge plant is a huge plant engaged in producing materials vital to the nation's safety, perhaps even its life. It is further shown that it is absolutely necessary to operate the plant seven days a week, twenty-four hours a day and that if the boilers should be shut down for even five minutes it would require at least two to three years to get them in full operation again.

"Under such circumstances, it is folly to say that this vital defense effort shall be left to the tender mercies of the contending parties here with the strong possibility that at some crisis in our affairs this important security agency might be suddenly paralyzed. The Federal Power Commission wisely and properly followed the recommendation and request of the Atomic Energy Commission."

However, the courts have indicated that they will review a determination of the Atomic Energy Commission if such determination was arbitrarily arrived at. In *United States v. Taylor's Oak Ridge Corporation*,⁶¹ the court said:

"As to whether defendant's bid should have been accepted in preference to others is not a subject for judicial review, the decision therein being an exercise of administrative functions of the Atomic Energy Commission. While the court has not been referred to any statute which excludes the matter from judicial review, this Court over a period of several years has had many occasions to consider whether it should undertake a review of purely administrative procedures of Government agencies. Where there has been no violation of a vested right, this court has consistently refused to intervene in such administrative affairs. . . ."

61. 89 F.Supp. 28 (U.S. Dist. Ct., E.D. Tenn., 1950).

“ . . . While this court has declined to intervene in the administrative decisions of government agencies, it has not foreclosed itself from doing so, in the event it should appear that an agency has acted arbitrarily and capriciously to the detriment of a party dealing with it. . . .”

Hence, an applicant who feels that his application for a license was arbitrarily refused by the Atomic Energy Commission does have an effective remedy in the courts.

5. CONCLUSION

The issuance of licenses by the Atomic Energy Commission for the building of facilities for the commercial production of atomic energy should be on the broadest plane consistent with the maintenance of public health and safety and the protection of national security. The standard that the Atomic Energy Commission should use ought to be: Will the issuance of this license involve a risk of harm to the public, rather than, will the issuance of this license benefit the public? A person who puts up his own money should be entitled to spend it on any type of project, however foolish the Atomic Energy Commission thinks it is, that he wants to, so long as there is no danger to anyone else. And the courts ought to review the determination of the Atomic Energy Commission with a critical eye to see that it adheres to this standard. Only in that way can the maximum progress of the American atomic energy industry be assured.