PART IV

FEDERAL STATUTORY AND ADMINISTRATIVE LIMITATIONS UPON ATOMIC ACTIVITIES
Federal Statutory and Administrative Limitations Upon Atomic Activities

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I. INTRODUCTION

Scientific and technological considerations heretofore have dominated the interest and work of the United States government and private American business in the field of atomic energy. This major preoccupation with research and engineering problems in the development of a new source of energy for peacetime uses is understandable. The product of the exigencies of World War II and the post-war arms race between the Soviet bloc and the United States and its allies, the atomic bomb and its proliferations as a hydrogen and cobalt weapon constitute an important factor in the present balance—or imbalance—of world power. Adopting a new source of energy developed in the context of conflict and of government monopoly to the peacetime needs of medicine, public utilities, and industry may well comprise the beginning of a new industrial revolution of which the scientist and engineer are the principal architects.

A. Scope and Policy of AEC Regulation

In their preoccupation with technology, private industry and the American public have tended to overlook the problems of, and the present justification for, government regulation which covers every facet of the field of atomic energy.¹ The Atomic Energy Act of 1954 ² establishes the broadest control ever exercised by the federal government over any one industry in the United States.³ The statutory provisions en-

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³ The Civil Aeronautics Board is "[n]ext to the AEC . . . perhaps the administrative agency with the widest and most complex range of responsibility," Joint Committee on Energy, "A Study of AEC Procedures and Organization in the Licensing of Reactor
acted by Congress are the framework of this control, which is, in turn, implemented and effected by the administrative regulation and policy of the Atomic Energy Commission.

The Atomic Energy Act of 1946, otherwise known as the McMahon Act, was enacted to substitute civilian for military control over the application of atomic energy largely to the field of warfare. The "primary purpose" of the Atomic Energy Act of 1954 was "to make our Nation's legislative controls better conform with the scientific, technical, economic, and political facts of atomic energy as they exist today," principally in the field of its peaceful uses. Thus, the Atomic Energy Act of 1954 states:

> Atomic energy is capable of application for peaceful as well as military purposes. It is therefore declared to be the policy of the United States that—

a. the development, use, and control of atomic energy shall be directed so as to make the maximum contribution to the general welfare, subject at all times to the paramount objective of making the maximum contribution to the common defense and security; and

b. the development, use, and control of atomic energy shall be directed so as to promote world peace, improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise. (Emphasis supplied.)

Of course, the 1954 statute was not enacted without wide differences of opinion between both major political parties. The debate continues; especially concerning the extent to which government should participate in the process of industrial exploitation of atomic energy. Indeed, tech-
nological and scientific developments, with attendant economic effects, may well require a reappraisal from time to time of the respective roles of government and private business. However, the fact is that Congress has enacted a statute, and the Commission is bound by a policy, which stresses 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.\(^8\)

Prior to 1956 only a limited recognition had been given to the effect of the statutory and administrative restraints imposed under atomic

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\(^8\) H.R. Rep. No. 2181, supra note 5 at 3. The majority report on H.R. 9757 to amend the Atomic Energy Act of 1946 further stated (p. 9): "It is our firmly held conviction that increased private participation in atomic power development, under the terms stipulated in this proposed legislation, will measurably accelerate our progress toward the day when economic atomic power will be a fact. ... We do not believe that the efforts of free enterprise, using its own resources and money, are by themselves ade­quate to achieve the speediest possible attack on the goal of peacetime power. Neither do we believe that maximum progress toward this objective will be afforded by an effort relying exclusively on governmental research and development, using the public's moneys. We believe, rather, that teamwork between Government and industry—team­work of the type encouraged by these amendments—is the key to optimum progress, efficiency, and economy in this area of atomic endeavor. ..."
energy legislation upon the hopes and expectations of the American public with respect to the benefits realizable from the peaceful uses of this energy, as clearly intended by the Congress when it enacted the Atomic Energy Act of 1954. Early in 1956, in its important report on the "Peaceful Uses of Atomic Energy" to the Joint Congressional Committee on Atomic Energy, the McKinney Panel on the Impact of the Peaceful Uses of Atomic Energy pointed out that "the role of the Federal Government in this field [atomic energy] could strongly influence, if not control, the rate of future development" of its peaceful uses. Indeed, with respect to the administrative controls exercised by the Atomic Energy Commission through its licensing and rule-making powers and its ownership of special nuclear material, the Panel found:

One of the consequences of regulatory systems is a tendency toward overregulation. This is particularly true where all initiative for making determinations rests with the regulatory body.

The Atomic Energy Commission has, to a certain extent, recognized the dangers inherent in "overregulation" and claims that it "has sought, within the limits required for the protection of the public, to impose no unnecessary restrictions upon the developing industry." In a major statement of policy contained in its semiannual report to Congress for the last six months of 1957, the agency said:

Development of the atomic energy industry necessarily has depended primarily upon the initiative of private enterprise organizations. The Commission has played a principal role also because of the peculiar nature of the special nuclear material on which the industry rests, its military importance, the Government activities and industry based on its processing and

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9 See, e.g., Atomic Industrial Forum, Inc., "A Growth Survey of The Atomic Industry 1955-1965" (1955) (hereafter cited as AIF Growth Survey) (p. 10): "Further, in using the data presented in this report, . . . it is suggested that the reader take into account, as they may affect his own situation, such factors as . . . [t]he possible effect of future . . . federal regulatory actions. . . ."


11 Id. at 129.

12 AEC, Twenty-third Semi-Annual Report 175 (1958). See also id. at 138: "It has been the policy of the Commission to encourage industry to carry on the various phases of industrial participation in atomic energy with a minimum of Governmental financial assistance and controls."
use, the secrecy that necessarily surrounded so much of the technology and cost data, and the possible hazards to public health and safety created by radioactivity. Much of the Commission's efforts . . . have been directed toward helping private enterprise groups to overcome the obstacles created by Federal dominance of the field and by the continuing paramount position of national defense considerations.\(^{18}\) [Emphasis supplied.]

B. Encouragement of Private Industrial Development

In carrying out what it conceives to be its mandate under the 1954 act, the Commission has established several programs for the development of civilian power reactors, utilizing the resources and experience of private industry but assuring the cooperation of government in connection with certain important phases of research and development. The Commission has summarized the general principles governing the reactor programs, as follows:

1. Developing economically competitive nuclear power for civilian use will be aided by maximum practical utilization of the financial incentive common to business ventures in order to stimulate ingenuity and imagination and the assumption of calculated technical and economic risks.

2. The Commission's role should be to develop advanced technology at Government expense and to stimulate outside groups to undertake developmental or demonstration power projects primarily with non-COMmission financing.

In general, the application of these principles has involved:

(a) Financing almost entirely by the Commission of experimental reactors and studies whose primary aim is to develop and prove out basic technology;

(b) Limited financial help by the Commission to industrial, cooperative, or public power groups in construction and operation of reactor demonstration projects which build on the technology developed in the experiments and add operational and economic data.

(c) Complete financing by industry of certain independent projects which also contribute further to technology and add operational and economic data.\(^{14}\)

The first of these three branches of the power reactor program, which is concerned with Commission-financed development of basic reactor

\(^{18}\) *Id.* at 161.

types, has produced twelve reactor experiments, with four under construction and one planned. 15

Of more direct importance to private and public power groups has been the power demonstration reactor program inaugurated in January, 1955, and involving three so-called "rounds" or invitations to negotiate with the government. 16 This program has the principal aim of developing joint participation by "private, cooperative, and public power groups and the Commission... to develop prototype power reactor plants to demonstrate technical and economic feasibility of various reactor concepts." 17

Under the first round invitation, issued in January, 1955, 18 the Commission called for proposals from private industry without limitation as to size of plant and has approved three proposals as bases for contracts. 19 The second round invitation, issued in September, 1955, 20 proposed the development, design, and construction of smaller reactors ranging from 5,000 to 40,000 kilowatts of electricity, which program has been confined to date to proposed publicly and cooperatively owned facilities. 21 It has produced seven proposals, four of which initially were approved by the Commission as bases for contract negotiations.

15 AEC, Twenty-third Semi-Annual Report 101-123, 358 (1958); see AEC, Twenty-second Semi-Annual Report 49-54 (1957); 1957 Section 202 Hearings, supra note 7 at 114-117.

16 AEC, Twenty-third Semi-Annual Report 16, 99-100 (1958); AEC, Twenty-second Semi-Annual Report 54 (1957); 1957 Section 202 Hearings, supra note 7 at 117; Cole, supra note 6 at 479.

17 AEC Statement Feb. 1957 to Joint Committee, 1957 Section 202 Hearings, supra note 7 at 117; AEC, Twenty-second Semi-Annual Report vii, 49 (1957); Cole, supra note 6 at 472-480; statement of W. K. Davis, Director, AEC Division of Reactor Development, 1957 Authorizing Legislation Hearings, supra note 7 at 158: "...[W]e have a rather unique situation where the Government, through AEC, is developing an industry which in the end has to be supplied to the utilities by private industry. There is no way the Government is going to supply the reactors themselves to the utilities who are going to use them..."; statement of K. E. Fields, AEC General Manager, id. at 143-144, 146-148.

18 AEC Press Rel. No. 589 (Jan. 10, 1955); 1957 Authorizing Legislation Hearings, supra note 7 at 512.


20 AEC Press Rel. No. 695 (Sept. 21, 1955); 1957 Authorizing Legislation Hearings, supra note 7 at 513-515; see Statement of K. E. Fields, AEC General Manager, id. at 144-146, 148-152.

21 These projects are "almost entirely a Government program," since the Rural Electrification Administration (REA) furnished loans for each such project; state-
As the result of strong representations to the Joint Committee in 1957, Congress included special provisions in the appropriations act for fiscal year 1958 with respect to contracting for such publicly and cooperatively owned projects. This legislation also contained provision, at an initial cost of $18,000,000, for the institution of a prototype power reactor facilities program by the AEC itself involving the construction of a natural uranium, graphite-moderated, gas-cooled power reactor facility and a plutonium recycle experimental reactor.

Section 202 of the 1954 act, 42 U.S.C.A. §2252, requires the Joint Committee during the first 60 days of each session of Congress to “conduct hearings in either open or executive session for the purpose of receiving information concerning the development, growth, and state of the atomic energy industry.”

This is the so-called “cooperative power reactor demonstration program,” provided in Section III of Pub. L. 85-162, 85th Cong., 1st Sess. (1957). Under this program, $129,915,000 initially was authorized for use in a program not to exceed $149,915,000 for, among other purposes, “arrangements for projects sponsored under the second round of the Commission’s power reactor demonstration programs by cooperatives and publicly owned agencies under which the reactor is financed in major part by the Government.” In connection with these projects, the Commission is required to contract directly with the private manufacturers of facilities, rather than have the utility make the contract. After operation for five years by the Commission under contract with the utility, the latter has the option to purchase the plant; if such a purchase is not made, the plant must be dismantled. This special treatment for publicly or cooperatively owned utilities was held warranted by the policy consideration that “the need for advancing the small or intermediate reactor art should be the AEC’s primary interest and negotiations with cooperatives and publicly owned organizations should take into consideration basic differences in their size, financial structures, and capacity for participation” without “jeopardizing the financial integrity of cooperatives and publicly owned organizations” (Sen. Rep. No. 791, 85th Cong., 1st Sess. (1957)). In its authorization legislation for fiscal year 1959, the Joint Committee on Atomic Energy increased the amounts authorized for the next 12 months from $129,915,000 to $155,113,000 and increased the over-all program totals from $129,915,000 to $155,113,000; H.R. Rep. No. 2108, 85th Cong., 2d Sess. 20-21 (1958).

Sections 101(e)(14)-(15) and 110, Pub. L. 85-162, 85th Cong., 1st Sess. (1957); see Sen. Rep. No. 791, supra note 23 at 21-33. This program is based on the Joint Committee contention that the Commission has not “been making sufficient progress in the development of prototype power reactors to test and demonstrate the practical problems of achieving economic nuclear power,” id. at 21. In a statement issued when he approved Pub. L. 85-162, Aug. 21, 1957, President Eisenhower stated that, while he was “not opposed to such projects [for natural uranium and plutonium production reactors] as studies by the Commission, . . . I will oppose the expenditure of public money for the construction and operation by the Government of any large-scale power reactor, or
The third round announced by the Commission on January 7, 1957, and requiring proposals by December 31, 1958 (later extended to June 30, 1959), placed no limitation on the types or sizes of plants which may be proposed, except that "they should make significant contributions toward the achievement of commercial utilization of nuclear power and that construction will be completed by June 30, 1962," which date apparently will be extended in the case of individual proposals. 25

The third round contemplates assistance in the form of:

any prototype thereof, unless private enterprise has first received reasonable opportunity to bear or share the cost" (N.Y. Times, Aug. 22, 1957). In a letter to Rep. Cole, Aug. 3, 1957, prior to enactment of the legislation, AEC Chairman Strauss charged that the provision for reactor prototypes in the appropriation legislation "would constitute a substantial start toward a program for Government-owned atomic power facilities" and that "a congressional direction to the Commission to proceed with particular reactor concepts would set an unwise precedent" (103 Cong. Rec. A6319-21 (Aug. 5, 1957)). Sections 101(e) and 110 of Pub. L. 85-162 represented considerably diluted versions of continuous attempts in recent years to require the Commission to develop a prototype reactor program with an initial expenditure of as high as $400,000; see 1957 Section 202 Hearings, supra note 7 at 41, 58; S. 151, 85th Cong., 1st Sess. (Jan. 7, 1957); Winsbrough, supra note 7 at 219; BNA, Atomic Industry Reporter 2:171-179 and 2:211; Cole, supra note 6 at 487-488.

25 AEC Statement, 1957 Section 202 Hearings, supra note 7 at 118-119. See BNA, Atomic Industry Reporter 3:11, 13 and 15; statement of AEC General Manager Fields, 1957 Authorization Legislation Hearings, supra note 7 at 145-146, 152-153; Cole, supra note 6 at 480-482. As of Jan. 1, 1958, four utilities or groups of utilities have submitted proposals under this round, one of which (Northern States Power Co., Sioux Falls, Iowa) signed a contract with the AEC on Nov. 19, 1957; AEC, Twenty-third Semi-Annual Report 101 (1958). Extension of the termination date of this round from Dec. 31, 1958, to June 30, 1959, was agreed to by the Joint Committee in its proposed appropriation legislation for fiscal year 1959, H.R. 13121, Section 109; see H.R. Rep. No. 2108, supra note 23 at 21 and 31. The Commission itself early recognized the difficulty of meeting the completion deadline of June 30, 1962 (BNA, Atomic Industry Reporter 4:19) and has sought extension of the deadline with respect to two particular projects. These are (1) the proposal of East Central and Florida West Coast Nuclear Groups for a gas-cooled reactor, to be completed by June 30, 1963, the basis for the arrangement for which the Joint Committee approved in the 1959 authorization legislation (H.R. 13121, Section 109 Pub. L. 85-590, 85th Cong., 2d Sess. (1958); see H.R. Rep. No. 2108, supra note 23 at 21 and 31, and BNA, Atomic Industry Reporter 4:75 and 4:94) and (2) the proposal of Pennsylvania Power & Light Co. and Westinghouse Electric Corp. for a homogeneous reactor project, with no firm construction date. The latter proposal was the subject of critical concurrent resolutions introduced in April 1958, by Sen. Anderson (Dem., N.M.) and Rep. Holifield (Dem., Cal.), S. Con. Res. 78 and H. Con. Res. 307, 85th Cong., 2d Sess., and an adverse decision by the Comptroller General, April 8, 1958, Dec. B-135649, BNA, Atomic Industry Reporter 4:123 and 221:827. The Commission thereupon made a specific submission of the proposed contract, in restricted form, to the Joint Committee, which approved such submission as the basis for an arrangement in the proposed appropriation legislation for fiscal year 1959 (Sec. 109, Pub. L. 85-590, supra; see H.R. Rep. No. 2108, supra note 23 at 21-22 and 32).
(1) Waiver of established Commission charges for use of source and special nuclear materials over a specified period of time; (2) performance either without cost or at less than full cost in Commission laboratories of mutually agreed-upon research and development not reasonably available elsewhere; and (3) support of research and development required to advance the technology of projects which promise to make a significant contribution toward achieving cheap, abundant, and safe nuclear power.26

Criticism of the Commission's program, which became particularly acute in the 1957 session of Congress,27 resulted in the amendment of the appropriations provisions of the Atomic Energy Act of 1954. Under Section 261 28 of that statute as then amended, any arrangement between the Commission and a private party must be reviewed and specifically authorized by the Joint Committee. 29 This provision conceivably could permit congressional review of all expenditures heretofore made under the first and second rounds, 30 a development which has been termed an attempt to effect ex post facto application of a statute.31

26 AEC Statement, 1957 Section 202 Hearings, supra note 7 at 118.
27 A principal criticism has been that the third round invitation would permit applicants under the other two rounds to "get more money even though it previously had been limited to a fixed amount" (Rep. Cannon, 103 Cong. Rec. 5195-5196 (1957)). Sen. Gore characterized this invitation as a Commission attempt "to further feather the bed of private concerns in order to entice them to submit proposals" and "to add feathers to the bed of those with whom you [AEC] entered into contracts even as far back as 1956" (1957 Section 202 Hearings, supra note 7 at 35-36). In its report authorizing appropriations for the AEC in accordance with Section 261, as amended in 1957, the Joint Committee stated (Sen. Rep. No. 791, supra note 23 at 20): "During the hearings it was also brought out that the language of the third round might make available third round funds to the first and second round participants and to other reactor projects already under construction. The committee does not approve the implications of this language. Such language would permit the transference of funds authorized by Congress for specific future projects retroactively to past projects which were proposed under different terms and conditions. . . . Provision is made in the third round for postconstruction research and development assistance which, if attempted to be applied as proposed in the second round . . . could result in outright subsidies to the operators of private reactors."
29 Pub. L. 85-162, 85th Cong., 1st Sess. (1957). In the AEC authorization legislation for fiscal year 1959, Congress provided that, "[b]efore the Commission enters into any arrangement the basis of which has not been previously submitted to the Joint Committee . . . , it shall make public announcement of each particular reactor project it considers technically desirable for construction and shall set reasonable dates for submission, approval of the proposal and negotiations of the basis of the arrangement, and commencement of construction" (Section 109, Pub. L. 85-590, supra; see H.R. Rep. No. 2108, supra note 23 at 22 and 32).
31 See statement of AEC Chairman Strauss, supra note 7 at 69.
C. Development of Private Industry

Although confronted with numerous technical and financial problems which may presage "lean and trying years" in the foreseeable future, the private industry regulated by the 1954 statute is no mere economic fledgling. Even prior to 1954 approximately $50 millions were spent by private sources for nuclear research and development. Between 1954 and 1958, it is reliably estimated that some $300 millions of non-government funds will have been spent for such research and development, of which approximately $115 millions will go into capital facilities.

As the peaceful uses of atomic energy are expanded, private industry should assume an increasingly important role. In 1952, for example, the research institutions spent $1.2 millions, and industry $4.8 millions, for facilities and equipment and operations in the field. During 1956-1958, however, such industrial expenditures are expected to reach $44.1 millions annually, compared with $3.7 millions for the institutions. These efforts are believed capable of producing nuclear power on a nearly commercial basis sometime between 1965 and 1970.

32 1957 Section 202 Hearings, supra note 7 at 58-59; 1957 Authorizing Legislation Hearings, supra note 7 at 203, 331-339; Sen. Rep. No. 296, 85th Cong., 1st Sess. 1 (1957). See AEC Twenty-third Semi-Annual Report 7 (1958): "Late in 1957, some readjustment was going on in that part of the atomic energy industry concerned with civilian power reactors. Some firms had dropped out, or reduced their undertakings. Current economic trends undoubtedly were a partial factor in some cases. While this adjustment may temporarily deter new firms from entering the industry, the hard core of the atomic energy business is already established and growth is steady...." For a discussion of technological and economic factors affecting industry, including reduction in capital, fuel, and maintenance costs, see id. at 94-98; for the point of view of industry concerning retrenchment during 1957, see Hearings Before Joint Committee on Atomic Energy on "Development, Growth and State of the Atomic Energy Industry," 85th Cong., 2d Sess. 218, 270 (1958) (hereafter cited as 1958 Section 202 Hearings).

33 C. L. Wilson, President, Metals & Controls Corp., BNA, Atomic Industry Reporter 3: 51.

34 AIF Growth Survey, supra note 9 at 6.

35 Id. at 11.

36 Id. at 26. According to former AEC Chairman Strauss, "industry's share... represents about one-third of the total national effort to develop economic nuclear power" (BNA, Atomic Industry Reporter 4: 21).

37 AIF Growth Survey, supra note 9 at 14.

38 See id. at 35; Cole, supra note 6 at 475-476. The McKinney Panel Report, supra note 10 at 2, states that "[b]y 1975 atomic power could amount to 20 to 40 per cent of presently installed electric generating capability in the United States. If this occurs, however, it will be in the context of a total generating capability of 3 to 4 times present levels." The goal of the AEC itself is achieving "competitive nuclear power in the United States during the next ten years," according to a statement by the Commission...
Progress in the atomic energy industry is, in the opinion of the Atomic Energy Commission, "without precedent," due to the fact that "[n]o other major scientific discovery has ever before been applied so quickly to so many practical uses." The Commission has thus described the condition of this industry at the end of 1957:

Since 1953, an atomic energy industry has come into being, though still on [a] relatively small scale for a major industry in the United States, and a foundation has been laid for healthy growth and expansion.

Basically, the industry has two main divisions—that which purchases and uses atomic energy products, such as the companies processing radioisotopes, and the manufacturers of such devices as thickness or density gauges that incorporate radioisotopes; and the section which designs, constructs, and operates or sells research and power reactors, plus the suppliers of materials, components, and services for Federal or private reactors. The radioisotope part of the industry is older and better developed, and still is rapidly expanding. The reactor part, a composite of Federal and private activities, is mostly new since 1953, but already has attracted considerable risk capital.

Private companies have entered many phases of the reactor part of the industry, particularly where there was a promising market for products or services. Industry has assumed heavy outlays in designing, building, and operating nuclear reactors to produce electric power. A foreign market is developing for United States built research and power reactors. Heavy expense has been incurred in nuclear research, development, and engineering.

submitted June 4, 1958, to the Joint Committee on Atomic Energy (BNA, Atomic Industry Reporter 54:39). This statement was made in connection with a program for projecting the civilian power reactor development effort through fiscal year 1963 and clearly was formulated in the light of continuous criticism of the AEC for its alleged failure to prepare and announce a long-range program in the civilian power reactor field. See, e.g., H.R. Rep. No. 2108, supra note 23 at 9-10; 1958 Section 202 Hearings, supra note 32 at 209. As of January 1, 1958, actual or potential electrical capacity of civilian nuclear power projects aggregated 1,306,500 kilowatts, of which 65,000 kilowatts were being produced by plants then in operation, 689,000 kilowatts were planned to be produced by plants then being built, and 552,500 kilowatts were proposed for plants then being planned. AEC, Twenty-third Semi-Annual Report 77, 357 (1958). The two plants in operation at the end of 1957 were the Vallecitos boiling water reactor at Pleasanton, Cal., operated by Pacific Gas & Electric Co., which achieved criticality in Oct. 1957 and has a capacity of 5,000 kilowatts, and the pressurized water reactor operated by the AEC and Duquesne Light Co. at Shippingport, Pa., which achieved criticality Dec. 2, 1957, and has a capacity of 60,000 kilowatts.

Private organizations and Government were constructing 89 reactors as of the end of 1957. Including 7 critical assemblies, there were 43 research, training, and test reactors (11 of them for the foreign market). The 46 power reactors, of which 36 were military machines, included 10 civilian powerplants, 1 for overseas sale.

Expenditures or obligations by the Federal Government for research and development and construction of civilian and military power and propulsion reactors are estimated at more than $500 million for the fiscal year ending June 30, 1958. Estimates were that private industry was spending about $64 million on civilian power reactors during the same period.40

D. Role of Administrative Law

Federal administrative law includes those statutes and regulations governing the departments, agencies, and regulatory commissions of the Executive Branch of the Government, as well as those rules made by such organizations to govern private activity. This branch of the law can and does have a widespread impact upon citizens and businesses in every state of the Union.41 The field is as broad as the field of national government. By enacting the Atomic Energy Acts of 1946 and 1954, Congress brought the control of the peaceful uses of atomic energy into an area where the established agencies and the courts have been guided by fairly well-defined concepts of administrative due process consistent with the needs and powers of government.

Except for unique scientific, technological, and economic problems which will be solved by the passage of time, the atomic energy field is no different from any other area of government regulation. The Atomic Energy Commission uses traditional forms of administrative controls, such as rule-making and licensing, to carry out its powers. In addition, that Commission has utilized conditions in contract awards as a means of industry control to a very great extent, probably more than heretofore used by any other federal agency.

Although special problems concerning atomic energy must be given due consideration in establishing a system of administrative regulation, a moratorium should not be declared in that area on Congressionally enacted and judicially developed concepts of due process and delegated

40 Id. at 6; for a detailed list of the reactors and projects involved, see 1958 Section 202 Hearings, supra note 32 at 36ff.
power otherwise applicable to an agency of the United States government. In passing the Atomic Energy Acts of 1946 and 1954, Congress, instead of conferring a special status upon administrative procedures of the Atomic Energy Commission, expressly made applicable thereto the provisions of the Federal Administrative Procedure Act of 1946. As Congress has recognized in passing atomic energy legislation, the Administrative Procedure Act

... was enacted by the Congress in 1946 to regulate and make uniform, where practicable, the administrative process, particularly in the control of private and property rights by agencies of the executive branch. That statute represented the culmination of nearly two decades of effort on the part of the Congress, the executive branch, members of the Judiciary, and the organized bar to meet the numerous problems of procedure and substantive rights which have arisen out of the multiplication of Federal administrative agencies and the expansion of their functions.

However, Congress took cognizance of situations where so-called Restricted Data or defense information was involved in connection with atomic energy. As more fully discussed hereafter, special provision was made in the 1954 statute for parallel non-public procedures in such cases.

In this study, the procedures used by the Atomic Energy Commission will be considered with particular regard to the philosophy and provisions of the Administrative Procedure Act and to the special problems of administrative law which have arisen under the atomic energy statutes of 1946 and 1954. Rule making (the procedure whereby the Commission largely effects and implements controlling legislation) and licensing and contracting (the administrative means for enforcing the rules) comprise the three major categories of administrative activity carried on by the Atomic Energy Commission. Accordingly, these three subjects are treated separately.

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43 Commission on Organization of Executive Branch of the Government, Task Force Report on Legal Services and Procedure, 137 (1955) (hereafter cited as Hoover Commission Legal Task Force Report). See Statement of Chairman of the Senate Judiciary Committee, Sen. Doc. No. 248, 79th Cong., 2d Sess. 311 (1946): "... I do not believe a more important piece of legislation has been or will be presented to the Congress of the United States ... because it deals with something which touches the most lowly as well as the most elevated and lofty citizen in the land. It touches every phase and form of human activity. ..."
44 Section 181, 42 U.S.C.A. §2231. For a summary of the legislative history of this section, see Joint Committee Staff Study, supra note 3 at 67-69.
II. RULE-MAKING PROCEDURES

A. Rule Making in Administrative Law

Rule making, sometimes called subordinate legislation, results from a delegation of legislative power to an administrative agency to implement the basic law established by Congress. Although "a normal feature of Federal administration ever since the Government was established," the rule-making process has assumed its present importance only with the development of numerous federal regulatory agencies and the increasingly common practice of Congress "to establish legislative standards [for agency rule making] in broad, vague and general terms." The power of agencies to issue rules is in many respects more important than the legislative authority of the Congress in creating the rule-making power. Rules, no less than statutes, establish standards of conduct for all to whom their terms apply. It was in recognition of this important role of rule making in the federal administrative process that Congress in 1946 included special provisions with respect thereto in the Administrative Procedure Act.

This statute establishes two categories of rule making, formal and informal. It specifies procedures applicable to rule making except where "there is involved any military, naval, or foreign affairs function of the United States or. . . any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." Informal rule making is required to be effected by publishing notice thereof in the Federal Register and by giving interested persons an opportunity to submit written or oral views with respect to the subject

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49 Sections 2(c), 4, and 7(c), 5 U.S.C.A. §§1001(c), 1003, and 1006(c).

50 Section 4(1) and (2), 5 U.S.C.A. §1003(1) and (2). These exceptions assume importance in the light of the military and international aspects of the Atomic Energy Commission's authority and of its powers with respect to leasing atomic materials, providing grants for research and development by contract or otherwise, and making contracts to implement the Government's atomic energy program.

51 Section 4(a), 5 U.S.C.A. §1003(a).
matter under consideration. Notice of proposed rule making may be omitted, however, where "the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." Except where the agency otherwise provides "upon good cause found and published with the rule," proposed rules must be published at least thirty days before their effective date.

In addition to informal rule making, the Atomic Energy Commission is authorized, together with nine other federal agencies and departments, to engage in formal rule making. Such rule making is involved wherever the statutes require that regulations be made on the record after opportunity for agency hearing in an adjudicatory proceeding. Under such procedure, an opportunity for a hearing must be afforded before the agency, a member thereof, or a hearing examiner appointed in accordance with the requirements of the Administrative Procedure Act. The presiding officer is authorized to issue a recommended decision based on the evidence; or the agency may issue a tentative decision or order the record certified to it for immediate final decision when it finds "upon the record that due and timely execution of its functions imperatively or unavoidably so requires."

The parties to

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52 Section 4(b), 5 U.S.C.A. §1003(b).
53 Section 4(c), 5 U.S.C.A. §1003(c).
55 Administrative Procedure Act, Section 4(b), 5 U.S.C.A. §1003(b).
56 Id., Section 7(a), 5 U.S.C.A. §1006(a).
57 Id., Section 11, 5 U.S.C.A. §1010.
58 Id., Section 8(a)(1)-(2), 5 U.S.C.A. §1007(a)(1)-(2).
the proceeding are afforded opportunity for the submission of evidence and the taking of exceptions to the decisions of the hearing officer equivalent to that afforded in formal adjudication.\textsuperscript{59}

B. Rule Making under the Atomic Energy Act of 1946

The Atomic Energy Act of 1946 contained few statutory references to the rule-making authority of the Atomic Energy Commission.\textsuperscript{60} Indeed, provision for general rule-making authority was not made in that statute until 1953.\textsuperscript{61} However, a number of regulations of wide scope and importance were developed under the Atomic Energy Act of 1946.\textsuperscript{62}

In order to assure continuity of regulation, the transition from the 1946 to the 1954 statute required special action by the Commission when the President signed the present legislation on August 30, 1954. This was effected the same day by a “note . . . promulgated as a rule” in which the Atomic Energy Commission announced:

Until further order of the . . . Commission, all provisions of rules, regulations and notices, published . . . under the authority of the Atomic Energy Act of 1946 and in effect immediately prior to the effective date of the Atomic Energy Act of 1954, are continued in force and effect to the extent that they are not inconsistent with the Atomic Energy Act of 1954.\textsuperscript{63}

Thus, a possible inconsistency between the definition of “fissionable material,” the term used in the 1946 statute,\textsuperscript{64} and “special nuclear material,” the equivalent term used in the 1954 statute,\textsuperscript{65} as well as the regulatory hiatus which might have otherwise resulted, were avoided.

The Commission resorted to provision in the Administrative Procedure

\textsuperscript{59} Id., Sections 7(c) and 8(a) and (b), 5 U.S.C.A. §§1006(c) and 1007 (a) and (b).
\textsuperscript{60} Sections 5(a)(4), 5(c)(2), 7(c), and 12(a)(2), 42 U.S.C. §§1805(a)(4), 1805(c)(2), 1807(c), and 1812(a)(2)(1946).
\textsuperscript{61} Section 12(a)(10), as added by Pub. L. 164, 83d Cong., 1st Sess. (1953).
\textsuperscript{63} The Commission filed this “Note” on September 2, 1954. It was published in the Federal Register the following day, 19 Fed. Reg. 5628.
\textsuperscript{64} Section 5(a)(1), 42 U.S.C.A. §1805(a)(1)(1946), which provided, in part, that “. . . the term ‘fissionable material’ means plutonium, uranium enriched in the isotope 235, any other material which the Commission determines to be capable of releasing substantial quantities of energy through nuclear chain reaction of the material, or any material artificially enriched by any of the foregoing. . . .”
\textsuperscript{65} Section 11y, 42 U.S.C.A. §2014(y): “The term ‘special nuclear material’ means (1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Commission . . . determines to be a special nuclear material . . .; or (a) any material artificially enriched by any of the foregoing. . . .”
Act authorizing adoption of a rule without resort to public rule-making procedures on the ground that such procedures "would be contrary to the public interest by reason of the fact that the public health and safety and the national defense necessitate the uninterrupted continuation of the effectiveness of all existing controls." The Commission indicated its intention in the future to secure wide public and industry participation in rule making when it stated that the provisions of the "Note" were considered "interim" only and that "comments by all interested parties are invited." 67

C. Rule Making under Atomic Energy Act of 1954

1. General Authority

The rule-making authority of the Atomic Energy Commission under the 1954 legislation is one of the keystones of the system of controls contemplated by that statute. Under Section 161q of that act, the Commission is given general authority to "make, promulgate, issue, rescind, and amend such rules and regulations as may be necessary to carry out the purposes of this Act." Seven other sections of the 1954 statute confer specific authority upon the Commission with respect to rule making in matters of safety, issuance of licenses, and definition of materials.

66 Section 4(a), 5 U.S.C.A. §1003(a).
67 By additional rule announced September 3, 1956 (19 Fed. Reg. 5628) and made effective Aug. 30, the Commission also amended its prior rules (10 Code Fed. Regs. §50.2) to make the term "production facility" under Section 111 of the new act (now Section 11t, 42 U.S.C.A. §20141) include all facilities for the production of "fissionable material." Such rule making also was effected without notice and public procedure "for good cause found by the Commission on the ground that such are impracticable by reason of the fact that due and timely execution of the Commission's functions in giving effect to the Atomic Energy Act would be impeded by such notice and procedure." As in the case of the "Note" published Aug. 30, 1954, this rule was stated to be "interim" only, and comments by interested parties were invited.
68 See McKinney Panel Report, supra note 10 at 21: "This sweeping revision [the 1954 Act] replaced a relatively simple Government monopoly with a complex structure for regulation of private activities. At the same time, it gave wide discretionary authority to the Commission to stimulate and aid private development. Many new provisions required Commission interpretation and action before industry could tell what it could or could not do. . . ."
70 Section 53e(7), 42 U.S.C.A. §2073(e)(7) (distribution of special nuclear material "only pursuant to such safety standards as may be established by rule . . . to protect health and to minimize danger to life or property").
71 Sections 53b and 63b, 42 U.S.C.A. §§2073(b) and 2093(b) (establishing "by
Although an improvement in degree of specificity over the 1946 legislation, the Atomic Energy Act of 1954 exemplifies a tendency of Congress at times to give administrative agencies unusually broad latitude in effectuating Congressional policies, without providing clear and precise standards to channel and govern administrative implementation of such policies. With a few exceptions the formulation of Commission rules is limited only by vague and general concepts of "common defense and security" or "health and safety of the public." The statute, however wise its administration has been to date, represents an extreme example of so-called "skeleton legislation," which must be clothed by executive regulations.

2. Informal Rule-Making Procedures

Section 181 of the Atomic Energy Act of 1954 applies the Federal Administrative Procedure Act of 1946 "to all agency action taken under this [Atomic Energy] Act," except where Restricted Data and defense information are involved. In the latter event, "parallel procedures" are permitted, preserving administrative due process but at the same time precluding unauthorized disclosure of secret information.

Although the Commission has, by regulation and in apparent good faith, sought to implement these requirements with respect to rule making, the regulations governing rule making clearly emphasize informal procedures and do not encourage an opportunity for oral hearing. Indeed, it is Commission policy that

Informal hearings will normally be held for the purposes of obtaining necessary or useful information, and affording par-

rule, minimum criteria for the issuance of . . . licenses for the distribution of . . . [special nuclear material and source material respectively] depending upon the degree of importance to the common defense and security or to the health and safety of the public of . . . [its] physical characteristics . . . , the quantities . . . to be distributed . . . , and . . . [its] intended use . . ."); and Section 103a, 42 U.S.C.A. §2133(a) (commercial licenses to be issued "subject to such conditions as the Commission may by rule or regulation establish to effectuate the purposes and provisions of this Act").

Sections 11x, 42 U.S.C.A. §2014(x) (formerly Section 11s); Section 11y, 42 U.S.C.A. §2014(y) (formerly Section 11t); Section 51, 42 U.S.C.A. §2071; and Section 61, 42 U.S.C.A. §2091.


E.g., Sections 53b and 63b, supra note 71.

Sen. Doc. No. 8, supra note 45, at 98.

participation by interested persons, in the formulation, amendment, or rescission of rules and regulations.\textsuperscript{77}

Thus, in the case of "informal hearings," the procedure to be followed shall be such as will best serve the purpose of the hearing. For example, an informal hearing may consist of the submission of written data, views, or arguments with or without oral argument, or may partake of the nature of a conference, or may assume some of the aspects of a formal hearing in which the subpoena of witnesses and the production of evidence may be permitted or directed.\textsuperscript{78}

Informal public rule-making procedure is further covered in the Commission's Rules of Practice,\textsuperscript{79} which relate to "the issuance, amendment, or rescission of substantive rules in which participation by interested persons is prescribed under Section 4 of the Administrative Procedure Act."\textsuperscript{80} This procedure for "substantive rules" conforms to the provisions of the Administrative Procedure Act concerning hearing requirements for such rules.\textsuperscript{81}

Under the Commission procedure, rule making is commenced by an "initiation petition" made upon the agency's own motion, the recommendation of another federal agency, or the request of "any other in-

\textsuperscript{77} 10 Code Fed. Regs. §2,708. See Plaine, "Rules of Practice of Atomic Energy Commission," 34 Tex. L. Rev. 801, 818 (1956): "Because hearings for rule-making under the Atomic Energy Act are not 'on the record,' trial-type hearings, but are hearings in the legislative sense, the public rule-making procedure will normally be an informal hearing. Thus interested persons will be provided the opportunity, as the Commission determines and states in the notice, to submit written views or arguments, or to participate in a conference, or in an oral hearing as the case may be. . . ." House Committee on Government Operations, "Survey and Study of Administrative Organization, Procedure, and Practice in the Federal Agencies—Agency Response to Questionnaire," Part 11A—Independent Agencies (1957) (hereafter cited as AEC Response to Questionnaire), in which the AEC stated (p. 1081): "...[E]ven if an oral hearing [for rule making] were held, it would be most likely to be informal, in the nature of a conference so that formal procedures would not be necessary. . . ."

\textsuperscript{78} 10 Code Fed. Regs. §2,720.

\textsuperscript{79} 10 Code Fed. Regs. §§2,780-2,787.

\textsuperscript{80} 10 Code Fed. Regs. §2,780.

\textsuperscript{81} Under the Administrative Procedure Act, an agency rule is considered "substantive" unless it relates to "any military, naval or foreign affairs function of the United States," "any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts," "interpretative rules," "general statements of policy," and "rules of agency organization, procedure or practice." See Section 4(1), (2), and (a), 5 U.S.C.A. §1003 (1), (2), and (a) ; Sen. Doc. No. 248, supra note 43 at 199-200. The Commission believes that "public participation in these matters [non-substantive rule making] to the extent of commenting on proposed regulations is generally desirable" (AEC Response to Questionnaire, supra note 77, at 1082).
Petitions by such persons for the issuance, amendment, or rescission of AEC rules are required (1) to state "the substance or text of any proposed rule or regulation, or amendment thereof" or to "specify the rule or regulation the rescission of which is desired," and (2) to "state the basis for the request." Such petitions are to be given "a docket or other identifying number" and to become a matter of public record, except where Restricted Data or defense information is involved. In the latter event the Commission presumably will resort to "parallel procedures."

A hearing on a petition filed by an interested person is not held "unless the Commission deems it advisable," in which event notice of public rule making is given. Where "the Commission determines that the petition does not disclose sufficient reasons to justify instituting the public rule making procedure," the petitioner is so notified "with a simple statement of the grounds" for the agency's failure to act.

The notice provisions of the Commission's rules with respect to institution of public rule-making proceedings conform to those of the Administrative Procedure Act. The latter statute does not contain a provision with respect to the minimum time required for the giving of such notice. However, the Commission in its rules specifies a 15-day

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82 10 Code Fed. Regs. §2.781. See Section 4(d) of the Administrative Procedure Act, 5 U.S.C.A. §1003(d), which provides: "Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule."

83 10 Code Fed. Regs. §2.782. See notice of petition requesting amendment of 10 Code Fed. Regs. §2.301 concerning the definition of a "patent owner," assigned Docket No. PRM-1, 22 Fed. Reg. 524 (Jan. 26, 1957). The docket number indicates that this petition either is the first ever to be formally filed with the Commission or is the first document to be considered by the agency as falling within the meaning of "petition for rule making," as set forth in §2.782. However, the Commission ordered no hearing on the petition but merely stated that it could be examined in the public document room. Changes in the Commission's rules to date apparently have been made as the result of conferences between the agency and interested parties, rather than by petition, see Statement of AEC to Joint Congressional Committee on Atomic Energy, 1957 Section 202 Hearings, supra note 7 at 148.

84 As defined in Sections 11h, 42 U.S.C.A. §2014(h), and 11w, 42 U.S.C.A. §2014(w) (formerly Section 11r) of the 1954 act.


87 Section 4(a), 5 U.S.C.A. §1003(a), which states: "General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substances of the proposed rule or a description of the subjects and issues involved."
notice “provided that a lesser time may be prescribed upon good cause found and incorporated with a brief statement of the reasons in the notice.”

As noted previously, the hearing itself may not necessarily include the taking of testimony before a designated Commission officer but may be limited merely to the submission of views in writing. However, the interests of participating parties appear to be adequately protected by provisions in the rules that “opportunity to participate may include an opportunity to comment upon or respond to the data, views, or arguments submitted by others” and that additional time therefor may be granted at the discretion of the Commission.

Adoption of a rule under Commission procedure, as provided in the Administrative Procedure Act, requires consideration of relevant information by the Commission and publication of the rule with “a concise general statement of its basis and purpose.” Such publication must be made at least 30 days before the effective date of the rule “unless the Commission may provide otherwise upon good cause found and published with the rule.”

3. Formal Rule-Making Procedures

Under Section 189a of the 1954 act, the Commission must, “upon the request of any person whose interest may be affected by the proceeding,” grant a hearing “in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees.” The term “dealing with the activities of licensees” relates clearly to those rules and regulations which prescribe the terms and conditions imposed

89 10 Code Fed. Regs. §§2.720 and 2.785. According to the Commission, its practice is “to publish all regulations, procedural or otherwise, as notices of proposed rulemaking with a request for comments”; however, in actual practice, the Commission has used in rule making “the professional knowledge of the AEC staff and the knowledge and experience which AEC has acquired since its establishment in 1946 ... supplemented by comments of advisory groups and the public (and by studies of independent experts when available)” (AEC Response to Questionnaire, supra note 77, at 1080).
81 Section 4(b) and (c), 5 U.S.C.A. §1003(b) and (c).
82 10 Code Fed. Regs. §2.786; see, to the same effect, Section 4(b) of the Administrative Procedure Act, 5 U.S.C.A. §1003(b).
84 42 U.S.C.A. §2239(a).
upon licensees, and also, it is believed, to those which set forth the grounds for suspending, revoking, or amending any license.

Although Section 189a does not specifically prescribe either a "formal" hearing or one "on the record" for rules affecting licensing, the section undoubtedly applies to such rule-making procedures where regulations involving licensing are concerned, particularly in view of Section 189b which provides for judicial review of "any final order entered in any proceeding" under Section 189a. In order for court review to be effected under Section 189b, there must be a record made under Section 189a. For the Commission to take any other position would be to open the door to possible use of rule making by informal procedure without hearing to affect the substantive rights of existing licensees, where a formal licensing proceeding would otherwise be required by Section 189a.

As provided under the Administrative Procedure Act and the pro-

95 E.g., maintenance of records and making of reports by licensees of production and utilization facilities, 10 Code Fed. Regs. §50.71.
96 E.g., grounds for revocation, suspension, or modification of a license, 10 Code Fed. Regs. §70.61(b).
97 Although the issue has not yet arisen, the Commission may well take a position restricting the application of formal hearing procedures to the second clause of Section 189a of the 1954 statute requiring a "hearing" upon request of any party "in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees." See Plaine, supra note 77 at 811: "Section 189a of the Atomic Energy Act is the provision governing the grant of hearings by the Atomic Energy Commission, in particular affecting licensing. It provides opportunity for hearings in both adjudicative cases (e.g., the granting or revoking of licenses) and sublegislative matters (e.g., the issuance of rules dealing with the activities of licensees). It is silent respecting an 'on the record' requirement for hearings. Nothing in the text or history of Section 189 indicates that Congress intended to depart from the dichotomy under the Administrative Procedure Act between adjudication and sublegislation. The AEC has therefore quite properly followed the accepted interpretation that an 'on the record' requirement is implied in adjudicative proceedings, but not in sublegislative proceedings involving rule-making."
98 See Zenith Radio Corp. v. Federal Communications Commission, 211 F. 2d 629, 633-634 (D.C. Cir. 1954) ("... Such an established statutory right [to a license] requires adjudicatory disposition, and the procedure which is sufficient for the rule-making is not sufficient for that purpose. . . .") The fact that Section 189a of the 1954 act does not contain the words "on the record" should be immaterial in the context of the provisions for adjudication and judicial review contained therein and the broad interpretation placed upon Section 5 of the Administrative Procedure Act, 5 U.S.C.A. §1004, prescribing opportunity for a hearing in cases of adjudication "required by statute to be determined on the record" and upon Section 4(b), 5 U.S.C.A. §1003(b), requiring a formal hearing for rule making "required by statute to be made on the record after opportunity for an agency hearing" (Wong Yang Sung v. McGrath, 339 U.S. 33, 48 (1950), as modified, 339 U.S. 908 (1950)).
99 Sections 7, 8, and 10, 5 U.S.C.A. §§1006, 1007, and 1009.
procedure of the Commission, a "formal" rule-making proceeding includes the use of a hearing officer or of the agency itself, the conduct of the hearing along lines of judicial procedure where practicable, and the rendering of a decision by such presiding officer, with appropriate review by the agency and by a court.

The inclusion of the requirement for "formal" rule making in areas in which that process closely resembles adjudication represents a salutary legislative policy. This policy does much to protect the interests of atomic energy licensees in administrative due process, as well as to advance the interests of the Commission in orderly procedures which inspire public confidence.

4. Public Rule-Making Hearings

On only one occasion has the Commission announced and held public hearings in connection with rule making. Notice of this proceeding was given February 26, 1955, for the purpose of obtaining the views of all interested persons with respect to procedures and methods for awarding leases for the mining of uranium on federal lands under the control of the Atomic Energy Commission. In commenting on this proceeding, the Commission has stated:

No oral hearing has ever been requested on proposed rules nor has the Commission ever felt it desirable to initiate such a hearing. In one case, oral hearings were held to determine the advisability of changing our source material purchasing practices.

5. Written Submissions

On numerous occasions the Commission has published a notice of "contemplated" rule making without public hearing but requesting that

101 These procedures are described in detail in Section C, "Licensing," infra.
102 "To assert that formal rule making is, unlike adjudication, not an adversary proceeding is to have regard only to the form of the proceeding and to ignore realities. In many respects, where rules are promulgated on the basis of a record made at a formal hearing involving sharply contested issues of fact, the agency is, in effect, prosecuting the proceeding against private parties to be affected in the future by the rules" (Hoover Commission Legal Task Force Report, supra note 43, at 164).
103 The rule making described in subsections d-i generally covers the period through June 30, 1957.
105 AEC Response to Questionnaire, supra note 77 at 1080-1081.
"[i]nterested persons . . . submit their views or other relevant information" concerning proposed changes in rules within thirty days \(^{106}\) or, in one instance, within fifteen days.\(^{107}\) With respect to the licensing of by-product material \(^{108}\) and also in connection with so-called "parallel procedures" for licensing involving classified information,\(^{109}\) the Commission has promulgated rules to be effective within thirty days but requested written submittals thereon in the meanwhile. Such comments and submittals usually are directed to be sent to the chief of the division, branch, or field office of the Commission which will administer the rules involved.

6. Promulgation of Rules

As a general, although not necessarily a uniform, policy, the Commission gives thirty days' notice of the promulgation of final rules as required by the Administrative Procedure Act.\(^{110}\) However, no such notice has been given in a number of cases.


Promulgation of regulations on the date of the notice of final formulation or prior thereto has been justified by the Commission on the grounds that such rules involved non-substantive or security matters not required to be developed according to the Administrative Procedure Act. In such cases the Commission usually has found merely that "good cause exists why the regulations . . . should be made effective without the customary thirty-day period of notice." "Good cause" for dispensing with the thirty-days requirement of the Administrative Procedure Act also has been found where rules are needed in pending proceedings or because of safety considerations. Also, the Commission has found "good cause" to promulgate regulations on the date of the notice of final formulation or prior thereto in the following cases:


mission has utilized the exceptions contained in the Administrative Procedure Act permitting promulgation, without notice, of rules “recognizing exemption or relieving restriction” and dealing with public property and personnel.

Where the Commission publishes an advance statement of the proposed rules, which rules are later promulgated without thirty days’ notice, interested persons have some degree of prior notice. However, this is not the case where the rules are not published in proposed form but are nevertheless made immediately effective.

7. Special Non-Public Procedures

Under the 1954 statute, the Commission is authorized to promulgate certain rules by special non-public procedures involving the President and the Joint Congressional Committee on Atomic Energy. These procedures are used when the Commission desires to add “other material” to the categories of “special nuclear material” or “source material.”

Pursuant to these procedures, the Commission is required to make findings (1), with respect to “special nuclear material,” that the material to be added to that category “is capable of releasing substantial quantities of atomic energy”; and (2), with respect to “source material,” that such additional material “is essential to the production of special nuclear material.” In both cases, the Commission also must find that its determination “is in the interest of the common defense and security.” Express Presidential assent to each such determination then is required, whereupon

The Commission’s determination, together with the assent of the President, shall be submitted to the Joint Committee and

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117 Section 11y, 42 U.S.C.A. §2014(y) (formerly Section 11t) and Section 51, 42 U.S.C.A. §2071.

118 Section 11x, 42 U.S.C.A. §2014(x) (formerly Section 11s) and Section 61, 42 U.S.C.A. §2091.
a period of thirty days shall elapse while Congress is in session . . . before the determination of the Commission may become effective: Provided, however, That the Joint Committee, after receiving such determination, may by resolution in writing, waive the conditions of all or any portion of such thirty-day period.¹²⁰

These special procedures represent an innovation in the 1954 statute as compared with the 1946 act. They were intended to permit the Commission "to enlarge the traditional scope of materials covered under the [1954] Act, but only after appropriate safeguards are provided for careful review."¹²¹ The first such determination by the Commission under Section 51 was announced on June 30, 1955,¹²² when, effective that date, Uranium 233 was declared to be "special nuclear material."¹²³ The fact that these highly important definitions of "special nuclear material" and "source material" can be expanded by essentially secret rule-making procedures, without notice to interested persons who might comment thereon, has been criticized.¹²⁴

8. Miscellaneous Rule-Making Procedures

a. Policy Determinations

The Commission has published, by notice effective immediately, important policy decisions affecting the civilian reactor program. Thus, on March 3, 1956, the agency announced a classified schedule of guaranteed fair prices for special nuclear material lawfully produced under


¹²¹ Statement of Mr. William Mitchell, former AEC General Counsel, Oct. 13, 1954, 1 CCH Atomic Energy Law Rep. ¶508. See H.R. Rep. No. 2181, supra note 5 at 15: "In view of the potentially great impact any future declaration of the addition of further materials to the category of special nuclear material [under Section 51 of the 1954 act] could have on the economy of the Nation, these statutory steps were deemed to be necessary. . . . It is believed that this provision gives the Commission the statutory basis it needs for including new materials within this category, and still provides adequate safeguards to assure that this power is not abused. . . ."

¹²² 20 Fed. Reg. 4664. The notice stated that the Commission's determination, with Presidential approval, was submitted to the Joint Committee on April 12, 1955. This indicates considerable negotiation between the Commission and the Committee before the latter gave its approval. The 30-day limitation in the statute appears meaningless, because the Committee could take adverse action prior to the expiration thereof, to forestall a promulgation of the determination by the Commission without the Committee's complete approval.

¹²³ Section 11y(i), 42 U.S.C.A. §2014(y)(1) (formerly Section 11t(1)), merely defines "special nuclear material" as including "uranium enriched in the isotope 233."

¹²⁴ 1 CCH Atomic Energy Law Reporter ¶1175a.
license, such prices to take effect July 1, 1955, and to be effective until June 30, 1962. The basis for the determination was not disclosed and the schedule was at that time classified. On November 17, 1956, and June 6, 1957, the Commission announced nonclassified guaranteed fair prices to be paid for plutonium and uranium 233 produced in licensed reactors and delivered to the Commission for one year after July 1, 1962.

Other policy decisions affecting the domestic reactor program also have been announced by notice rather than by rule. The Commission has indicated that the practice of making such decisions by automatic notice without opportunity for rule-making procedures might be changed.

b. Interpretations

The Commission has recognized as rules certain interpretations of the Atomic Energy Act. This has been effected by the creation of a special Part 8 of its regulations "to contain interpretations of the . . . Act of 1954 . . . and of regulations . . . issued thereunder." Only one such interpretation, however, has been issued.

c. Special Determinations and Authorizations

Under the 1954 act, before proposing or receiving written submittals with respect to draft regulations, the Commission has adopted the prac-
tice in a few instances of announcing a policy determination preliminary to public rule making.

This was first done by the Commission to meet the need for clarifying and regularizing the status of American consultants who were called upon to advise concerning atomic energy projects and plants abroad.134 On October 5, 1955,135 the Commission announced that “any activity which . . . constitutes directly or indirectly engaging in the production of special nuclear material in any [friendly] foreign country” and which did not “involve the communication of Restricted Data or other classified defense information” or the “violation of other provisions of law” would not be considered a violation of Section 57a(3)(B) of the 1954 act.136 The agency also announced its intention to incorporate and implement the foregoing “determination and authorization” in regulations, which were subsequently promulgated on January 20, 1956.137

9. General Content and Form of Rules

Rules and regulations promulgated by the Atomic Energy Commission generally show careful and clear draftsmanship and are cast in a form which makes their content readily ascertainable by the person consulting them. Thus, each part of the rules usually begins with paragraphs which set forth the purpose,138 basis,139 and scope140 of the rules. In some cases, policy “findings” upon which the rules are based, are included.141 “Definition” sections often are included where required or appropriate.142

The Commission apparently has sought to find a practical solution to two problems which often face regulated persons or businesses. The first of these problems arises from the fact that rules of procedure often seem to conflict whenever two or more rules or sets of rules are appli-

136 42 U.S.C.A. §2077(a)(3)(B): “It shall be unlawful for any person to . . . directly or indirectly engage in the production of any special nuclear materials outside of the United States except . . . upon authorization by the Commission after a determination that such activity will not be inimical to the interest of the United States.”
139 E.g., 10 Code Fed. Regs. §40.1 (“Control of Source Material”).
cable to a given situation. Under the Commission's Rules of Practice, where there is any conflict between a general procedural rule applicable to every type of agency proceeding "and a special rule in another subpart applicable to a particular type of proceeding, the special rule will govern." 148

More important, however, has been the Commission's attempt to deal with the problem of reliance by private parties upon official interpretations of its rules. To provide some protection for the private party who seeks an interpretation of the meaning and applicability of a rule and desires to rely upon such interpretation, each of eleven parts of the Atomic Energy Commission's regulations provide, with respect to the subject matter of that part, that

Except as specifically authorized by the Commission in writing, no interpretation of the meaning of the regulations in this part by any officer or employee of the Commission other than a written interpretation by the general counsel will be recognized to be binding upon the Commission. 144

It is to be hoped that the above type of provision will be extended to all parts of the Commission's rules.

Only in a few cases throughout the entire federal government does the private party have such a right to rely in good faith upon an interpretation of an administrative rule or its application to the facts of a particular case. 148 In most cases, the party acts at his peril in so relying, particularly where the application of a rule is controversial and subject to the vicissitudes of changes in agency policy.


144 10 Code Fed. Regs. §20.6 ("Standards for Protection Against Radiation"); §25.4 ("Access to Restricted Data"); §30.5 ("Licensing of Byproduct Material"); §40.50 ("Control of Source Material"); §50.3 ("Licensing of Production and Utilization Facilities"); §55.5 (Operators' Licenses"); §70.6 ("Special Nuclear Material"); §81.4 ("Standard Specifications for Granting of Patent Licenses"); §95.7 ("Safeguarding of Restricted Data"); §110.5 ("Unclassified Activities in Foreign Atomic Energy Programs"); and §140.4, ("Financial Protection Requirements and Indemnity Agreements"). For an example of a similar rule adopted under the 1946 act, see §50.60 ("Control of Facilities for the Production of Fissionable Material"), now obsolete.

146 By statute, an advisory agency opinion may be relied upon from the Office of Alien Property, 50 U.S.C. App. §5(b), and the Department of Labor under the "Portal-to-Portal" Act, 29 U.S.C.A. §259. These two statutes, as well as the Defense Production Act of 1950, 64 Stat. 818, 50 U.S.C.App. §2157, and the six regulatory statutes administered by the Securities and Exchange Commission, 15 U.S.C.A. §§77s(a), 77ss(c), 78w(a), 79t(d), 80a-37(c), and 80b-11(d), permit reliance in good faith upon a rule or regulation of the agency concerned. See Hoover Commission Legal Task Force Report, supra note 43 at 189: "By practice and precedent, letters of advice and staff opinions are given limited validity by the Bureau of Foreign Commerce,
D. Conclusions

By the end of 1957 the Atomic Energy Commission had developed the major framework of rules implementing the Atomic Energy Act of 1954. Criticism of the agency's delay in developing and promulgating these rules, particularly under the impetus of a pending administrative proceeding, has been countered by the claim that the Commission "went about its job slowly and deliberately so that there would be an opportunity for industry to comment on what the AEC proposed and for the AEC to think carefully about its regulations before they were issued." Consultation with advisory groups, rather than resort to public rule-making proceedings, seems to have been the primary reliance of the Commission in developing its regulations. This policy, while not apparently abused to date, is vulnerable to imputations of ex parte influence in the eyes of the public and could be so abused in the future.

In general, the Atomic Energy Commission would appear to have exercised its rule-making authority under the 1954 statute in accordance with both the letter and the spirit of the Administrative Procedure Act of 1946. A desire to improve public policy and relations with the

Department of Commerce, by the Federal Deposit Insurance Corporation, by the Interstate Commerce Commission, by the Post Office Department, and by the Office of Munitions Control, Department of State. This excellent practice . . . has been most effectively used by the Securities and Exchange Commission, which issues several thousand such opinion letters annually."

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146 See 1957 Section 202 Hearings, supra note 7 at 18, 147; Trowbridge, "Licensing and Regulation of Private Atomic Energy Activities," 34 Tex. L. Rev. 842 (1956).
147 In the Matter of Power Reactor Development Company, AEC Dkt. F-16. This proceeding was inaugurated on Aug. 31, 1956, by the filing of a petition of intervention to oppose the conditional granting of a construction permit to the applicant, awarded to the applicant by the Commission on Aug. 4, 1956.
148 Trowbridge, supra note 146.
149 1957 Section 202 Hearings, supra note 7 at 149; AEC Response to Questionnaire, supra note 77 at 1081.
150 See McKinney Panel Report, supra note 10 at 130: "The Commission has selected a complex and time-consuming technique for developing its regulations. It has conducted conferences with representatives of diverse organizations on each aspect of regulations. . . . While some points of view may not be fully reflected by this technique, opportunity for comment is also afforded after publication of proposed regulations in the Federal Register. The logic of this course of Commission action appears sound and is not being vigorously opposed by any interests or groups so far as can be observed." The only substantial attack to date upon the Commission in the field of rule making has come from intervenors United Automobile Workers and AFL-CIO in AEC Dkt. No. F-16, in the matter of Power Reactor Development Company. The intervenors did not specifically attack the licensing rules involved in that proceeding but argued that the Commission, "in granting the conditional construction permit," violated 10 Code Fed. Regs. §§50.35, 50.40, and 50.45; see "Petition for Intervention
industries and individuals subject to regulation might have dictated uniform resort to public rule-making procedures and to notice of promulgation of rules, even where non-substantive matters traditionally have been exempt therefrom under the Administrative Procedure Act.

Particularly commendable, so far as the practice goes, has been the adoption of the regulation for interpretation of rules by the Commission's General Counsel, upon which good-faith reliance can be placed. This procedure should be extended to all parts of the agency's rules, which step could be effected by an appropriate amendment to Part 8 of the Commission's rules.

Largely untested is the 1954 statute's provision for review of certain rules by the Joint Congressional Committee on Atomic Energy, which rules relate to changes in the definitions of "special nuclear material" and "source material." The Committee's authority thus conferred tends to give the Committee "a very substantial role in the atomic energy program." This review procedure affords a relatively speedy means for amending Sections 119 and 111y of the 1954 act by a quasi-legislative process. However, the power exercised by the Joint Committee in this connection conceivably could be used in the future to affect the administration of the atomic energy law by the Executive Department.

III. LICENSING

A. Licensing in Administrative Law

In its report published in 1941, the Attorney General's Committee on Administrative Procedure referred to licensing by federal agencies as a distinguishing characteristic of the "trend toward preventive legislation" in the United States. Indeed, the report stated:

Licensing of any activity may be one of the most burdensome forms of regulation, since all who engage in the activity must


151 1 CCH Atomic Energy Law Reporter §568.

be licensed in order that the persons who would probably act improperly may be controlled. But it is also one of the most effective [means of control], and it is particularly likely to be resorted to where the effort to effectuate policies is made with conviction.\textsuperscript{158}

More than a decade later another governmental body, after a survey of federal administrative functions, observed that the “power to license is in effect the power to control the business and commercial life of the community.” \textsuperscript{154}

In no field of regulation affecting American private industry has the Congress used licensing more extensively to assure governmental control than in that of atomic energy. The major areas of private industrial and research activity permitted under the Atomic Energy Act of 1946 were severely circumscribed by restrictions upon the licensing process. One of these areas—the manufacture or production of any device utilizing fissionable material or atomic energy, or the utilization of such forms of energy—was never exploited. Under the Atomic Energy Act of 1954, expanded private use of atomic energy is governed by licensing requirements which give the President, the Atomic Energy Commission, and even the Joint Committee on Atomic Energy, greater control over industry than is the case in any other area of federally regulated activity.

In enacting the Atomic Energy Act of 1946 \textsuperscript{155} and the statute which superseded it in 1954,\textsuperscript{156} Congress had the foresight to require that the licensing authority of the Atomic Energy Commission be subject to safeguards of the Federal Administrative Procedure Act. Provisions of that legislation affecting the licensing process clearly were enacted by Congress in 1946 “because of the very severe consequences of the conferring of licensing authority upon administrative agencies” and “to remove the threat of disastrous, arbitrary, and irremediable administrative action.” \textsuperscript{157}

Under the Administrative Procedure Act, licensing covers “any form

\textsuperscript{153} Sen. Doc. No. 8, \textit{supra} note 45 at 14.
\textsuperscript{155} Section 14, 42 U.S.C.A. §1814 (1946).
\textsuperscript{156} Section 181, 42 U.S.C.A. §2231.
\textsuperscript{157} Sen. Doc. No. 248, \textit{supra} note 43 at 368.
of required official permission.” Agencies are required to proceed with reasonable dispatch to conclude and decide proceedings on applications for licenses. No license may be withdrawn without the agency’s first giving the licensee notice thereof in writing and an opportunity to demonstrate or achieve compliance with all lawful requirements. In business of a continuing nature, no license can expire until timely application for a new license or for a renewal thereof is determined by the agency, except in “cases of willfulness or those in which the public health, interest, or safety requires.” In the latter cases, an agency can summarily suspend or revoke a license.

B. Licensing Under Atomic Energy Act of 1946

Licensing under the Atomic Energy Act of 1946 was rigorously curtailed by Congressional policy, even though the Commission was required to carry out a program “directed toward improving the public welfare, increasing the standard of living, [and] strengthening free competition in private enterprise.” Particularly restrictive was the direction of the statute for a “program for Government control of the production, ownership, and use of fissionable material to assure the common defense and security and to insure the broadest possible exploitation of the fields.” This policy was further effectuated in Section 4(e) of the Atomic Energy Act of 1946, which provided that

158 Id. at 306; see 197, 254. Under Section 2(d), 5 U.S.C.A. §1001(d), licensing constitutes a form of agency “adjudication” and is always the subject of an “order.” Under Section 2(e), a license is defined as including “the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission”; and “licensing” as including “agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.” Under Section 2(f), an agency “sanction” “includes the whole or any part of any agency . . . requirement, revocation, or suspension of a license”; and agency “relief” includes “any agency . . . grant of . . . license.” Under Section 2(g), an “agency proceeding” includes licensing, and “agency action” includes an agency license.

159 See Section 6(a), 5 U.S.C.A. §1005(a): “. . . Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives. . . .” Although this provision was intended by Congress to assure a speedy decision with respect to matters before any agency, consistent with the public interest in a full and complete record, “The Administrative Procedure Act provides no remedy for failure of agencies to proceed with reasonable dispatch” (Hoover Commission Legal Task Force Report, supra note 43 at 183-186).

160 Section 9(b), 5 U.S.C.A. §1008(b).

161 Section 1(a), 42 U.S.C. §1801(a) (1946).


163 42 U.S.C. §1804(c) (1946).
licenses for the manufacture of production facilities for fissionable material were to be issued "in accordance with such standards and upon such conditions as will restrict the production and distribution of such facilities to effectuate the policies and purposes of this Act."

I. Types of Licenses

Licensing activities of the Atomic Energy Commission under the 1946 act were limited to four major categories. These included licenses (1) for facilities (including important component parts thereof) for the production of fissionable material, (2) for the transfer of source materials, and (3) for the distribution and use of by-product materials (radioisotopes). A fourth licensing activity, never implemented, covered the manufacture or production of any equipment or device utilizing fissionable material or atomic energy.

In controlling facilities for the production of fissionable material, the Commission under the 1946 act issued both specific licenses for domestic and foreign activities and also general licenses for domestic activities. The general licensing device was especially convenient because of the fact that the definition of facilities for the production of fissionable material was broad enough to encompass an extensive list of articles in common use. These included Geiger counters and mass spectrometers and spectrographs. The production and utilization of these articles, together with those of some twenty other devices, were controlled by general licenses subject only to reporting requirements.

The same division of licenses into general and special categories was made with respect to the licensing of source material transfers. This was effected by the use of a detailed list of exempted products.

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165 Section 4(e), 42 U.S.C. §1804(e) (1946).
168 Section 7(a), 42 U.S.C. §1807(a) (1946).
172 10 Code Fed. Regs. §§50.12(b) and 50.40-.41 (repealed).
174 10 Code Fed. Regs. §40.60, listing "Schedule I" which covered incandescent mantles, ceramic products, refractories, glass products, photographic supplies, certain rare earth metals, and vacuum tubes, and certain types of thoriated tungsten. Section 40.61, containing "Schedule II" and §40.28 prohibit the use of source material, containing by weight uranium in excess of 0.05%, in the manufacture of ceramic, glass, and photographic products.
and transactions protected by general license. A similar program for general and special licensing was in effect promulgated to regulate the distribution of byproduct material by exempting from the AEC’s rules therefor certain categories of items and quantities thereof.

2. Standards and Conditions

It is perhaps fortunate that licensing under the Atomic Energy Act of 1946 did not assume the importance that this function has under current legislation. The statutory standards under which the Atomic Energy Commission exercised its authority under the 1946 legislation were sketchy, if not entirely non-existent from a practical point of view, with the “licensing power . . . left to the virtually uncontrolled discretion of the Commission.” Except in the case of authorizations for radioisotope procurement, licensing regulations issued by the agency failed to provide specific standards for licenses and the conduct of licensees.

The tone of the regulations under the 1946 act was, of course, set by the statute itself. Under that act, licenses for the manufacture, production, transfer, or acquisition of any facilities for the production of fissionable material were to “be issued in accordance with such standards and upon such conditions as will restrict the production and distribution of such facilities to effectuate the policies and purposes of this [1946] Act.” The standards and conditions with respect to transfers of source materials were only slightly more specific and required that licenses should not impair an adequate supply of source materials or permit “the use of such materials in a manner inconsistent with the national welfare.” More exact and readily ascertainable standards and conditions were stated with respect to authorizations for the use of radioisotopes. Licensing of fissionable and source materials was prohibited under the 1946 act “if, in the opinion of the Commission, the issuance

175 10 Code Fed. Regs. §40.62, containing “Schedule III.”
176 10 Code Fed. Regs. §30.71 (repealed) containing “Schedule A” for exempt items, and §30.72 (repealed), containing “Schedule B” for exempt quantities.
177 Report of the American Bar Association Special Committee on Atomic Energy to Joint Committee on Atomic Energy 12 (Mimeo Nov. 20, 1953) (hereafter cited as ABA Committee Report).
178 Section 4(e), 42 U.S.C. §1804(e) (1946).
179 Section 5(b) (3), 42 U.S.C. §1805(b) (3) (1946).
180 Section 5(c) (2), 42 U.S.C. §1805(c) (2) (1946), set forth the authorized uses for byproduct materials. Further, authorization was to be denied to “any applicant, who is not equipped to observe or who fails to observe such safety standards to protect health as may be established by the Commission.” See 10 Code Fed. Regs. Pt. 30 (repealed).
of a license to such person . . . would be inimical to the common defense and security.”

A similar vaguely-worded condition was applied to licenses for the manufacture, production, or export of any equipment utilizing fissionable material or atomic energy.

The regulations issued with respect to licenses for facilities for the production of fissionable material and for transfers of source material followed the statute and permitted the Commission to impose “such conditions as it deems appropriate and in accordance with law.” Regulatory standards incorporated in the rules were as indefinite as those of the statute itself. They included such terms, capable of varied interpretation, as “assurance of the common defense and security,” “assurance of adequate” supplies of the materials or facilities concerned, “prevention of the use of source materials in a manner inconsistent with the national welfare,” “preservation of health and safety,” “inimical to the common defense and security,” and “effectuating the policies and purposes of the Atomic Energy Act of 1946.” Since compliance with all regulations of the Commission was a condition of every license and since the Commission reserved the right to change its regulations, there existed no clearly ascertainable standards and conditions with respect to licenses for facilities to produce fissionable materials and to transfer source material.

Only in the case of regulations with respect to authorization for utilization of radioisotopes did the Commission set forth standards and conditions which could be readily ascertained with reasonable cer-


182 Section 7(c), 42 U.S.C. §1807(c) (1946).


185 10 Code Fed. Regs. §§40.22(a) and 50.22(a) (repealed).

186 10 Code Fed. Regs. §§40.22(b) and 50.22(b) (repealed).

187 10 Code Fed. Regs. §§40.22(c) and 50.22(c) (repealed).

188 10 Code Fed. Regs. §40.22(d).


190 10 Code Fed. Regs. §50.22(d) (repealed).

191 10 Code Fed. Regs. §40.25: “Nothing in this section [on revocation, suspension, and modification of licenses] shall limit the authority of the Commission to issue or amend its regulations in accordance with law.” See, to the same effect, §50.32 (repealed). The open-end nature of the licenses issuable under the 1946 Act also arises under the 1954 act; see Section 187 of the latter statute, 42 U.S.C.A. §2237 and 10 Code Fed. Regs. §70.32(b), more fully discussed hereafter.
tainty. Thus, requirements for approval of an authorization for the use of radioisotopes required specified uses for the byproduct material, suitable equipment for health and safety, and suitably trained personnel.

3. Licensing Procedures

Although subject to the requirements of the Federal Administrative Procedure Act, procedures for licensing under the Atomic Energy Act of 1946 were not otherwise defined or marked out by Congress. However, except in the case of appeals from denials or revocations of licenses, licensing procedures complied generally with those required by the Administrative Procedure Act.

Appeals procedure was clearly deficient in the case of licenses for the manufacture of facilities for the production of fissionable material and transfer of byproduct materials. In each case, the only procedure provided was for an applicant to file a "petition" in letter form with the Commission "stating the reasons why the petition should be granted." Although the General Counsel of the Commission at one time held the view that these regulations in effect authorized an intra-agency appeal when desired by an applicant, such a construction depended more upon the practice of the agency itself than upon the actual language of the regulations involved.

192 10 Code Fed. Regs. §§30.21(a)(1)-(2) (repealed). Special requirements were listed for human uses by institutions (§30.24(a)) and by individual physicians (§30.24(b)), for human use of sealed sources (§30.24(c)), for use in research and development (§30.24(d)), and for processing (§30.24(e)).


194 Thus, Section 4(e), 42 U.S.C. §1804(e) (1946), stated that licenses for the manufacture of facilities for the production of fissionable material "shall be issued in accordance with such procedures as the Commission may by regulation establish." Section 5(b)(3), 42 U.S.C. §1805(b)(3) (1946), was to same effect with respect to licenses for the transfer of source materials. Section 5(c)(2), 42 U.S.C. §1805(c)(2) (1946), covering authorizations for distribution of radioisotopes, contained no provision whatsoever for licensing procedures.

195 See 10 Code Fed. Regs. §§30.30 (repealed), 40.20, and 50.20 (repealed) dealing with license applications; §§30.34 (repealed), 40.25, and 50.32 (repealed) dealing with license revocation, suspension, or modification; and §40.26 dealing with license renewals.

196 10 Code Fed. Regs. §§40.51 and 50.61 (repealed).

197 Answers of Atomic Energy Commission to Questionnaire Submitted by Task Force on Legal Services and Procedure, Commission on Organization of Executive Branch of the Government (1954): "As indicated in §40.51 and 50.61 of the regulations, an appeal may be made by filing a letter with the Commission, stating the reasons for the appeal. If reason therefor appears, the action may be modified by the Licensing Controls Branch. Otherwise the appeal and the related file data are referred to the General Manager for consideration and response to the applicant."
C. Licensing Under Atomic Energy Act of 1954

Licensing under the Atomic Energy Act of 1954 is the means whereby the government not only regulates the atomic energy industry but also effects the development of that industry in accordance with the aims of that legislation. "[A] comparative newcomer among the Commission's many other functions," licensing constitutes a fairly "narrow but highly significant area of the Commission's overall responsibilities for atomic energy development" which is "closely linked with the AEC's nonregulatory responsibilities." 198

The overriding national defense policy of the Congress in enacting the 1946 Act set the tone of licensing thereunder. In enacting the Atomic Energy Act of 1954, however, Congress manifested a compelling intention to take advantage of the potentialities of private industry in the development of atomic energy for peaceful uses. Accordingly, "the development, use, and control of atomic energy ... to [among other things] strengthen free competition in private enterprise," 199 as provided in the 1954 act, should and must guide the Commission in enacting regulations to implement the legislation. Further, Congress intended that Commission programs for assistance to research and development and the "dissemination of unclassified scientific and technical information" should "encourage scientific and industrial progress." 200 Indeed, one of the specific purposes of the present statute, clearly designed to set the administrative tone of the licensing function thereunder, is the stated policy "to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public." 201

Licensing under the Atomic Energy Act of 1954 is subject to two controlling factors that did not exist under the earlier legislation. First, the Commission acts "in the dual capacity of encouraging as well as regulating private activity," with the result that "considerations of Government promotion and assistance were more closely interrelated with those of regulation than is the case in most other regulatory agencies." 202 Second, the Joint Congressional Committee on Atomic Energy acts, under a 1957 amendment to Section 261 of the 1954 stat-

198 Joint Committee Staff Study, supra note 3 at 2-3.
199 Section 1b, 42 U.S.C.A. §2011(b).
200 Section 3a and b, 42 U.S.C.A. §2013(a) and (b).
201 Section 3d, 42 U.S.C.A. §2013(d).
202 Joint Committee Staff Study, supra note 3 at 4.
ute,\textsuperscript{208} in a reviewing capacity with respect to all major licenses where federal government assistance in any form is involved. These two factors vitally affect the development of private atomic enterprise under the 1954 act, as amended.

The Atomic Energy Act of 1954 establishes a complex system of integrated licensing controls. Thus, where a public utility or research institution desires to build and operate on atomic reactor, it must obtain (1) a construction permit to build the reactor; (2) a facility license to operate the reactor; (3) depending on the reactor design, a license to acquire, possess, and use source material; (4) a license to possess and use special nuclear material; and (5) a license for each person operating the reactor.

Several statutory features promote the integration of licensing functions. For example, the licensing provisions of the 1954 act are, for the most part, contained in a single chapter of the statute.\textsuperscript{204} An applicant for a so-called "commercial"\textsuperscript{205} or "non-commercial"\textsuperscript{206} license for a facility utilizing or producing special nuclear material is encouraged to develop the information which will be required by the Commission by prior consultation with the agency and to submit its application for each type of license required in connection with the operating permit, insofar as possible, at the same time.\textsuperscript{207} Further, Section 161h of the present statute authorizes the Commission to

\begin{quote}
\ldots consider in a single application one or more of the activities for which a license is required by this Act, [and] combine in a single license one or more of such activities. \ldots \textsuperscript{208}
\end{quote}

The licensing system now administered by the Atomic Energy Commission requires the following types of authorizations before a private person or business can act:

1. *Special Nuclear Material*—License to receive, possess, use, and transfer special nuclear material, as provided in Sections 53 and 57a(1)-(2): for the conduct of research and development activities under Section 31; for use in conduct of research and development activity or in medical therapy, under

\textsuperscript{205} Under section 103, 42 U.S.C.A. §2133.
\textsuperscript{206} Under section 104, 42 U.S.C.A. §2134.
\textsuperscript{208} 42 U.S.C.A. §2201(h).
non-commercial licenses pursuant to Section 104; and for use under commercial licenses pursuant to Section 103.

2. Source Material—License to transfer, deliver, receive, possess, import, or export source materials after removal from the place of deposit in nature, as provided in Sections 62 and 63; for use in the conduct of research and development activities under Section 31; for use in research and development activities or in medical therapy under non-commercial licenses pursuant to Section 104; for use under commercial licenses pursuant to Section 103; or for "any other use approved by the Commission as an aid to science or industry."

3. Byproduct Material—License to transfer, manufacture, produce, acquire, own, possess, import, or export byproduct material, as provided in Sections 81 and 82, for use in research and development, medical therapy, industrial uses, agricultural uses, and "such other useful applications as may be developed."

4. Activity Abroad—Authorization for activity involving the production of special nuclear material outside the United States, as provided in Section 57a(3)(B), where United States has no agreement for cooperation with a foreign country pursuant to Sections 54 and 123.

5. Commercial Utilization or Production Facility—License for commercial utilization or production facility using special nuclear material as provided in Section 103.

6. Non-Commercial Utilization or Production Facility—License for non-commercial utilization or production facility using special nuclear material as provided in Section 104 for medical therapy, research and development activities for industrial or commercial purposes, and research and development activities for non-commercial purposes.

7. Construction Permit—Construction permit for construction prior to licensing, or alteration after licensing, of utilization or production facility licensed under Sections 103 and 104, as provided in Section 185.

8. Operator's License—License to operate, as provided in Section 107, various classes of utilization or production activities otherwise licensed under Sections 103 and 104.

9. Access Permit—License authorizing access, subject to personnel security clearances, to confidential or secret Restricted Data, as developed by Commission regulation under Sections 3b, 141, 145, and 161i.

With respect to the domestic distribution of special nuclear material, the transfer of source material in interstate or foreign com-

209 Section 53b, 42 U.S.C.A. §2073(b); see 10 Code Fed. Regs. §§70.11-14.
merce, the domestic distribution of byproduct material, and the domestic production or use of component parts of utilization and production facilities, the Commission is authorized to issue either a special or general license. The authority of the Commission in this respect is considerably expanded under the Atomic Energy Act of 1954, as compared with the situation under the 1946 statute.

I. Standards and Conditions

The statutory standards established by the Atomic Energy Act of 1954 for Commission licensing, and also the conditions and terms imposed on licensees under Commission regulations, constitute only a minor improvement over those of the 1946 legislation and rules issued thereunder. For example, the completely vague and meaningless standard of "national welfare," so commonly used in the Atomic Energy Act of 1946, appears infrequently in the 1954 legislation and survives in the present regulations only as a licensing condition for source materials. However, the Atomic Energy Act of 1954, particularly with respect to licensing, provides "only the vaguest 'standards' to guide the hand of the Commission." The indefinite standard of "common defense and security" appears

210 Sections 62 and 63b, 42 U.S.C.A. §§2092 and 2093(b); see 10 Code Fed. Regs. §§40.11, 40.23, 40.60, and 40.62.
212 Section 109(a), 42 U.S.C.A. §2139(a).
213 Under Section 1a, 42 U.S.A. §2011(a) ("Declaration"), it is "the policy of the United States that . . . the development, use, and control of atomic energy shall be directed so as to make the maximum contribution to the general welfare. . . ." Under Section 3c, 42 U.S.C.A. §2013(c), the Commission is directed to carry out, among others, "a program for Government control of the possession, use, and production of atomic energy and special nuclear material so directed as to make the maximum contribution to . . . the national welfare." See also Section 2g, 42 U.S.C.A. §2012(g), concerning the use of funds "to promote general welfare," and Section 2i, 42 U.S.C.A. §2012i, concerning government indemnity in the interest of the general welfare.
214 10 Code Fed. Regs. §§40.1 and 40.22(c).
215 Stason, Workshops on Legal Problems of Atomic Energy 4 (1956) (hereafter cited as Atomic Energy Workshops); see "Report of Workshop III" at 58-59. See also statement of Rep. Holifield concerning Section 53 of the 1954 act with respect to licenses for special nuclear material, 1957 Congressional Review Hearing, supra note 7 at 16: "Under Section 53 . . . of the act, you [the AEC] have wide latitude to make administrative judgments in the granting of a license. You can, in effect, include in this granting of the license every kind of a term and condition that you want. . . ."
216 This is nowhere defined in the new act except in Section 11g, 42 U.S.C.A. §2014(g), which merely states, "The term 'common defense and security' means the common defense and security of the United States."
frequently throughout the present statute 217 and the regulations issued thereunder. 218 Further, under the Atomic Energy Act of 1954, any license may contain "such terms and conditions as the commission may, by rule or regulation, prescribe to effectuate the provisions of this Act." 219 This language confers on the Commission almost unlimited discretionary authority over licenses in the atomic field. This broad authority also is written into the regulations by the provision that a license shall be issued "in such form and upon such conditions as it [the Commission] deems appropriate and in accordance with law." 220 Of even more doubtful regulatory justification is the statutory 221 and regulatory 222 provision under the 1954 act that licenses may be, ipso facto, modified or amended by subsequent changes in legislation or regulations. 223 This is particularly true in view of the fact that a hearing on

217 Section 1a, 42 U.S.C.A. §2011(a) ("Declaration"); Section 2a, b, d, e, g, and i, 42 U.S.C.A. §2012(a), (b), (d), (e), (g), and (i) ("Findings"); Section 3c, d, and e, 42 U.S.C.A. §2013(c), (d), and (e) ("Purpose"); Sections 53b and 57b(2), 42 U.S.C.A. §§2073(b) and 2077(b)(2) ("Domestic Distribution of Special Nuclear Material" and "Prohibition"); Sections 63b and 69, 42 U.S.C.A. §§2093(b) and 2099 ("Domestic Distribution of Source Material" and "Prohibition"); Section 81, 42 U.S.C.A. §2111 ("Domestic Distribution of Byproduct Material"); Sections 103b and d and 104a, c, and d, 42 U.S.C.A. §§2133(b) and (d) and 2134(a), (c), (d) ("Atomic Energy Licenses"); and Section 182a, 42 U.S.C.A. §2232(a) (general licensing standards).

218 10 Code Fed. Regs. §§30.31b(1) and 30.33(c) ("Licensing of Byproduct Material"); §40.22(a) ("Control of Source Material"); §70. 32(b)(1) ("Special Nuclear Material"); §§50.12 and 50.40(c) ("Licensing of Production and Utilization Facilities").

219 Section 183, 42 U.S.C.A. §2233; see, to the same effect, Section 103a, 42 U.S.C.A. §2133(a), with respect to commercial licenses.

220 10 Code Fed. Regs. §40.21; see, to the same effect, §§30.31(b), 50.50, 55.30, and 70.31(a).

221 Sections 183d and 187, 42 U.S.C.A. §§2233(d) and 2237. "Section 183d would seem to imply that while licenses are subject to the hazard of a change in the act, they are not subject to the hazard of a change in regulations without a change in the act"; but "section 187 indicates that license terms are subject to modification by subsequent regulations" and to revocation for failure to observe such subsequent regulations, Upton, supra note 207 at 496, 497.

222 10 Code Fed. Regs. §§30.32(a), 40.25, 50.54(h), 55.40(a), and 70.61(a).

223 Section 170a of the 1954 act, 42 U.S.C.A. §2210(a), added by Congress in 1957, requires that, as a condition of their licenses, certain classes of licensees "have and maintain financial protection" in the form of liability insurance or otherwise, as determined by the Commission under Section 170b, 42 U.S.C.A. §2210(b). It is a further condition of such licenses that the licensee enter into an indemnity agreement with the AEC, Section 170c, 42 U.S.C.A. §2210(c). With respect to these conditions imposed upon persons licensed by the Commission prior to enactment of the 1957 legislation, the Joint Committee has stated, H.R. Rep. No. 435, 85th Cong., 1st Sess. 21 (1957): "In view of the provisions in section 187 of the Atomic Energy Act of 1954, making
changes in the licensing regulations usually is held only upon the request of any licensee affected thereby.224

2. Types of Licenses

a. Use and Production of Special Nuclear Material

Under the Atomic Energy Act of 1954, the United States retains title to all special nuclear material.225 The Atomic Energy Commission is authorized to distribute such material at a reasonable charge to persons licensed to possess it. The statute also requires that the Commission purchase from licensees at a fair price special nuclear material produced by licensees in the course of their operations. Section 31 of the Atomic Energy Act of 1954226 authorizes assistance by the Commission to private or public institutions or persons for research and development activities relating to nuclear processes, the theory and production of atomic energy, utilization of special nuclear material, and the protection of health and the promotion of safety. Under Section 104,227 licenses are authorized for medical therapy and for research and development for industrial or commercial purposes. Where special nuclear material is licensed by the Commission for activities authorized under Sections 31 and 104, the Commission may, but is not required to, make a reasonable charge for the use of such material, the charge to be based upon established criteria, "considering, among other things, whether the licensee is a nonprofit or eleemosynary institution and the purposes for which the special nuclear material will be used."228

On the other hand, the Commission is required to make a reasonable charge for special nuclear material for use by commercial licensees229 under Section 103 of the Atomic Energy Act of 1954.230 Further, with respect to charges for such material to be used by both Section 104 non-

all licenses subject to later amendment of the act, there is no need to incorporate language here amending the licenses where this financial protection may be required. . . ." For a discussion of the insurance and indemnity provisions of the 1954 act, see infra, text at note 495.

224 Section 189b, 42 U.S.C.A. §2239(b).
225 Sections 2b and 52, 42 U.S.C.A. §§2012(b) and 2072.
228 Section 53b(1)-(2) and c, U.S.C.A. §2073(b)(1)-(2) and (c).
229 Section 53b(3) and c, 42 U.S.C.A. §2073(b)(3) and (c).
230 42 U.S.C.A. §2133.
commercial licensees and Section 103 commercial licensees, the Commission must take into consideration

(1) the use to be made of the special nuclear material;
(2) the extent to which the use of the special nuclear material will advance the development of the peaceful uses of atomic energy; [and]
(3) the energy value of the special nuclear material in the particular use for which the license is issued. . . . 231

Where a Section 103 commercial license is involved, the Commission must, "insofar as practicable, make uniform, nondiscriminatory charges" for special nuclear material used in connection with such a license. 232 In addition,

. . . with respect to special nuclear material consumed in a facility licensed pursuant to section 103, the Commission shall make a further charge based on the cost to the Commission, as estimated by the Commission, or the average fair price paid for the production of such special nuclear material as determined by Section 56, whichever is lower. 238

Section 56 of the Atomic Energy Act of 1954 deals with the "fair price" to be paid by the Commission for special nuclear material produced in licensed private facilities. 234 Such a price must be applicable to all producers of the same type of material and must reflect the value of the material for its intended use by the United States, and the Commission "may give such weight to the actual cost of producing that material as the Commission finds to be equitable." Further, Section 56 provides that

. . . the Commission may establish guaranteed fair prices for all special nuclear material delivered to the Commission for such period of time as it may deem necessary but not to exceed seven years.

By the middle of 1957 the Commission had made available to private industry for domestic use 50,000 kilograms of contained uranium 235. 235

231 Section 53d(1)-(3), 42 U.S.C.A. §2073(d)(1)-(3).
233 Section 53d(5), 42 U.S.C.A. §2073(d)(5).
235 Twenty thousand kilograms were made available Feb. 22, 1956, and an additional 30,000 kilograms July 3, 1957. At the same time, equal amounts were released for use by cooperating foreign nations. See AEC, Twenty-third Semi-Annual Report, 19, 23 (1958); AEC Twentieth Semi-Annual Report vii-ix (1956); Atomic Energy Facts 3 (GPO 1957).
Subsequently, the Commission by regulation established guaranteed fair prices for special nuclear material lawfully produced under license through June 30, 1963.\(^{236}\) The agency also has sought to waive the use charge for special nuclear material in connection with certain projects under the civilian reactor program.\(^{237}\) In addition, the Commission, at a fixed unit charge to the licensee, recovers in Commission-owned facilities source and special nuclear materials from spent reactor fuel or blanket materials of licensees under Sections 103 and 104 of the Atomic Energy Act of 1954.\(^{238}\)

Opponents of the 1954 legislation have attacked these sale and purchase provisions, as administered by the Commission, as a "built-in subsidy feature" to industry.\(^{239}\) As a result of this criticism, a new Section 58 was added to the statute by Congress in July 1957, providing:

> Before the Commission establishes any fair price or guaranteed fair price period in accordance with the provisions of Section 56, or establishes any criteria for the waiver of any charge for the use of special nuclear material licensed or distributed under section 53, the proposed fair price, guaranteed fair price period or criteria for the waiver of such charge shall be submitted to the Joint Committee. . . .\(^{240}\)

The Commission-proposed price must lie before the Joint Committee for a period of forty-five days prior to its effective date. This provision was aimed directly at curbing the future exercise of Commission discre-


\(^{237}\) Under the first, second, and third round invitations; see statement of AEC General Manager Fields, 1957 Authorizing Legislation Hearings, supra note 7 at 153-154. In its request for authorization of funds for fiscal year 1958, the AEC asked authorization for a total of $23,115,000 for waiver of fuel-use charges under the three rounds, but Congress authorized only $20,000,000 to be used under the third round invitation (Sen. Rep. No. 791, supra note 23 at 39). Waiver of use charges aggregating $1,325,000 under the first round invitation and $1,750,000 under that of the second round, as requested by the Commission, were disallowed by Congress.


\(^{239}\) H.R. Rep. No. 2181, supra note 5 at 130-131; Adams, "Atomic Energy: the Congressional Abandonment of Competition," 55 Col. L. Rev. 158, 168-169 (1955); Rep. Holifield, 1957 Authorizing Legislation Hearings, supra note 7 at 183; Rep. Cannon, 103 Cong. Rec. 5192 (1957). In his report on a review of AEC contract No. AT(30-3)-22 with Yankee Atomic Electric Co. executed in Nov. 1956, the Comptroller General charged that the Commission's announced policy of waiving fuel-use charges up to an agreed-upon amount of money was not fully complied with in the Yankee contract "since it provides that AEC will waive its use charge, without limitation, for all special nuclear material used during the contract period" (1957 Section 202 Hearings, supra note 7 at 758).

tion with respect to prices for special nuclear material used in the civilian reactor program.\textsuperscript{241}

As a matter of law, ownership of special nuclear material by the United States is not necessary to adequate regulation of the atomic energy industry.\textsuperscript{242} As long as the Commission remains the major producer of special nuclear material and as long as the number of private users of such material for energy producing purposes is limited, the need for private ownership is not particularly pressing. However, as the number of private reactors increases, the availability of an assured source of enriched reactor fuel at reasonably foreseeable prices will become a requisite to financial and operational stability of the industry. The more the industry is subject to normal competitive market conditions, the healthier it will be, and the greater will be the benefit to the public welfare from a thriving private atomic energy production base.

The Commission appears conscious of these factors. As it has emphasized to the Joint Committee:

The AEC policy on pricing materials and services which it makes available, and on establishing fair prices which it will pay for special nuclear materials produced in licensed facilities is recognized as being of major importance to the growth and development of the industry, both here and abroad.

The influence of these prices on the industry depends not only upon their actual level, but almost equally upon their stability, for without some assurance that these prices will remain reasonably stable, industry will be unable to make the long-range plans essential to the procurement of the financing necessary to proceed with its projects.\textsuperscript{243}

At the present time, industry has no guarantee that it can obtain a reasonably assured quantity of special nuclear material at prices which will

\textsuperscript{241} H.R. Rep. No. 571, 85th Cong., 1st Sess. 6 (1957) : “It is intended that the provisions of section 58 shall apply to changes by the Commission to any presently established fair price, guaranteed fair price period, or criteria for the waiver of charge period, as well as to the establishment of such matters in the future.”

\textsuperscript{242} Estep, “Federal Control of Health and Safety Standards in Peacetime Private Atomic Energy Activities,” 52 Mich. L. Rev. 333 (1954); see “Report of Workshop III,” Atomic Energy Workshops, \textit{supra} note 215 at 56-57: “... [A]uthority for adequate regulation of such industry exists under the several clauses of the Constitution, including, for example, the commerce power and the war power and established regulatory powers thereunder.”

\textsuperscript{243} 1957 Section 202 Hearings, \textit{supra} note 7 at 107. See 1958 Section 202 Hearings, \textit{supra} note 32 at 62, 67, and 127 (“... the Government’s price for fissionable material and associated processing operations is potentially one of the most significant factors that determine the course and speed of power reactor development.”).
be set by supply and demand rather than by administrative or congressional fiat, possibly based on political, not economic, considerations.\textsuperscript{244}

The McKinney Panel has urged that Congress re-examine the policy of federal ownership of special nuclear material. In the meantime, problems created by such ownership confront the industry.

Federal ownership does create some problems which may tend to grow with the growth of a private atomic industry. The most critical of these is the role of the Federal Government in the pricing of special nuclear materials, hence its role in the economics of private licensed operations. . . .

In most prospective near-term commercial atomic power reactors, the "buy back" price could make or break the economies of the plant. By law, the Commission can only guarantee "buy back" prices for 7 years, while plants able to produce such material must run for 25 to 40 years to amortize their costs. Thus, private investors have no way of forecasting when they may suddenly be thrown into a losing operation as a result of changes in future Commission-guaranteed prices. It is true that all licensees receive the same prices, but all licensees will not have the same types of plants and may have differing economic break-even points.

During the period when there are relatively few atomic power-plants in operation, there are advantages to the principle of Federal ownership [\textit{i.e.}, assured buyer of byproduct materials and stability of prices]. . . .

As the number of atomic power-plants increases, a market for the byproduct plutonium or uranium \textsuperscript{233} for use as reactor

\textsuperscript{244} To Code Fed. Regs. §50.60(a); see Upton, \textit{supra} note 207 at 493-94: "How binding is this [Commission] allocation? The difficulty is that Section 161m of the act, which permits the Commission to make long-term agreements to sell source material, expressly denies similar authority for the distribution of special nuclear material. Thus, one could argue that the Commission's assurances would be meaningless and that the licensee would not have any legal remedy if the Commission failed to honor its assurances." See also statement of AEC to Joint Committee, 1957 Section 202 Hearings, \textit{supra} note 7 at 107: "The Commission's prices [for enriched uranium] . . . are not guaranteed, but . . . it is the intention of the Commission to maintain the price schedule on as stable a basis as is possible. . . ." On the other hand, Section 56, 42 U.S.C.A. §22076, authorizes Commission-guaranteed fair prices for special nuclear material produced in private facilities for up to 7 years, which presumably have the binding force of a contract between the government and private parties acting in reliance upon the guarantee, provided Joint Committee approval of such guarantee has been given under Section 58, 42 U.S.C.A. §22078. Under Section 161m(2), 42 U.S.C.A. §2201(m)(2), the Commission may sell or lease source or byproduct material to Section 103 or 104 licensees, subject to cancellation by the licensee; this section specifically excludes special nuclear material from the provisions thereof. Special nuclear material may be recaptured by the AEC during a war or national emergency declared by Congress (Section 108, 42 U.S.C. §2138).
fuel will undoubtedly develop, thus a degree of inherent market stabilization will come into existence. . . . When that time does arrive, the policy of Federal ownership should be re-examined. 248

b. Use of Source and Byproduct Materials

The transfer, receipt, delivery, or possession of source materials 246 and byproduct materials 247 are subject to Commission licensing. 248 Such materials may be sold, leased, or otherwise made available by the Commission to its licensees 249 at reasonable charges and upon written criteria established by the Commission, 250 without, however, the necessity of obtaining Joint Committee approval as in the case of special nuclear material. 251

Licenses for the transfer, delivery, or possession of source and byproduct material are issued pursuant to regulations which establish general conditions with respect to the common defense and security, the preservation of health and safety, the furnishing of reports, and the keeping of records. 252 Prior to May 1957, the Atomic Energy Commission did not require immediate reporting of incidents involving possible radiation hazards from the use of byproduct materials. This

246 McKinney Panel Report, supra note 10 at Vol. 1, p. 131; see also 13 and 134.
247 Defined as uranium, thorium, and their refined counterparts after removal from the place of deposit in nature (Section 11x, 42 U.S.C.A. §2014(x), formerly Section 11s, 42 U.S.C.A. §2014(s)).
248 Defined as "any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material" (Section 11e, 42 U.S.C.A. §2014(e)).
249 Section 62 (source material) and Section 81 (byproduct material), 42 U.S.C.A. §§2092, 2111.
250 Section 63c (source material) and Section 81 (byproduct material), 42 U.S.C.A. §§2093(c), 2111.
251 Section 58, 42 U.S.C.A. §2078.
252 10 Code Fed. Regs. §§40.21-.22 and 40.30 (source material) and 30.23-.24, 30.31(b)-32, and 30.41-.43 (byproduct material). As of the end of 1957, the AEC had issued 1,200 licenses to use radioisotopes for industrial purposes to about 1,667 industrial organizations, AEC, Twenty-third Semi-Annual Report 25 (1958). In addition, 7 commercial firms have received licenses to dispose of low-level radioactive byproduct and source material wastes (id. at 151). On March 8, 1958, the AEC for the first time gave notice of its intention to issue a byproduct and source material license to provide radioactive waste disposal service, 23 Fed. Reg. 1663, BNA, Atomic Industry Reporter 4: 88. As of March 1958, the AEC had denied 4 applications for licenses for source materials and 46 applications for licenses for byproduct materials, while 21 applications of the latter type were withdrawn, 1958 Section 202 Hearings, supra note 32 at 91.
serious omission in the agency's regulations was corrected by amendment to the rules governing licensees of such materials as the result of an accident reported to the Commission more than a month after its occurrence. For both source and byproduct material, the Commission has exempted certain types of uses from the requirements of a specific license and provided instead a general license in such situations.

c. Operators

Although its statutory authority with respect to operators' licenses is practically unfettered, the Commission has exercised restraint in restricting to the minimum the classes of persons required to obtain licenses. Licenses for individual operators of utilization and production facilities have been generally controlled by reasonable conditions of health and proficiency.

283 10 Code Fed. Regs. §20.403, 22 Fed. Reg. 3389 (May 14, 1957). This regulation requires that (1) each byproduct material licensee "immediately" notify the nearest AEC Operations Office by telephone and telegraph "of any incident involving licensed material possessed by him and which may have caused or threatens to cause serious exposure to individuals and the suspension of work in the facility involved for one week or more; (2) each such licensee notify the AEC within 24 hours of any incident involving minor exposure to individuals and the suspension of work in the facility involved for less than one week; and (3) each such licensee submit to the AEC a written report of any of the above types of incidents within 30 days thereafter. At the time these additions to the regulations affecting byproduct material licenses were issued, the Commission also added a regulation requiring such licensees to report "immediately" any theft or loss of licensed material, 10 Code Fed. Regs. §20.402.

284 This involved Byproduct Material License Nos. 31-246-1 and 31-246-2 issued to M. W. Kellogg Company, infra note 454. The incident involving byproduct material occurred on March 13, 1957, but was not reported to the Commission until April 19, 1957, according to the AEC General Manager (BNA, Atomic Industry Reporter 265: 206).

285 10 Code Fed. Regs. §§40.23, 40.60, and 40.62 (source material) and 30.20-.21 and 30.71-.72 (byproduct material). On June 27, 1958, the AEC announced that depleted uranium (containing less than .007 percent by weight of uranium 235) would be sold by the Commission on an unclassified basis to domestic buyers for such goods as ceramics, glass products, coloring agents, and photographic supplies; such sales and transfers of the material involved would continue to be subject to the Commission's licensing procedures; AEC Press Rel. No. A-158.

286 Section 107, 42 U.S.C.A. §2137.

287 For example, licensing is not required of persons who may manipulate controls but who do so in the presence and under the direction of a licensed operator. As of the end of 1957, only 148 operators' licenses had been issued, AEC, Twenty-third Semi-Annual Report 195-199 (1958); see BNA, Atomic Industry Reporter 227: 851-857. As of March 1958, only one application for an operator's license had been denied by the AEC; 1958 Section 202 Hearings, supra note 32 at 91.

d. Foreign Activity, Imports, and Exports

The Atomic Energy Act of 1954 established several categories of regulated activity concerning the export, import, or use abroad of atomic materials or of atomic information. These activities are controlled by the requirement of a license.

Section 62 of the present legislation requires a license for the import into, or export from, the United States of any source material. Section 82c contains a similar requirement with respect to byproduct material. The export or import of special nuclear material by private individual is, of course, impossible under the 1954 act, since title to such material is vested in the United States government.

Persons under the jurisdiction of the United States are prohibited from directly or indirectly engaging "in the production of any special nuclear material outside of the United States" except in two circumstances. In the first circumstance, such activity is authorized where carried on pursuant to an agreement for cooperation between the United States and a foreign country, which requires the approval of the Atomic Energy Commission, the Department of Defense, the President, and the Joint Committee. In the second circumstance, the activity may be authorized by the Commission if it determines that "such activity will not be inimical to the interest of the United States." As an implementation of this authority, licenses are required by the Commission for private concerns and persons to engage in certain unclassified activities in foreign atomic energy programs, outside of the scope of agreements for cooperation.

261 Section 52, 42 U.S.C.A. §2072.
263 Section 123, 42 U.S.C.A. §2153; see also Section 144, 42 U.S.C.A. §2164.
264 Thirty-nine such agreements with 37 countries were in effect at the end of 1957. AEC, Twenty-third Semi-Annual Report 195-199 (1958); see BNA, Atomic Industry Reporter 287: 203. Once such an agreement is reached, the Commission issues an authorization letter to the private concern or individual to act under the agreement; see AEC authorization letter to Westinghouse Electric Corporation dated April 2, 1956, under an agreement with Belgium; BNA, Atomic Industry Reporter 287: 401.
265 10 Code Fed. Regs., Pt. 110. Section 110.7(a) of the regulations states the determination by the Commission that "any activity which . . . (1) Constitutes directly or indirectly engaging in the production of special nuclear material in any foreign country [other than countries or areas within the Soviet or Communist Chinese bloc] . . . ; and (2) Does not involve the communication of Restricted Data or other classified defense information; and (3) Is not in violation of other provisions of law . . . will not be inimical to the interests of the United States and is authorized by the
The principal difficulty which arises in the international field derives from the fact that the Atomic Energy Commission is not the only federal regulatory body concerned with exports and imports. The Commission is a member of the Advisory Committee on Export Policy created by the Secretary of Commerce in 1950 to administer the Export Control Act of 1949. This Committee advises the Secretary of Commerce with respect to "export measures required from the standpoint of national security, foreign policy, and short supply," which measures are administered under Department of Commerce regulations. Under this system, import certificates are required from the Department for source materials or for facilities for the production or utilization of special nuclear material. Export licenses issued by the Department of Commerce also are required for components of facilities for the production or utilization of special nuclear material, isotopes for which procurement authorization previously has been obtained from the Atomic Energy Commission, unclassified technical data, and certain types of unpublished technical data. Validated licenses are required for the export of certain metals such as beryllium and boron to all foreign countries except Canada. Special licensing restrictions apply to the exportation of certain materials to the Soviet and Chinese Communist bloc.

Although diffuse exercise of federal regulatory power by different agencies of the government is ordinarily objectionable, over-all control of exports and imports by the Department of Commerce appears justified in view of the aspects of foreign policy involved. The burden imposed on the private or business interest by having to deal with two

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268 15 Code Fed. Regs. §§368.1(a)(3), (b)(1), and (e).


274 15 Code Fed. Regs. §§371.3(a)(1) and 399.1(f).

275 So-called "R" commodities, such as naphthenates of metals, for which no license is required for export to countries outside this bloc, 15 Code Fed. Regs. §§371.3(a)(2) and 399.1(f).
different agencies—that department and the Atomic Energy Commission—is, to a certain extent, outweighed by the need for centralized control of strategic exports and imports.

e. Access Permits

To make "available to private enterprise classified scientific and technical information relating to the civilian uses of atomic energy" under the Atomic Energy Act of 1954,\textsuperscript{276} the Atomic Energy Commission in 1955 instituted its information access permit program. No such program existed under the Atomic Energy Act of 1946, although that statute stated the policy, never implemented, that

... the dissemination of scientific and technical information relating to atomic energy should be permitted and encouraged so as to provide that free interchange of ideas and criticism which is essential to scientific progress.\textsuperscript{277}

The Atomic Energy Act of 1954 sought to raise, consistent with national security, the paper curtain imposed by the earlier statute. Congress therefore laid down the policy for the Commission that

The dissemination of scientific and technical information relating to atomic energy should be permitted and encouraged so as to provide that free interchange of ideas and criticism which is essential to scientific and industrial progress and public understanding and to enlarge the fund of technical information.\textsuperscript{278}

The dissemination of information under atomic energy legislation is complicated by the existence of a special category of information created under the 1946 statute, Restricted Data.\textsuperscript{279} Such information is defined in the Atomic Energy Act of 1954 as

... all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear

\textsuperscript{276} AEC Statement to Joint Committee, 1957 Section 202 Hearings, supra note 7 at 92; see AEC, Twenty-third Semi-Annual Report 165-66 (1958).

\textsuperscript{277} Section 10a(a), 42 U.S.C.A. §1210(a) (2) (1946); see, to the same effect, Section 1(b) (2), 42 U.S.C.A. §1801(b) (2) (1946).

\textsuperscript{278} Section 141 b, 42 U.S.C.A. §2161(b); see, to the same effect, Section 3b, 42 U.S.C.A. §2013(b), authorizing the Commission to engage in "a program for the dissemination of unclassified scientific and technical information and for the control, dissemination, and declassification of Restricted Data, subject to appropriate safeguards, so as to encourage scientific and industrial progress." Section 142, 42 U.S.C.A. §2162, provides for classification and declassification procedures. Under Section 146b, 42 U.S.C.A. §2166(b), "[t]he Commission shall have no power to control or restrict the dissemination of information other than as granted by this or any other law."

\textsuperscript{279} Section 10(b) (1), 42 U.S.C.A. §1810(b) (1) (1946). This definition does not substantially differ from that under the 1954 legislation.
material; or (3) the use of special nuclear material in the production of energy. . . .

Persons employed by private concerns in connection with Commission contracts or commercial or non-commercial licenses under Sections 103 and 104 of the 1954 act must receive permission from the Commission, after investigation, to have access to Restricted Data. Since administration of an atomic energy license or operation of an atomic energy reactor pursuant to license will in all cases require the use of such data, the access permit is an absolute necessity for the private concern involved.

Access permits are issued by the Commission for periods of two years for three separate categories of Restricted Data. These are (1) an "L" clearance for Confidential Restricted Data, (2) a "Q" clearance for Secret or Top Secret Restricted Data in areas outside the controlled thermonuclear field, and (3) a special "Q" clearance for access to information involving the controlled fusion process. For an "L" clearance, the applicant must demonstrate to the Commission that he has "potential use" for the information desired. For a "Q" clearance involving access to Secret or Top Secret Restricted Data not related to the controlled thermonuclear field, the applicant must demonstrate to the agency a specific need for the information desired. A "Q" clearance for access

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280 Section 111w, 42 U.S.C.A. §2014(w) (formerly Section 111r).
281 Under Section 161i(1) of the 1954 Act, 42 U.S.C.A. §2161(i)(1), the Commission is authorized to issue regulations necessary "to protect Restricted Data received by any person in connection with any activity authorized pursuant to this Act." Section 145a, 42 U.S.C.A. §2165(a), further provides that "[n]o arrangement shall be made under section 31, no contract shall be made or continued in effect under section 41, and no license shall be issued under section 103 or 104, unless the person with whom such arrangement is made, the contractor or prospective contractor, or the prospective licensee agrees in writing not to permit any individual to have access to Restricted Data until the Civil Service Commission shall have made an investigation and report to the Commission on the character, associations, and loyalty of such individual, and the Commission shall have determined that permitting such person to have access to Restricted Data will not endanger the common defense and security." Similar clearance is required for Commission employees, Section 145b, 42 U.S.C.A. §2165(b). Investigation procedures are covered by Sections 142e-e, 143, and 145c, 42 U.S.C.A. §§2162(c)-(e), 2163, and 2165(c), and criminal penalties concerning misuse of Restricted Data are prescribed in Sections 221 and 224-227, 42 U.S.C.A. §§2271 and 2274-2277. Effective July 1, 1958, issuance of access permits became the authority of the AEC's field offices; AEC Press Rel. No. A-152 (June 23, 1958).
283 10 Code Fed. Regs. §§25.11(b)(7), 25.15(a), and 95.3(d).
284 10 Code Fed. Regs. §§25.11(b)(7), 25.15(b)(1), and 95.3(g).
to Secret or Top Secret Restricted Data related to controlled thermonuclear processes will not be granted unless the applicant is, among other things, "directly engaged in a substantial effort to develop, design, build or operate a fission power reactor that is planned for construction and is making or proposes to make a comparative evaluation of fission and controlled thermonuclear processes for production of power." 285

Although an access permit is probably a license within the meaning of the Federal Administrative Procedure Act,286 the Atomic Energy Commission has refused to recognize that such a permit is protected by the licensing provisions of the Atomic Energy Act of 1954. However, the Commission has followed a liberal, rather than a restrictive, policy in issuing such permits,287 and the denial of permits has not been up to the present time, in any event, a serious factor adversely affecting the atomic energy program.288

The only major criticism of the access permit program has been made in connection with the application by Power Reactor Development Company for a construction permit.289 In that proceeding counsel for certain intervenors moved the Commission to grant access, "without imposition of any security requirements," to information relevant to the proceeding. The motion alleged that the information required by counsel had been "published" within the meaning of Section 142a of the 1954 Act by its being "made available or offered by the Commission to many hundreds of persons under the Commission's access permit program, and to many thousands of the employees of such persons." The motion concluded that (1), "[t]o the extent that the Atomic Energy Act of 1954 requires Intervenor's attorneys to submit to the security regulations of the Commission as a condition of access to any information essential and pertinent to the preparation and trial of this proceeding, the Act abridges freedom of speech and violates due process of law contrary to the First and Fifth Amendments of the Constitution. . . ."; and (2) due process of law and the Fifth Amendment would be

286 Section 2(e), 5 U.S.C.A. §1001(e), made applicable to AEC functions by Section 181 of the Atomic Energy Act of 1954, 42 U.S.C.A. §2231.
287 At the end of 1957, 1,404 access permits were in force, involving 22,352 persons cleared for access to classified documents in 26 major categories of American industry; 57 percent of the permits allowed access to secret and confidential Restricted Data, and the remainder to confidential Restricted Data alone. AEC, Twenty-third Semi-Annual Report 138, 166 (1958).
288 Green, supra note 282 at 555-556.
289 AEC Dkt. No. F-16.
violated as to the intervenors "for the Commission to condition Intervenors' ability effectively to pursue their rights and privileges under law upon their attorneys' submission to the Commission's security requirements." The motion of intervenors was opposed by Commission counsel, and the Commission denied the motion March 5, 1957. \cite{290} The intervenors claimed that Commission refusal to grant the motion constituted "denial of a fair hearing." \cite{291}

f. Commercial and Non-Commercial Facilities

The most important category of atomic energy licenses are those prescribed in Chapter 10 of the Atomic Energy Act of 1954. This category covers licenses for the construction and operation of facilities utilizing or producing special nuclear material either for medical therapy and research and development (a Section 104 \cite{292} "non-commercial" license) or for private industrial uses (a Section 103 \cite{293} "commercial" license). Even though Section 103 or Section 104 licenses are used for different purposes, both types of licenses were intended to be subject . . . to the same general conditions . . . , namely, ownership and control in United States citizens, and operation to be consonant with the common defense and security and with the health and safety of the public. \cite{294}

(1) Construction Permits

An integral part of the licensing system is the so-called construction permit provided for under Section 185 \cite{295} of the 1954 statute. A construction permit is a form of intermediate licensing issued prior to the

\cite{285} BNA, Atomic Industry Reporter 3:12, 3:85, and 246:739-743. Considerations of public policy probably favor the Commission's making access to Restricted Data as easy as possible for intervenors' counsel within the requirements established by Congress. However, the extreme position on the motion would, if sustained, have weakened the entire information security program; see id. at 2:379.

\cite{291} Post-Hearing Brief of Intervenors with Proposed Findings and Conclusions 28-35. The intervenors conceded that 40 out of the 73 documents requested in the motion were declassified by the Commission without any deletions. The applicant in the proceeding argued to the Commission that the question raised by the intervenors was "utterly without merit" and claimed that "[n]o classified evidence has been offered by any party to this proceeding, and there has been no indication that any information still classified is directly relevant to any issue in the proceeding" (Reply Memorandum for Applicant 2-3 (Nov. 19, 1957)).

\cite{292} 42 U.S.C.A. §2134.
\cite{293} 42 U.S.C.A. §2133.
\cite{294} H.R. Rep. No. 2181, supra note 5 at 20.
\cite{295} 42 U.S.C.A. §2235.
granting of a Section 103 or 104 license. This two-step procedure for licensing an atomic energy facility was based on that contained in the Federal Communications Act of 1952. The standards and conditions attached to a construction permit are generally the same as those for the license eventually desired by the permit applicant.

As of June 30, 1958, the Commission had issued construction permits for five facilities to conduct research and development activities for industrial or commercial purposes under Section 104b of the 1954 act. By that time the agency also had issued construction permits for thirty-two facilities to conduct research and development activities for nu-

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297 47 U.S.C.A. §§153(dd) and 308; see Hollis, "Atomic Energy and Lawyers," 24 D.C. Bar Assn. J. 76, 79 (1957). An excellent description of the negotiations and procedures whereby application is made to the Commission for a construction permit and its conversion to a license is to be found in the Joint Committee Staff Study, supra note 3 at 11-15 and App. 4 at 100-108; see also remarks of F. K. Pittman, Deputy Chief, AEC Division of Civilian Application, Dec. 12, 1955, BNA Atomic Industry Reporter 51:105. In its Brief filed in the PRDC proceeding, AEC Dkt. No. F-16, the so-called "separated staff" of the Commission claimed that the "legislative history [of the Atomic Energy Act of 1954] indicates that the concept of a construction permit was patterned in some measure on that contained in the Federal Communications Act" (p. 16).

298 10 Code Fed. Regs. §§50.45 and 50.55(c).
299 Consolidated Edison Co., CPRR-1 (May 4, 1956); Commonwealth Edison Co., CPRR-2 (May 4, 1956); General Electric Co., CPRR-3 (May 14, 1956); Power Reactor Development Co. (PRDC), CPRR-4 (Aug. 4, 1956); and Yankee Atomic Electric Company, CPRR-5 (Nov. 4, 1957). The PRDC permit has been the subject of a formal AEC hearing.

300 Providing for facilities "involved in the conduct of research and development activities leading to the demonstration of the practical value of such facilities for industrial or commercial purposes."


Critical experiment construction permits: Babcock and Wilcox, CPCX-1 (Dec. 9, 1955) and CPCX-9 (Oct. 2, 1957); Battelle Memorial Institute, CPCX-2 (Dec. 28,
clear processes and for the theory and production of atomic energy under Sections 31 and 104c of the Atomic Energy Act of 1954.

Two problems are presented in connection with construction permits. The first, which has not yet arisen but which nevertheless deserves consideration, concerns the conversion of a permit into a license upon construction of a facility, in the absence of "good cause." The phrase "good cause" as used in this context is not defined by the act or regulations and creates considerable uncertainty as to the right of a permittee to receive a license.

The second problem presented with respect to a construction permit arises under the regulation which authorizes the Commission to issue a provisional permit in cases where

... an applicant is not in a position to supply initially all of the technical information otherwise required to complete the application. ... If the Commission is satisfied that it has information sufficient to provide reasonable assurance that a facility of the general type proposed can be constructed and operated at the proposed location without undue risk to the

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1955); Nuclear Development Corp. of America, CPCX-3 (June 11, 1956); General Electric Co., CPCX-4 (July 5, 1956); Lockheed Aircraft Corp., CPCX-5 (Mar. 15, 1957); Martin Co., CPCX-6 (May 13, 1957); General Dynamics Corp., CPCX-7 (June 18, 1957); General Electric Co., CPCX-8 (Sept. 20, 1957); Westinghouse Electric Corp., CPCX-10 (Oct. 17, 1957) and CPCX-12 (June 16, 1958); National Advisory Committee for Aeronautics, CPCX-11 (Jan. 22, 1958).

42 U.S.C.A. §2051, providing for AEC research assistance.

Providing for facilities "useful in the conduct of research and development activities of the types specified in Section 31 and which are not facilities of the type specified in subsection 104b."

One application for a license for a research reactor was denied by the Commission prior to 1958. On Dec. 31, 1957, the Commission by notice advised that the application of The Prosperity Company, Syracuse, N.Y. had been denied "with the consent of the applicant and without prejudice to submittal of a new application." 22 Fed. Reg. 11088 (Dec. 31, 1957); see BNA, Atomic Industry Reporter 4: 16.


"Good cause" for the purpose of extending the completion date of a permit is defined in the regulations as including "developmental problems attributable to the experimental nature of the facility or fire, flood, explosion, strike, sabotage, domestic violence, enemy action, an act of the elements, and other acts beyond the control of the permit holder." (10 Code Fed. Regs. §50.55(b)).

See Upton, supra note 207 at 492: "... [A] permit does not mean very much under present circumstances. The unsolved technological problems are such that any permit must be stated in terms so general to be of questionable value as assuring the issuance of a subsequent facility license." It is the opinion of the Chairman of the AEC's Advisory Committee on Reactor Safeguards that "it is impossible to give a construction permit which can be guaranteed to be converted into an operating license in my view" (1958 Section 202 Hearings, supra note 32 at 120).
health and safety of the public and that the omitted information will be supplied, it may process the application and issue a construction permit on a provisional basis without the omitted information subject to its later production and an evaluation by the Commission that the final design [of the facility] provides reasonable assurance that the health and safety of the public will not be endangered.  

The regulations also provide for certain "common standards" for both construction permits and licenses and for the granting of a construction permit to an applicant for a license "if the application [for a construction permit] is in conformity with and acceptable under the criteria and standards" applicable to a license.  

The issuance of a provisional construction permit to Power Reactor Development Co. (PRDC) to build a fast-neutron breeder reactor at Monroe, Michigan, for the production of electrical energy developed the opposing points in view concerning the Commission's authority to issue such a permit under the Atomic Energy Act of 1954. The view

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808 10 Code Fed. Regs. §§50.35.
811 CPPR-4 (Aug. 4, 1956), 21 Fed. Reg. 5974 (Aug. 9, 1956). The conversion of the construction permit into a license is subject to two general conditions, namely: (1) "Unless, within twelve months from the date of this construction permit, PRDC submits sufficient information relating to its financial resources to enable the Commission to make a finding that the Company has adequate financial resources to meet the requirements of the law and the regulations, this permit shall expire; provided that the Commission may for good cause shown extend the time for the submission of such data"; and (2) "The conversion of this permit to a license is subject to submittal by PRDC to the Commission (by amendment of the application) of the complete, final Hazards Summary Report (portions of which may be submitted and evaluated from time to time). The final Hazards Summary Report must show that the final design provides reasonable assurance to the satisfaction of the Commission that the health and safety of the public will not be endangered by operation of the reactor in accordance with the specified procedures." (Ed. Note: On December 10, 1958, the Commission issued its Opinion and Initial Decision in the PRDC case and continued the provisional construction permit in effect, subject to further conditions to establish complete safety and financial qualifications.)
812 See Petition for Intervention and Request for Formal Hearing, AEC Dkt. No. F-16, filed Aug. 31, 1956, by three unions and their officials; BNA, Atomic Industry Reporter 2: 283 and 2: 294. The principal contentions were that (1) the Commission failed to make the requisite findings of "Reasonable Assurance" of safety required by Section 185 of the act and §§50.35 of the regulations, particularly in view of a generally adverse report dated June 6, 1956, by the Commission's Advisory Committee on Reactor Safeguards (Petition, pp. 4-11); and (2) the Commission could not issue a permit conditional upon the satisfaction of "financial qualifications" at a later date (id. at 11-13). See also statement of Rep. Cannon, 103 Cong. Rec. 5196-5198 (1957); statements of W. P. Reuther, President, United Automobile Workers, AFL-CIO,
taken by the intervenors in that proceeding against the validity of the provisional construction permit issued to PRDC was that no section of the Atomic Energy Act of 1954, including Section 185,

... provides for the issuance of conditional or provisional construction permits. There is nothing in this section [185], nor in any other section of the Act, which indicates that there may be inconsistent criteria for the issuance of construction permits.

It is true that Section 185 does enumerate, as one of the conditions for the issuance of an operating license, that the applicant file "any additional information needed to bring the original application up to date."... It was not contemplated that the kind of construction permit to be issued would depend on the amount of information filed with the application. In other words, Congress did not contemplate that the filing of additional information was one of the requirements that make the application acceptable to the Commission. ... [A]cceptability must be determined at the beginning, when the construction permit is granted.

It seems quite clear that Sections 50.45 and 50.40 [10 Code Fed. Regs.] were based on this interpretation of the Act. ... This means that there must be a present determination that the information supplied to the Commission gives reasonable assurance that the health and safety of the public will not be endangered by the construction and operation of the reactor. 818

The view supporting the validity of a provisional construction permit stresses the necessity for such a device under a broad interpretation

B. C. Sigal, counsel, UAW, and Leo Goodman, staff member, UAW, 1957 Authorizing Legislation Hearings, supra note 7 at 597-633; statement of A. J. Biemiller, Legislative Director, AFL-CIO, 1957 Section 202 Hearings, supra note 7 at 440; statements of Sen. Anderson and Rep. Holifield, Joint Committee Staff Study, supra note 3, App. 7.B and C, at 125-127. The standing of intervenors to intervene in the proceedings was questioned by PRDC, which stated, however, that it was willing to have the issues involved in the granting of the construction permit heard in a proper hearing (BNA, Atomic Industry Reporter 2:307 (Sept. 26, 1956)). "Notice of Hearing, Order and Memorandum" were issued by the Commission Oct. 8, 1956, 21 Fed. Reg. 7869 (Oct. 12, 1956) and Joint Committee Staff Study, supra note 3, App. 7.D. at 128-132. After prehearing conferences held Oct. 29 and Nov. 29, 1956, the hearing commenced Jan. 8, 1957, with the introduction of testimony in narrative form by the applicant, PRDC. Witnesses were examined May 13, June 10, Aug. 1, and Aug. 7, 1957. Briefs were submitted by Nov. 29, 1957, and the record was certified to the Commission without decision by the hearing examiner appointed in the case. Procedural and other issues presented in these proceedings are discussed where appropriate elsewhere in this chapter.

818 Reply Brief of Intervenors 9 (Nov. 19, 1957). See, to the same effect and arguing that the legislative history of Section 185 supported this position, Post-Hearing Brief of Intervenors, supra note 291 at 16-17.
of the Atomic Energy Act of 1954 and the Commission's regulations. In the light of Section 185,

. . . the Commission was thus faced with the very practical problem of determining what showing is to be required at the construction permit stage, especially by applicants for licenses for developmental projects. The construction of a large power reactor and associated generating facilities necessarily takes approximately four or five years. Yet the entire history to date of the peaceful application of nuclear energy comprises a span of only a little over a decade, and at least for the next few years relatively brief periods undoubtedly will continue to witness vast accretions of knowledge in this field. The Commission was therefore aware that if the basic policies of the Atomic Energy Act of 1954 were to be effectuated, and if the United States is not to fall far behind in this rapidly moving field, the construction of developmental projects . . . must not only be permitted but must be encouraged to be started without waiting for all of the technological problems associated with them to be definitively solved.

Thus it was clear that if the Commission required applicants for licenses to submit at the outset all of the technical information required to be included in the final Hazards Summary Report, it would effectively defeat the purposes of the Act by seriously delaying if not utterly eliminating most developmental projects, and particularly those which will lead to substantial technological advances.

Regardless of the issues involved in the PRDC proceeding, the provisional construction permit represents one of the means whereby private industry can carry out its role in the atomic energy field in the present fluid state of the technology involved. An alternative to legislation and regulations which permit industry to construct reactors on the basis of

814 Brief for Applicant 34-35 (Oct. 29, 1957). In its Brief filed with the Hearing Examiner in the PRDC proceeding, the so-called "separated staff" of the AEC, represented by the Acting General Counsel of the Commission and two other AEC attorneys, argued (p. 21): "Thus, the legislative history of Section 185 reflects both the desire of industry for maximum assurance that conversion of a construction permit to a license will be semi-automatic, and the concern by at least some members of Congress that once a construction permit is granted and substantial funds are expended, the pressures for conversion of the permit into a license may become overwhelming. Both considerations serve to emphasize the importance of the determinations made at the construction permit stage." PRDC took the position that "there is no legal, moral or other commitment of any sort to convert this [construction] permit into an operating license unless and until the full showing required by the law and the regulations to be made at that time has been completed to the satisfaction of the Commission . . . The only risk involved in going forward with this project . . . is a financial one, and a financial one to PRDC alone. . . ." (Brief for Applicant 87).
continually expanding knowledge of science and engineering is, of course, a government monopoly of all such developmental work.

(2) Non-Commercial Licenses

Non-commercial licenses issuable under Section 104 of the 1954 act are used for medical therapy, research and development for industrial or commercial purposes, and research and development of a theoretical and purely scientific nature. Through the end of June 1958, forty-two licenses had been issued, and one proposed, for reactors in the last-named category.

Standards and conditions applicable to non-commercial licenses relate primarily to considerations of health and safety and the value of the research involved. The principal administrative problem with respect to non-commercial licenses arises not so much under these regulations as...
as under another statutory requirement which must be met before a reactor, developed under Section 104b and shown to have the necessary safety and operational features,\textsuperscript{320} can be licensed for commercial use under Section 103.

Under Section 102\textsuperscript{321} of the act, whenever the Commission has made "a finding in writing that any type of utilization or production facility has been sufficiently developed to be of practical value" under Section 104, a Section 103 license therefor may be issued upon appropriate application.\textsuperscript{322} "Practical value" appears to embrace both technical and economic considerations, and up to the end of 1958 the Commission never had issued such a finding. This probably is due in part to the economic uncertainties in private atomic enterprise at this beginning stage of development and also to the failure of the statute and regulations to permit a private citizen to request, and provide the evidentiary basis for, a determination of "practical value" and to set forth the standards for such a finding.\textsuperscript{323} Indeed, until these deficiencies in Section 102 are corrected, the section can be used as "a barrier of Commission discretionary authority" to the issuance of Section 103 licenses.\textsuperscript{324}

Further, a problem arises in connection with the transition from a "developmental" to a practically useful stage of reactor development. The private operator has no statutory assurance that his Section 104b license will be permitted to remain in effect for its prescribed term after the Section 103 license is issued, thus protecting the investment and research of the licensee.\textsuperscript{325} It is true that the Commission has adopted a

\textsuperscript{320} A Section 104b license is essentially a "demonstration" license; Upton, \textit{supra} note 207 at 490.
\textsuperscript{321} 42 U.S.C.A. §2132.
\textsuperscript{322} H.R. Rep. No. 2181, \textit{supra} note 5 at 19: "This finding [under Section 102] separates the issuance of research and development licenses for any facility under Section 104b, and the issuance of commercial licenses under Section 103. . . ."
\textsuperscript{323} The McKinney Panel has recommended that the statute be amended to permit private citizens to initiate a proceeding for a finding of "practical value" and to limit the definition thereof to "technical considerations" (Report, \textit{supra} note 10 at 13). The Panel further stated (\textit{id.} at 132-133): "The Commission's interpretation of section 102 . . . particularly strains our concepts of private enterprise. As yet undefined tests of economic feasibility are to be applied by the Commission in arriving at such findings. While the Federal Government does frequently require applicants for other licensed activities to prove economic feasibility of proposed activities, this is the first time, so far as can be determined, that the Federal Government has set itself up to decide on its own initiative when private licensees can profitably embark on regulated activities, denying private investors the right to proceed before that time. . . ."
\textsuperscript{324} \textit{id.} at 132.
\textsuperscript{325} See Upton, \textit{supra} note 207 at 490.
rule that seemingly covers the situation, but a rule can always be changed.

(3) Commercial Licenses

Although the Commission has sought to develop some semblance of regulatory order out of the hodgepodge of provisions contained in Section 103 and related sections, particularly Section 105, the result does not inspire confidence that the regulatory authority can maintain a proper balance between the public and private interests involved.

Under Section 7 of the Atomic Energy Act of 1946, the licensing of atomic power for commercial use was made practically impossible by statutory strictures. Under the procedure therein provided, the Commission was required to report to the President and through him to Congress that industrial, commercial, or non-military use of atomic energy had been developed to a point where such use was practicable. No license for such use could be issued by the Commission until the report had been submitted to Congress while in session and ninety days had elapsed after such submission.

Due to the strictures of Section 7 and the prevailing governmental sentiment prior to 1954 towards the development of atomic energy for peaceful uses, Section 7 was never utilized. Moreover, much of the restrictive philosophy of the section has crept into Section 103 of the present act. Indeed, it is the conflict between these restrictions and the

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826 Effective November 30, 1956, 21 Fed. Reg. 9354, a new §50.24 was added to the licensing regulations, which provided that "[t]he making of a finding of practical value pursuant to section 102 of the act will not be regarded by the Commission as grounds for requiring: (a) The conversion to a Class 103 license of any Class 104 license prior to the date of expiration contained in the license; or (b) The conversion to a Class 103 license of any construction permit, issued under section 104 of the act, prior to the date designated in the permit for expiration of the license." Implementing a policy adopted more than a year previously by the Commission, the regulation "may serve to set at rest, at least for the time being, one possible uncertainty facing those companies engaged in proving out power reactor concepts through construction of full-scale prototypes" (BNA, Atomic Industry Reporter 2: 389).


829 McKinney Panel Report, supra note 10 at 13: "Despite recognition of the fact that there is no evidence of anyone now being injured by the licensing provisions of sections 103 and 104, the principles involved in these sections... conflict with the principles of private enterprise which the 1954 act has been represented as advancing." See also 132-134.


831 For a favorable view of Section 7, see H.R. Rep. No. 2181, supra note 5 at 107-108. For a criticism thereof, see ABA Committee Report, supra note 177, at 15-21.
underlying philosophy of the Atomic Energy Act of 1954 to encourage investment of private capital in atomic energy facilities which creates the problem for industry. In this connection it is significant that Section 104 of the present act specifically states that licenses issued thereunder should be "subject to the minimum amount of regulation" consistent with the regulatory duties of the Commission. 332 No such policy statement is contained in Section 103, although the inference to be drawn from its absence is far from clear. 333

(a) Section 182 Restrictions

Restrictions imposed upon Section 103 licensees concern notice requirements, priorities, the right of the Commission to require information, and antitrust provisions. Under Section 182c of the present statute, 334 notice prior to the issuance of such a license is required to be given to "such regulatory agency as may have jurisdiction over the rates and services of the proposed activity, to municipalities, private utilities, public bodies, and cooperatives within transmission distance and which are authorized to engage in the distribution of electric energy." 335 The effective date of the license is further delayed by a requirement of notice for four consecutive weeks in the Federal Register, followed by another period of four weeks before the license becomes effective.

332 Section 104a, b, and c, 42 U.S.C.A. §2134(a), (b), and (c).
333 The applicant PRDC in AEC Dkt. F-16 argued that "Section 104.b enjoins the Commission not to impose in the way of developmental projects any administrative road blocks that are not absolutely essential from the standpoint of security and safety, and it requires that priority be given to those activities most likely to lead to 'major advances' in the industrial application of nuclear energy" (Brief for Applicant, supra note 314 at 34). The policy of the section was urged in support of the PRDC position that, in order to qualify for a provisional construction permit, the applicant need only establish "a reasonable probability under all the circumstances that . . . the proposed [PRDC] reactor . . . can in due course be proved safe for operation at the proposed site" (id. at 36) and "is reasonably assured under all the circumstances of obtaining the financial resources that it will probably need," taking into consideration "the determination of its [PRDC's] member companies to see the project through" (id. at 16 and 12). The contrary view, advanced by the intervenors in that proceeding, was that, notwithstanding Section 104b, "nothing takes priority over the twin elements of (1) common defense and security and (2) health and safety of the public. The encouragement of private participation in the atomic energy industry is a means to these ends, not a qualification of them" (Reply Brief of Intervenors, supra note 313 at 3).
334 42 U.S.C.A. §2232(c).
335 See 10 Code Fed. Regs. §50.43(a). The Joint Committee Staff Study, supra note 3 at 69-70, outlines briefly the legislative history of Section 182.
Licensing of activities involving interstate as well as intrastate commerce by joint action of a federal and state regulatory body is not an uncommon practice under administrative law. The provisions of Section 182c go further, however, and can only be regarded as a means of prolonging for a period of eight weeks the licensing of an otherwise qualified private commercial facility. During that period application can be made to a court to enjoin the license, or Congress, if in session, can take action by legislation to reverse the performance of Executive Department functions. However, other than the delay involved, this particular restriction raises no insuperable problems for private industry.

Section 182d of the present act also establishes a system of priorities to be given to license applicants. That section provides:

The Commission, in issuing any license for a utilization or production facility for the generation of commercial power under section 103, shall give preferred consideration to applications for such facilities which will be located in high cost power areas in the United States if there are conflicting applications for a limited opportunity for such license. Where such conflicting applications resulting from limited opportunity for such license include those submitted by public or cooperative bodies such applications shall be given preferred consideration.

As summarized by the Commission in its regulations, such priorities among "conflicting applications for a limited opportunity for such license" are as follows:

1. Applications submitted by public or cooperative bodies for facilities to be located in high cost power areas in the United States.
2. Applications submitted by others for facilities to be located within such high cost power areas in the United States.
3. Applications submitted by public or cooperative bodies for facilities to be located in other high cost power areas.
4. All other applications.

See, e.g., Interstate Commerce Commission use of "joint boards" composed of representatives of the agency and state regulatory bodies, 49 U.S.C.A. §305.

Representatives Holifield and Price have charged that these notice requirements lack "specific recognition of those interests whose rights may be affected by Commission action or whose participation may be in the public interest," H.R. Rep. No. 2181, supra note 5 at 122.

42 U.S.C.A. §2232(c).

Section 182d raises several questions which are not satisfactorily answered by its legislative history.\textsuperscript{840} The term "limited opportunity" is susceptible of varying interpretations, although a reasonable meaning would seem to be "limited availability of special nuclear material."\textsuperscript{341} Moreover, what constitutes a "high cost power area" is an exceedingly difficult question to answer because of very slight differences in the cost of generating electricity from conventional sources among several areas within the United States.\textsuperscript{842}

Both the Commission indirectly, and the Joint Committee directly, have implemented the preference provisions of the 1954 statute with respect to cooperatively and public-owned utilities. The Commission's second round invitation in September 1955, under the civilian power reactor program encouraged application by seven utilities of the preferred publicly or cooperatively owned type to develop, design, construct, and operate nuclear power plants with generating capacities of between 5,000 and 40,000 kilowatts.\textsuperscript{348}

However, the limitations on funds available to such groups of utilities have tended to prevent their full-scale participation in the civilian atomic energy program.\textsuperscript{844} Although recognizing that this preferred

\textsuperscript{840} See H.R. Rep. No. 2181, \textit{supra} note 5 at 28: "... [W]here all other conditions are equal and there are conflicting applications for a limited opportunity for a license, the Commission is required to give preferred consideration to facilities which will be located in high-cost power areas." See Joint Committee Staff Study, \textit{supra} note 3 at 69-70.

\textsuperscript{841} Upton, \textit{supra} note 207 at 491.

\textsuperscript{842} See Atomic Energy Facts 78 (GPO 1957); Rep. Cole has characterized Section 185c as "this fear and apprehension [in private industry] which I call a roadblock" (1957 Section 202 Hearings, \textit{supra} note 7 at 69). After agreeing with Sen. Pastore (Dem., R.I.) that New England "certainly is a high cost area," Mr. E. L. Lindseth, Vice Chairman, Committee on Atomic Power, Edison Electric Institute, told the Joint Committee in the 1957 Section 202 Hearings, \textit{id.} at 268-269: "Our industry takes no exception to that portion of the act which relates to preference in favor of high cost fuel areas. . . ."

\textsuperscript{843} See AEC Twenty-fourth Semi-Annual Report 335 (1958); four of those have been accepted as bases for negotiation of contracts, statement of AEC, 1957 Section 202 Hearings, \textit{supra} note 7 at 117-118. These four proposals "are all entitled to preference under the Atomic Energy Act" (Statement of AEC Division of Reactor Development Director, 1957 Authorizing Legislation Hearings, \textit{supra} note 7 at 186). One public body, Consumers Public Power District, of Columbus, Nebraska, has applied for a contract under the first round invitation, Sen. Rep. No. 791, \textit{supra} note 23 at 10-11.

\textsuperscript{844} Cole, \textit{supra} note 6 at 480: "... [A]ll three invitations for proposals under the demonstration program have emphasized the specific types of available government assistance and have stressed that the Commission's obligations would be limited or 'closed end.' There is one dilemma which is posed by the Commission's desire to
class of utilities showed no "particular competence or experience" with respect to atomic reactors, the Joint Committee in 1957 recommended, and Congress enacted, legislation which specifically directed the Commission to give such utilities a highly preferred position under the civilian power reactor program, with advantages not available to privately owned utilities.

(b) Section 105 Restrictions

Another type of restriction imposed on Section 103 licenses is created by Section 105 of the Atomic Energy Act of 1954 concerning antitrust problems. Previously, under Section 7(c) of the 1946 act:

Where activities under any license might serve to maintain or to foster the growth of monopoly, restraint of trade, unlawful competition, or other trade position inimical to the entry of new, freely competitive enterprises in the field, the Commission is authorized and directed to refuse to issue such license or to establish such conditions to prevent these results as the Commission, in consultation with the Attorney General, may determine. The Commission shall report promptly to the Attorney General any information it may have with respect to any utilization of fissionable material or atomic energy which appears to have these results.

Under the present legislation, the restrictions imposed under the 1946 legislation have been broadened by new statutory provisions which were "in large part, the product of compromise." The antitrust provisions of the 1954 act have three principal effects upon the regulated atomic energy industry. Each of these is presumably based on the intended policy of strengthening "free competition in private enterprise."

limit commitments and this is a result of a preference clause contained in the Atomic Energy Act of 1954. The very limited funds generally available to such 'preference' groups . . . for assumption of technological risk make it difficult, in a practical sense, for these groups to assume responsibility for excessive costs. Thus difficulty is encountered in making contractual arrangements containing strong incentives for cost-reduction except as these groups may be able to make favorable arrangements with reactor manufacturers."

346 These preferred contractual arrangements were contained in Section 111(a)(1) of Pub. L. 85-162, 85th Cong., 1st Sess. (1957), and are discussed in detail, infra.
348 42 U.S.C. §1807(c) (1946);
349 Attorney General Brownell, 1957 Section 202 Hearings, supra note 7 at 631-635.
350 Section 1b, 42 U.S.C.A. §2011(b); see Jacobs and Melchoir, "Antitrust Aspects of the Atomic Energy Industry," 25 Geo. Wash. L. Rev. 508 (1957). The authors were listed as members of the Antitrust Division, Department of Justice.
The first, and most important, is the mandate that no provision of the act “shall relieve any person from the operation” of the antitrust laws. These laws may well be applied not only to actual violations thereof, but also, and of more practical significance to the industry, to “incipient practices which could ultimately lead to Sherman Act violations.” Moreover, in the event a license is found by a court of competent jurisdiction to have violated any provision of the federal antitrust laws, then the Commission “may suspend, revoke or take such other action as it may deem necessary with respect to any license issued by the Commission under the provisions of this Act.”

As under the 1946 act, Section 105b of the 1954 act requires the Commission to report to the Attorney General any information coming to its attention with respect to license activity “which appears to violate or to tend toward the violation of any of the [antitrust] . . . Acts, or to restrict free competition in private enterprise.” Further, under

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852 Jacobs and Melchoir, supra note 350 at 509; see Brownell, 1957 Section 202 Hearings, supra note 7 at 631: “... In this evolving [atomic energy] industry, we [the Federal Government] attempt preventive measures to foster competition, rather than remedial litigation to undo the effect of anticompetitive action already taken.” Critics of the current AEC program have emphasized the alleged danger from incipient violations of the antitrust laws. Rep. Cannon, 103 Cong. Rec. 5197-5198 (1957) has referred to “serious antitrust implications” in the PRDC project because it was being undertaken by “two separate combinations of companies.” Some witnesses in the Joint Committee 1957 Section 202 Hearings charged that the 1954 act was being administered in such a fashion as to effect “monopolization of the atomic energy field” by major power companies, which were accused of engaging in “a form of legalized collusion” to violate the antitrust laws, supra note 7 at 452-456; see, to the same effect, id. at 285-289 and 460-462.

853 Jacobs and Melchoir, supra note 350 at 511-12: “Should the Federal Trade Commission find a violation of section 5 of its act and the respondent not seek court review, the [Atomic Energy] Commission could not under this section [105a of the Atomic Energy Act] cite the finding as a basis for suspension, as this would not constitute a finding by a court of competent jurisdiction. . . . Thus, considerable importance attaches to what might be an accident of procedure, i.e., whether an action for violation of one of the antitrust laws is brought in the first instance by the Department of Justice or by the Federal Trade Commission.” The opposite position would be that Congress intended an atomic energy licensee to have its alleged violation of the antitrust laws adjudicated in a federal court, either at the District Court level in an original proceeding or at the Court of Appeals level on review of a Federal Trade Commission order, rather than have the atomic energy license jeopardized by merely an administrative determination.

854 Jacobs and Melchior, supra note 350 at 512: “The obligation will require the application of a degree of antitrust expertise at an early stage, to make possible the detection of anti-competitive practices in their incipience.”
Section 105c, when the Commission proposes to issue a Section 103 license, the Attorney General must be notified, and he must give an opinion within 90 days, to be published in the Federal Register, "whether insofar as he can determine, the proposed license would tend to create or maintain a situation inconsistent with the antitrust laws." This section empowers the Attorney General to request, and the Commission to furnish or "cause to be furnished, such information as the Attorney General determines to be appropriate or necessary to enable him to give the advice called for by this section." It should be noted that Section 105c has application only to proposed Section 103 commercial licenses. It does not apply to construction permits for either Section 103 or 104 licenses, nor does it reach to Section 104 licenses, a fact which has occasioned some controversy.855

Indeed, Section 105 was one of the most controversial portions of the Atomic Energy Act of 1954. The theory underlying the section is derived from certain other administrative powers and duties delegated by Congress with respect to government ownership, regulation, or disposal of war industries and materials.856 As originally proposed in Congress, this section would have permitted a licensee to purge itself of any violation of the antitrust laws in connection with any atomic energy activity, before the Atomic Energy Commission could take any action with respect to the license.857 The legislation reported out by the Joint Committee on Atomic Energy would have provided "for hearings [before

856 Section 20 of the Surplus Property Act of 1944, reenacted as Section 207 of the Federal Property and Administrative Service Act of 1949, 40 U.S.C.A. §488 (whenever an executive agency begins negotiations for the disposition of plant or property which cost the United States at least $1 million or of patents, processes, and inventions, the Attorney General must advise within 60 days whether "the proposed disposition tend to create or maintain a situation inconsistent with the antitrust laws"); Section 708 of Defense Production Act of 1950, 50 U.S.C.A. App. §2158 (requiring submission of "voluntary agreements and programs" within an industry to the Attorney General and Federal Trade Commission, publication thereof in the Federal Register, and formal approval thereof by the Attorney General before the President can put any such agreement or program into effect); Rubber Producing Facilities Disposal Act of 1953, 50 U.S.C.A. App. §1941a (before submission of proposed disposal of rubber plant to Congress, Rubber Producing Facilities Disposal Commission must obtain, but need not follow, advice of Attorney General with respect to antitrust problems in connection with such disposal). See Austern, "Memorandum of Collateral Antitrust Enforcement," Atomic Energy Workshops, supra note 215 at 165-166; Jacobs and Melchior, supra note 350 at 515-516.
the Federal Trade Commission] and judicial review in case there is any claim by the Attorney General or the Federal Trade Commission that a proposed license of any production or utilization facility would violate the antitrust laws.” A Senate amendment to the bill passed by the House, which was rejected by the conference committee, would have . . . required that the Commission follow the advice of the Attorney General unless the President made a finding that the issuance of such a license was essential to the common defense and security and the finding was published in the Federal Register. This amendment in effect made the advice of the Attorney General a decision binding upon the Commission and the applicant without hearing. . . .

As finally enacted, Section 105 does not require the denial of a license because of a possible antitrust violation as was the case under the 1946 statute. The Commission merely takes “due account” of the Attorney General’s opinion. It would, however, take a foolhardy Commission to disregard the Attorney General’s opinion.

Thus, the atomic energy industry faces the possibility of adverse decisions based upon administrative interpretation and the application of the antitrust laws without an opportunity for administrative hearing or judicial review. However, it is to be hoped that the Commission,

860 10 Code Fed. Regs. §50.42(b); see also §50.54(g); Austern, supra note 339 at 165. Concerning this provision, Attorney General Brownell has stated, 1957 Section 202 Hearings, supra note 7 at 633: “This provision, patterned after earlier surplus of property disposal laws, makes available to the [Atomic Energy] Commission analysis of any special anticompetitive considerations presented. Antitrust advice, however, need not be controlling. For the Commission must also weigh the necessities of defense and security and public health and safety. Nonetheless such a procedure provides an effective means to insure that knowledge of possible antitrust difficulties required to foster competition.”
861 See Adams, supra note 239 at 170. It is possible that, where the Attorney General either gives adverse or favorable advice concerning a Section 103 license application to the Commission, he would not be precluded from proceeding by appropriate antitrust proceedings against the licensee for future violations of these laws or for violations unknown and undisclosed to the government at the time the application was processed. See Attorney General Brownell, 1957 Section 202 Hearings, supra note 7, at 633; Jacobs and Melchior, supra note 350 at 517-518. Probably the Attorney General’s position would not be binding upon a private party seeking treble damages or other relief under the antitrust laws.
862 Under the Humphrey amendment, supra note 359, the Attorney General was both “a judge and jury,” “not an appropriate role for the prosecuting attorney to play” (Sen. Hickenlooper (Rep., Iowa), 100 Cong. Rec. 14344 (Aug. 13, 1954)).
if so requested by an applicant for a license which initially is denied as a result of Section 105, would make the antitrust question an issue at the formal hearing provided by statute and regulation.\footnote{105 \textsuperscript{105}}

Section 105, as enacted by Congress and implemented by Commission regulation, represents a probable deterrent to private participation in the atomic energy field. Section 105a providing that no official action under the Atomic Energy Act shall prevent appropriate action by the Department of Justice and Federal Trade Commission under the antitrust laws merely states existing law for “normal application of antitrust to the civilian atomic industry.” \footnote{105 \textsuperscript{105}} These provisions are unobjectionable, even if unnecessary. The only basic objection to Section 105a lies in the unlimited discretion granted the Atomic Energy Commission in the event a licensee is found by a court to have violated an antitrust act, clearly a matter which should be left exclusively in the jurisdiction of the court,\footnote{105 \textsuperscript{105}} without permitting extrapunitive action by an administrative body.\footnote{105 \textsuperscript{105}}

The language of Section 105b and c, especially with respect to the grounds on which the Attorney General may render an adverse advisory opinion or the Commission may refuse a license, go far beyond ordinary concepts of antitrust law developed heretofore by statutes, the courts, and administrative agencies.\footnote{105 \textsuperscript{105}} A final source of possible administrative overreaching under Section 105 lies in the requirement, under Section 161p of the act, that licensees furnish information and reports, and permit inspections, “as may be necessary to effectuate the purposes

\footnote{105 \textsuperscript{105}} Section 189a, 42 U.S.C.A. §2239(a); 10 Code Fed. Regs. §2.102(a).

\footnote{105 \textsuperscript{105}} Attorney General Brownell, 1957 Section 202 Hearings, \textit{supra} note 7 at 632.

\footnote{105 \textsuperscript{105}} See Atomic Energy Workshops, \textit{supra} note 215 at 61.

\footnote{105 \textsuperscript{105}} “Those who engage in activity in this [atomic energy] field in violation of the antitrust laws should get no better and no worse treatment, be subjected to the same sanctions, imposed by the same administrative and judicial tribunals, and prosecuted by the same enforcement agencies, as are those who engage in any other business subject to the antitrust laws” ("Report of Workshop III," Atomic Energy Workshops, \textit{supra} note 215 at 58).

\footnote{105 \textsuperscript{105}} See “Report of Workshop III,” Atomic Energy Workshops, \textit{supra} note 215 at 58; Austern, \textit{supra} note 357, at 155; Austern, \textit{supra} note 356 at 167-168: “In Section 105c of the Atomic Energy Act, the Attorney General is to decide whether a proposed license would tend to create or maintain ‘a situation inconsistent with the antitrust laws.’ This language does not confine the Attorney General’s interest in the matter to any particular area of the company’s business. On occasion the Attorney General is bound to be influenced by the existence of litigation which he is conducting against a proposed licensee, even if the litigation does not directly involve atomic energy at all. . . .” For a similar criticism of the standards in Section 7(c) of the 1946 Act, see ABA Committee Report, \textit{supra} note 177 at 20.
of the Act, including Section 105 of the Act." This statutory provision, as implemented by regulation, in effect constitutes an unlimited hunting license for the federal government to police the atomic energy industry without any of the traditional safeguards afforded other branches of industry subject to the antitrust laws.

The provisions of Section 105 as enacted have been characterized as "‘passing the buck’ on monopoly prevention” and as locking “the barn after the horse is stolen.” The power given the Atomic Energy Commission under the 1946 act to decide antitrust questions has been supported and justified on the basis of the argument that eight Federal agencies, other than the Federal Trade Commission, have the same authority in the fields regulated by them. What has been termed the “collateral enforcement” of the antitrust laws is, however, subject to serious objection because of diffusion of responsibility and possible inefficient administration.

However, in enacting the Atomic Energy Act of 1954, Congress has avoided adding to the conflicting interpretation and sometimes overlapping jurisdiction in the antitrust field by excluding the Atomic

368 42 U.S.C.A. §2201 (p).
369 10 Code Fed. Regs. §§50.70 (inspections) and 50.71 (records and reports). These requirements present real problems for the licensee who conceivably could withhold no operating information from the Commission, and the Commission apparently is under no affirmative obligation to refrain from publishing what might ordinarily be a business secret. Limited protection for business secrets is afforded by 10 Code Fed. Regs. §2.790, which permits the Commission to “withhold any document or part thereof from public inspection if disclosure of its contents is not required in the public interest and would adversely affect the interest of a person concerned,” subject, of course, to the exercise of Commission discretion. As of March 6, 1957, the Commission had received four requests for the withholding of certain information contained in license applications, two of which were granted. “Requests by License Applicants to Withhold Matters from Public Inspection,” Joint Committee Staff Study, supra note 3, App. 13, at 183-186.

370 H.R. Rep. No. 2181, supra note 5 at 125-126. See Adams, supra note 239 at 178-179: “If monopoly comes to atomic energy, it shall not have been inevitable. . . . It shall have come about because of unwise, man-made, discriminatory, privilege-creating legislation which throttles competition and restricts opportunity. . . .”


374 See Transamerica Corp. v. Board of Governors of Federal Reserve System, 206 F.2d 163 (3d Cir. 1953).
Energy Commission from issuing orders based upon antitrust considerations. There has been substituted the procedure for reports to and from the Attorney General, with the possible withholding of the license by the Commission based upon these reports. Because of the extra-judicial character of the Attorney General's participation in the atomic energy licensing process, this procedure can hardly be regarded as an improvement from the standpoint of the licensee.

More recently, still another extra-judicial forum to consider possible antitrust problems affecting individual licensees has been established. This results from the 1957 amendments by Congress to Section 261a of the Atomic Energy Act. In its review of the bases requested for appropriations by the Commission for financial assistance to private parties under the civilian power reactor programs, the Joint Committee will have the opportunity "to review the antitrust and patent implications of each individual arrangement before it is consummated." 

3. Hearing Procedures

The general licensing provisions of the 1954 statute, as implemented by the Commission's regulations, establish procedures for the granting, denial, or revocation of licenses which substantially comply, both in spirit and in letter, with the requirements of the Federal Administrative Procedure Act. Inasmuch as these hearing procedures in their formal aspects are only now being gradually utilized by the Commission, considerable question remains concerning their application and implementation. The hearing procedures of the Commission have, in fact, undergone considerable statutory and policy change since enactment of the 1954 legislation.

Initially, Section 189a of the statute provided only that "in any proceedings . . . for the granting, suspending, revoking, or amending of any license . . . and in any proceeding for the issuance or modifica-


Remarks of Rep. Holifield outlining scope of review of Joint Committee under Section 261a, 1957 Congressional Review Hearings, supra note 7 at 38: "Antitrust policy and patent policy: Under the Joint Committee bills . . . the basis for each individual arrangement must be submitted to the Joint Committee . . . before becoming effective it provides any financial assistance. Such basis shall include a description of 'the general features of the proposed arrangement or amendment' . . . and it is contemplated that the Joint Committee may therefore be able to review the antitrust and patent implications of each individual arrangement before it is consummated."


42 U.S.C.A. §2239(a).
tion of rules and regulations dealing with the activities of licensees. . . .
the Commission shall grant a hearing upon the request of any person
whose interest may be affected by the proceeding. . . ." Section 181
provides that the "provisions of the Administrative Procedure Act shall
apply to all agency action taken under this act." 380 Licensing under the
Atomic Energy Act clearly constitutes adjudication under the Adminis-
trative Procedure Act. 381 The Commission has taken the praiseworthy
and correct 382 position that a "formal hearing" should be held on applica-
tions for the issuance, amendment, or transfer of a license or con-
struction permit 383 or the modification, suspension, or revocation
thereof.384 However, "informal" proceedings are obviously preferred
by the Commission for the collection of necessary information and for
rule making.385

Prior to 1957, a "formal" proceeding could be initiated under two
circumstances. Before the Commission acted on an application, such a
hearing could be ordered upon the request of the applicant, an inter-
venor, or the Commission itself. Request by the applicant or an inter-
venor for such a hearing also could be made, within thirty days after
notice of Commission action with respect to the license had been
published.386

Further, "in such cases as it deems appropriate," the Commission
could serve notice of proposed action on an application upon the appli-

381 Section 2(d), 5 U.S.C.A. §1001(a).
382 Under Section 5 of the Administrative Procedure Act, 5 U.S.C.A. §1004, formal
adjudication occurs where the applicable statute requires a determination "on the record
after opportunity for an agency hearing." Although Section 189a of the Atomic Energy
Act of 1954 prior to the 1957 amendment did not use the words "on the record," the
context in which the hearing requirement was used and the liberal interpretation to be
accorded the Administrative Procedure Act warranted the Commission's position that
a hearing "on the record" was required where requested under Section 189a. See Wong
908, 70 S. Ct. 564 (1950); Hoover Commission Legal Task Force Report, supra note
43 at 167-170. For a contrary point of view, see Davison, "Requirements of Hearings
in Administrative Adjudication," Joint Committee Staff Study, supra note 3, App. 15
at 195. In the case of the first such request in a licensing proceeding, the Commis-
"on correctly ordered a formal hearing. In the Matter of Power Reactor Develop-
12, 1956). Prior to 1957, it was recommended that the Commission, as a matter of
policy, order a formal hearing in each Section 103 licensing proceeding, "Report of
Workshop III," Atomic Energy Workshops, supra note 215 at 59.
cant and interested parties and publish such notice, and a formal hearing could be held upon request of such applicant or other parties if request therefor was made within fifteen days after service of the notice. Under this procedure, the Commission "uniformly" took its action first, subject to a request for hearing within thirty days.

However, after December 1956, the agency changed its practice and issued notices of intention to grant a license affording fifteen days' time in which to file requests for hearing. In April 1957, the Commission by rule formalized the latter procedure. The Commission's action was taken partly as the result of a Joint Committee Staff Study which set forth in compelling terms the reasons for requiring a formal hearing in every case prior to issuance of a construction permit or license under Sections 103 or 104 of the statute. The proposal had, in fact, been opposed by the Commission. Subsequently, Congress followed the Staff recommendation, and in September 1957, it amended Section 189 to require that the "Commission . . . hold a hearing after thirty days notice and publication once in the Federal Register on each application under Sections 103 or 104b for a license for a facility, and on any application under Section 104c for a license for a testing facility."
This congressional action represents an important step in bringing administrative due process to atomic energy procedures, a development which had been paralleled to a certain extent by Commission procedure developed by regulation and precedent in the Power Reactor Development Company licensing proceeding, the first of its kind held by the agency. The requirement of an opportunity for a hearing before an application for a construction permit or license is issued also resolves the question concerning the suspension of such a permit or license which is once issued but later becomes the subject of a hearing.

The "Memorandum of Opinion of the Commissioners" granting the permit was not published in the Federal Register, an omission which should be corrected in the interests of complete public information in the field of atomic energy (see BNA, Atomic Industry Reporter 227:644a). The Yankee proceeding was the first completed under the new Section 189a procedure.

In its order for hearing dated Oct. 8, 1956, in the PRDC proceeding, the Commission denied the request of intervenors "for an immediate suspension of said construction permit pending the final determination of the matters raised by said petitions . . . without prejudice to ultimate determination by the Commission as to whether the permit should be continued, modified, or vacated" (Para. (4)). The intervenors in that proceeding argued that the "continuance of the construction permit to PRDC . . . would be contrary to the Act and the regulations of the Commission" and that the permit "should be suspended" during the hearing (Reply Brief of Intervenors, supra note 313 at 43). The dilemma in which the AEC had placed itself by issuing a provisional construction permit and then by passing upon the merits of the controversy after a formal hearing thereon is stated by the intervenors in their Post-Hearing Brief, supra note 291 at 36: "If this were . . . a case of initial licensing in which the Commission had not taken a position on the merits at the time of the hearing, there can be no question that it would have been entirely appropriate for AEC not to take a position with respect to the issues. . . . But this is not in fact a case of initial licensing. The Commission had already issued the license when the instant proceeding was instituted, and it has continued that license, in effect, over the strenuous objections of Intervenors. It is utterly unrealistic for the Commission to act as if it had not already rendered a decision on the issues, and to ignore the fact that it was being called on, in effect, to defend or reverse its position." Refusal of the Commission to take a position during the proceeding was claimed to be a denial of a fair hearing. In this connection, the following exchange occurred between AEC Chairman Strauss and Sen. Gore during the 1957 Section 202 Hearings, supra note 7 at 43-44: "Senator Gore. Is not that [the PRDC construction permit] in fact in a state of suspension? . . . Mr. Strauss. There is a hearing in progress, Senator. . . . [C]onstruction is going ahead with no suspension or delay as far as the Commission is aware. Senator Gore. You have given a construction permit? Mr. Strauss. That is right. It is not in suspension in any way." Under the Federal Communications Act of 1952, 47 U.S.C.A. §309(c), a construction permit automatically is suspended for the duration of a hearing initiated by a protest. See Joint Committee Staff Study, supra note 3 at 21.
Subject, of course, to actual observance by the Commission of the Atomic Energy Act of 1954 and the Administrative Procedure Act in spirit as well as letter, the agency appears to have provided very adequately by its rules for administrative due process on such matters as service of papers, representation, intervention, consolidation of related proceedings, and notice of hearing. The burden of proof in any proceeding has been placed properly upon the applicant for a construction permit or license; which must affirmatively "demonstrate at the hearing that it is able to satisfy those requirements of law and the Commission's regulations which are in controversy."

897 10 Code Fed. Regs. §2.704. In formal hearings, involving as they do the practice of law, only attorneys at law will be permitted to represent others, 10 Code Fed. Regs. §2.704(b); see Plaine, supra note 77 at 808-809.
898 10 Code Fed. Regs. §§2.705-706; see Plaine, supra note 77 at 809. The PRDC proceeding, AEC Dkt. No. F-16, raises an interesting question with regard to the right of intervention. The three unions petitioning to intervene therein largely based their right to do so on their representation of union members whose health and safety allegedly would be adversely affected if the application were granted; see Post-Hearing Brief of Intervenors, supra note 291 at 1-2. The standing to intervene was questioned but not actually controverted by the applicant, and the Commission held that "[p]rima facie these allegations provide a basis for the granting of leave to intervene in the proceedings before the Commission" ("Memorandum of the Commission" I (Mimeo Oct. 8, 1956); see BNA, Atomic Industry Reporter 52: 41). The applicant, in a subsequent filing with the Commission, asked to have one of the issues, i.e., the issue of financial qualification, eliminated on the grounds, inter alia, that the intervening unions had no interest in the matter of financial qualification. On Mar. 4, 1957, the State of Michigan filed a petition, and was permitted, to intervene in the PRDC proceedings, to participate therein "as its interests may arise" (BNA, Atomic Industry Reporter 3: 77).
400 10 Code Fed. Regs. §2.735. This regulation provides for the specification of issues by the AEC in its order for hearing, to which specification in the PRDC proceeding intervenors strongly objected. Charging that the Commission had been "capricious" in its limitation of issues in the order dated Oct. 8, 1956, counsel for the intervenors charged before the Joint Committee that "we [the intervenors] had to consider it [participation in the hearing] on their [the AEC's] terms and only on their terms," without regard to "the question of whether the AEC itself had violated the law" (1957 Section 202 Hearings, supra note 7 at 467, 476-477). It was the position of the intervenors that, by its limitation of the issues of the proceeding "so as to preclude proof of illegal conduct on the part of the Commission in the issuance of a conditional construction permit to PRDC," the AEC had denied them a fair hearing (Post-Hearing Brief of Intervenors, supra note 291 at 19); see Reply Memorandum for Applicant, supra note 291 at 4.
a. Hearing Officers

In formal licensing proceedings, Atomic Energy Commission rules 402 require that the hearing officer be either a member of the Commission, an officer or board to whom has been delegated final authority of the agency to act, or a hearing examiner appointed under Section 11 of the Administrative Procedure Act. 403 The appointment of Section 11 hearing examiners in the first formal proceedings under the Atomic Energy Act of 1954 404 indicates the Commission will use such examiners to the greatest extent possible. The powers of a presiding officer 405 are essentially those provided for under the Administrative Procedure Act. 406 The use of prehearing conferences 407 and deposition procedure 408 also is emphasized. Time-consuming interlocutory appeals to the Commission from rulings of presiding officers are prohibited “except in extraordinary circumstances.” 409

Ordinarily, a presiding officer issues an intermediate decision which becomes final unless it is excepted to by the parties to the proceeding or

402 10 Code Fed. Regs. §2.732. This conforms to Section 7(a) of the Administrative Procedure Act, 5 U.S.C.A. §1006(a).
406 Section 7(b), 5 U.S.C.A. §1006(b).
407 10 Code Fed. Regs. §2.740; such a conference was held in the PRDC proceeding.
409 10 Code Fed. Regs. §2.748. This regulation provides that the hearing officer shall not permit interlocutory appeals to the Commission during a proceeding “except in extraordinary circumstances where in the judgment of the presiding officer prompt decision by the Commission is necessary to prevent detriment to the public interest or unusual delay or expense.” In the PRDC proceeding, AEC Dkt. No. F-16, the hearing examiner refused to permit an interlocutory appeal from his order overruling objections to the use of written narrative testimony by PRDC witnesses. This decision was affirmed by the Commission Feb. 27, 1957, on the grounds that “... to allow the requested appeal would simply mean allowing one of the parties to circumvent a sound rule aimed at expediting the course of hearings, and would encourage continuing interruptions of this hearing by recurring appeals to the Commission” (BNA, Atomic Industry Reporter 3:78).
unless it is ordered by the Commission to be certified to it.\textsuperscript{410} Prior to December 1957, in neither its regulations nor its practice had the Commission permitted a hearing officer to issue an initial decision, which would become final unless appealed.\textsuperscript{411} Such decisions, if permitted, would have afforded the agency the benefit of the views of the officer who heard the testimony.\textsuperscript{412} However, the Commission in orders issued in December 1957, instructed its hearing examiner to render initial decisions in two proceedings, a development which, it is hoped, may establish a new policy for the Commission in the future.\textsuperscript{413}

Hearing examiner orders, in cases where permitted by the Commission, and final orders of the agency itself are required to contain findings of fact and conclusions of law.\textsuperscript{414} Provision also is made in the AEC regulations for briefs and oral argument before the Commission \textsuperscript{415} and for petitions for reconsideration of a final order of the agency.\textsuperscript{416}

\textsuperscript{410} 10 Code Fed. Regs. §§2.751-752.


\textsuperscript{412} If hearing examiners are to perform the quasi-judicial role intended for them by Congress, then agencies should permit them to tender initial decisions in every case, unless the parties stipulate otherwise; Hoover Commission Legal Task Force Report, \textit{supra} note 43 at 203-206. See Joint Committee Staff Study, \textit{supra} note 3 at 39, n. 7: "The Commission's reluctance to permit the hearing examiner to make an initial decision [in the PRDC proceeding] is understandable, since he had no previous background in atomic energy matters, but it points up the need for qualified hearing examiners who are conversant with the Atomic Energy Act, AEC regulations and atomic energy technology." In questioning witnesses before the Joint Committee, Rep. Holifield claimed that the hearing examiner in the PRDC proceeding was a "special examiner appointed by the AEC" (1957 Section 202 Hearings, \textit{supra} note 7 at 441 and 467-468). For a criticism of the AEC's refusal to permit a decision at the examiner level, see id. at 478.

\textsuperscript{413} National Advisory Committee for Aeronautics, AEC Dkt. No. 50-30, 22 Fed. Reg. 9895 (Dec. 11, 1957), BNA, Atomic Industry Reporter 3:422; General Electric Co., AEC Dkt. No. 50-70, 22 Fed. Reg. 10126 (Dec. 18, 1957). On February 26, 1958, the hearing examiner gave his decision that the order for a construction permit be granted as of March 25, 1958, unless exceptions were filed to his decision or the Commission took the matter under advisement. On March 3, 1958 the applicant moved that the construction permit be granted immediately, to which motion the Commission staff consented, and the Commission ordered the construction permit issued on March 7, 1958. See BNA, Atomic Industry Reporter 4:95-96.

\textsuperscript{414} 10 Code Fed. Regs. §§2.749, 2.750, and 2.754.

\textsuperscript{415} 10 Code Fed. Regs. §2.753. This rule does not contemplate oral argument before an intermediate decision provided under 10 Code Fed. Regs. §2.751. However, in the PRDC proceeding, the Commission announced that it would have oral argument before
b. Evidence

By both rule and practice, the Commission has shown a realistic but fair attitude towards the submission of evidence in formal proceedings before that agency. In accordance with the Administrative Procedure Act, the AEC regulations provide for the submission of "such oral or documentary evidence . . . as may be required for a full and true disclosure of the facts," with an admonition to the hearing officer to "exclude all irrelevant, immaterial or unduly repetitious evidence." The regulations also encourage the submission of evidence in written form. This practice has been used extensively, and it is believed wisely, in the Power Reactor Development Company proceedings.

the agency itself issued an intermediate decision; BNA, Atomic Industry Reporter 4:22. Oral argument was held before Commissioners Floberg, Graham, and Vance on May 29, 1958, at which Commissioner Floberg stated that consideration had been given to remanding the case to the hearing examiner for an intermediate decision but that the Commission had decided itself to issue such a decision, to which the parties would have an opportunity to file exceptions and comments before a final decision was rendered; see BNA, Atomic Industry Reporter 4:179.


Section 7(c), 5 U.S.C.A. §1006(c), which provides, in part: "Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence. . . . Every party shall have the right to present his case or defense by oral or documentary evidence . . . as may be required for a full and true disclosure of the facts. . . ."

10 Code Fed. Regs. §2.747(a); see Plaine, supra note 77 at 816.

10 Code Fed. Regs. §2.747(b). In the PRDC proceeding the applicant charged that, as the result of cross-examination by the intervenors, "the proportion of the testimony included in the transcript which is totally irrelevant to any issue presented is extraordinarily high" (Brief for Applicant, supra note 314 at 5, n. 7).


At a pre-hearing conference in the proceeding, AEC Dkt. No. F-16, on Nov. 29, 1956, the hearing examiner permitted the applicant to prepare the "substantial part" of its case in the form of sworn statements by witnesses, subject to objection by the intervenors and cross-examination of the witnesses concerned; BNA, Atomic Industry Reporter 2:387. On Jan. 8, 1957, the applicant presented and rested its case with the introduction of so-called "canned testimony" by six witnesses, whereupon the hearing was adjourned to Jan. 28, 1957, for objection to the testimony by the other parties concerned; id. at 3:11. After oral argument, the examiner on Jan. 29, 1957, overruled all but 5 of 62 objections to the PRDC evidence. The principal attack by intervenors on the evidence was that (1) under 10 Code Fed. Regs. §2.740(b), providing for pre-trial orders, the consent of intervenors was required to the entry of the examiner's pre-trial order with respect to written evidence and (2) counsel was denied the right to observe the demeanor of the witnesses. The intervenors filed an interlocutory appeal from the examiner's ruling (id. at 3:45) which was denied by the Commission Feb. 27, 1957 (id. at 3:78). The issue was extensively argued by the parties in their briefs, the intervenors taking the position that a fair hearing had been
It is a matter of common practice in the older established agencies like the Federal Communications Commission 422 and Federal Power Commission. 423

c. Public Records

An important problem that arises in connection with licensing by any agency is the manner in which the agency implements Section 3(c) of the Administrative Procedure Act which provides:

Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found. 424

Aside from problems which arise under the Atomic Energy Commission's access permit program, 425 that organization is one of the few executive agencies and departments which has spelled out by regulation the meaning of the term "public records." 426

denied them; Post-Hearing Brief of Intervenors, supra note 291 at 6-7 and 37-41; Reply Memorandum for Applicant, supra note 291 at 2-4. In connection with the National Advisory Committee for Aeronautics proceeding, AEC Dkt. No. 50-30, the presiding examiner requested parties thereto to distribute written copies of testimony to each other prior to the hearing; BNA, Atomic Industry Reporter 4:13. The use of sworn memoranda in proceedings, particularly where uncontested, was approved by the Joint Committee Staff Study, supra note 3 at 21-22, 24. The AEC has indicated that proposed written testimony by Commission witnesses will be submitted in advance of hearing to an applicant for a license where the application is not contested and the Advisory Committee on Reactor Safety report is generally favorable, whereby "the applicant and other parties will be in a position to cross-examine promptly, if they desire to do so." (Statement of Robert Lowenstein, Office of General Counsel, AEC, to Atomic Industrial Forum (mimeo, 1958)).


423 E.g., In the Matter of Charges for and in Connection with Marine Telegraph Services, FCC Dkt. Nos. 9915 and 9822 (1951). In particular, see testimony introduced by South Porto Rico Sugar Company, operator of a small coastal radio station which was saved considerable expense by the use of "canned testimony." Indeed, without such a device, such small companies would find participation in rate and other proceedings almost prohibitively high in cost. Further, the device speeds the proceeding, a result which the intervenors in the PRDC case recognized but probably did not favor.

424 5 U.S.C.A. §1002(c). See Hoover Commission Legal Task Force Report, supra note 43 at 155: "A weakness of the Administrative Procedure Act is that it contains no definition of matters of official record. The majority of agencies have not defined this term. Even where a definition has been provided, it has usually been too restrictive. . . ."

425 See text, supra at note 289.

426 10 Code Fed. Regs. Pt. 9, adopted Dec. 8, 1956. For the more important provisions of these regulations, see Joint Committee Staff Study, supra note 3, App. 3C, at 90-91; BNA, Atomic Industry Reporter 2:355.
Adopted to meet the needs of the AEC's first adjudicatory proceeding, the rules are not without their shortcomings, a fact which Congress has sought to remedy by amendment of the Atomic Energy Act of 1954. The practice of the Commission prior to the PRDC licensing proceeding was to withhold from the public the report of the agency's Advisory Committee on Reactor Safeguards (ACRS). A qualified report by the ACRS with respect to the PRDC reactor was leaked through Congressional sources, whereupon the Commission in October 1956, published the Committee report together with the AEC's order setting the PRDC case for hearing. The Commission made clear that this action was not to be considered a precedent, but modified its previous procedure in licensing cases to the extent that a summary of the ACRS report was contained in the memorandum accompanying the Commission issuance of a construction permit or license.

This action did not, however, completely answer doubts raised as to the wisdom of the Commission's policy of withholding ACRS reports, particularly in view of the indemnity program then being considered by the 85th Congress. The result was that, in enacting legislation to provide for a federal indemnity for atomic accidents and a limitation on the liability of persons participating in the atomic energy program, Congress gave the ACRS legislative status. This legislation also required that all applications for construction permits and licenses under Sections 103 and 104 be reviewed by ACRS, and that the report be "made part of the record of the application and available to the public, except to the extent that security classification prevents disclosure."

427 Joint Committee Staff Study, supra note 3 at 29; see AEC, Twenty-third Semi-Annual Report 320 (1958).
428 Joint Committee Staff Study, supra note 3, App. 8 at 133.
429 See Para. (6), "Notice of Hearing," 21 Fed. Reg. 7809 (Oct. 12, 1956), BNA, Atomic Industry Reporter 52:39; and Para. 9, "Memorandum of the Commission" Oct. 9, 1956, ibid., which stated in part: "This action is being taken because a copy of the Advisory Committee's report was sent to the Power Reactor Development Co. on June 18, 1956. . . . The Commission has concluded that the public interest would be served in this instance by making the document available to the interveners and the public."
430 Letter of AEC General Manager Fields to Joint Committee Executive Director, Oct. 17, 1956, Joint Committee Staff Study, supra note 3, App. 9 at 136.
433 Section 29, 42 U.S.C.A. §2230.
434 Section 182b, 42 U.S.C.A. §2232(b). The requirement for publicity of ACRS reports was closely tied in with that of Section 189a, as amended, requiring a formal...
The Atomic Energy Act of 1954 authorizes the Commission to provide by regulation

... in the case of agency proceedings or actions which involve Restricted Data or defense information ... for such parallel procedures as will effectively safeguard and prevent disclosure of Restricted Data or defense information to unauthorized persons with minimum impairment of the procedural rights which would be available if Restricted Data or defense information were not involved.\(^{485}\)

This provision constitutes a landmark in administrative law and a praiseworthy attempt to accommodate the national need for information security with administrative due process and fairness to persons participating in the atomic energy program.\(^{486}\)

The Commission delayed in implementing the statutory provision for

hearing in all Section 103, 104b, and 104c proceedings. See H.R. Rep. No. 435, supra note 223 at 12: "Having established the Committee [ACRS] under the bill, it was thought that its functions would be best served if its reports should be made public, and if the facilities of the type on which its report were required should be licensed only after a public hearing. ... [F]ull, free, and frank discussion in public of the hazards involved in any particular reactor would seem to be the most certain way of assuring that the reactors will indeed be safe and that the public will be fully apprised of this fact." The policy of ACRS, according to its chairman, is to avoid "concerning itself with problems of national policy other than the question of safety. The Committee believes that it is possible to conduct the operation of nuclear reactors without unnecessarily exposing the public or workers to harmful amounts of radiation" (1958 Section 202 Hearings, supra note 32 at 118). The emphasis by members of the Joint Committee on the role of ACRS is on its freedom of action "to exercise your judgment fully without restriction in this field" (id. at 117). With respect to the ACRS, an official of the AEC has recently emphasized that the group is an advisory group only and "not an 'independent agency,'" with the ultimate responsibility for the issuance or non-issuance of a license resting with the Commission; meetings of the ACRS probably will not be open, although representatives of the applicant may be asked to answer questions of ACRS after preliminary study of the application by the latter; in cases where the ACRS report is favorable, "the hearing is not likely to be protracted" before a hearing examiner (Lowenstein, supra note 421).

\(^{485}\) Section 181, 42 U.S.C.A. §2231.

\(^{486}\) As originally proposed, Section 181 required the AEC to "provide by regulation for identical procedures except that they shall not be made public." The language of the section as enacted was proposed by Sen. Hickenlooper (Rep., Iowa), with the following comment (Joint Committee Staff Study, supra note 3 at 68-69): "... [T]he change in section 181 relating to the Administration Procedure Act is to provide the Commission with a little more flexibility in dealing with procedures than was provided in this section in the bill. ... [T]he procedures are such as to protect against the wrongful dissemination of restricted data and defense information while at the same time preserving as many of the normal procedures as possible. ..."
such "parallel procedures." Apparently as the result of some prodding by the Joint Committee on Atomic Energy and "a need in pending proceedings" for such rules, the Commission finally in late 1956 provided for "parallel procedures" for Restricted Data.\textsuperscript{437}

As the Commission stated in its notice of rule making:

Discharge of this responsibility [under Section 181 of the Act] requires the framing of novel procedures; and a delicate balancing of the need to provide adequate protection for Restricted Data in relation to the importance of providing access for parties and the public to the records of administrative proceedings before the Commission and information relating thereto.\textsuperscript{438}

An important step in the implementation of the statutory provision was taken in placing these rules in effect.

The principal features of the new "parallel procedures" are (1) the obligation of parties to a proceeding to avoid introduction of Restricted Data,\textsuperscript{439} (2) the requirement of a notice of intent to introduce Restricted Data,\textsuperscript{440} and (3) the authority of the presiding officer to rearrange or suspend the proceeding pending the satisfaction of security requirements by interested parties and counsel.\textsuperscript{441} Effective implementation of these rules will depend, in large part, upon the whole-hearted cooperation of parties, their counsel, the hearing officer, and the Commission, a pattern which has been established in other types of administrative proceedings before federal agencies where the schedule of hearings, admission of evidence, and the examination of witnesses often is adjusted to suit the convenience and needs of the parties by mutual consent.\textsuperscript{442} The present rules are not without possible defect, and im-

\textsuperscript{438} 21 Fed. Reg. 8594 (Nov. 8, 1956).
\textsuperscript{439} 10 Code Fed. Regs. §2.806.
\textsuperscript{440} 10 Code Fed. Regs. §§2.807-808.
\textsuperscript{441} 10 Code Fed. Regs. §2.809.
\textsuperscript{442} See Section 5(a) of the Administrative Procedure Act, 5 U.S.C.A. §1004(a) which provides, \textit{inter alia}: "In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives." In the PRDC proceedings, AEC Dkt. No. F-16, the agency has had a "classification officer" available at the hearing to advise the hearing examiner on questions of security information; BNA, Atomic Industry Reporter 3: 87 and 3: 102.
provements in the procedure certainly should result from experience
gained by the Commission and private parties thereunder.448

4. Revocation, Suspension, and Modification of Licenses and
Construction Permits

Revocation of a license is specifically subject 444 to the safeguards of
Section 9(b) of the Administrative Procedure Act.445 This requirement
is implemented by Atomic Energy Commission regulation providing for
opportunity for a formal hearing.446 However, unlike applications for a
construction permit or license under Sections 103 and 104 of the statute,
the suspension, revocation, or modification of a license requires only
that the agency provide opportunity for hearing.

As under the Administrative Procedure Act, a license or construction
permit may be suspended or revoked,447 or an order to show cause im-
mediately issued,448 where “in the opinion of AEC the public health,
interest, or safety requires, or the failure to be in compliance [with the
Act, regulations issued thereunder, or license conditions] is wilful.”
Aside from failure to comply with the act, regulations issued thereunder,
or license conditions, other grounds for immediate or future suspension
or revocation of a license include a “material false statement” in an

324-25 (1957): (1) “The ... rules seem to contemplate the interruption of public
hearings whenever restricted data may be requested from a witness. ... This might
be completely disruptive, and, indeed, it might even be used for that purpose. An
alternative procedure would postpone the introduction of restricted data until some
convenient occasion later in the hearing. ...” (2) Provision of §2.805(d) for inter-
locutory appeals from rulings of a hearing examiner concerning safeguarding of re-
stricted data “would seem to open the door to innumerable interlocutory appeals which
could delay and disrupt the proceeding. ... [T]he presiding officer should be left
in control of the proceedings with authority to certify questions relating to access to
restricted data if in his judgment it should seem desirable to do so. ...” (3) “No
provision is made in the ... rules relative to court review of Commission decisions
involving classified information. ... It would seem desirable to take notice of the
possibility of review in cases involving classified information. Provision could be
made, for example, for certifying the non-classified record which could be amplified
to contain non-classified statements concerning the general nature and content of the
classified information. ... The classified record could thereafter be made available
upon court order to the court itself for the purpose of determining its relevance and
importance to an adequate court review. ...”

444 Section 186a, 42 U.S.C.A. §2236(a).
447 10 Code Fed. Regs. §§2.201(b), 70.61(d), 40.25, 30.51(c), 50.100, and 55.40(a)
and (b).
application or report,\textsuperscript{449} conviction of the licensee for violation of the antitrust laws "in the conduct of the licensed activity," \textsuperscript{450} and, in the case of an operator's license, for personal behavior on the job deemed by the Commission to create a hazard in the operation of a facility.\textsuperscript{451}

In connection with the requirements of compliance with license conditions, failure to maintain the records, submit the reports, and permit the tests and inspections imposed by the statute and regulations,\textsuperscript{452} as required by the license, would constitute grounds for immediate or proposed suspension or revocation of a license. When a license for a commercial or non-commercial production or utilization facility is revoked or suspended, the facility can be seized and operated by the government upon payment of "just compensation." \textsuperscript{453}

Prior to 1958, the Commission suspended only one license, and this without hearing because of the danger to public health and safety. By order dated May 2, 1957, a byproduct material license was temporarily suspended because of "certain incidents . . . resulting in the contamination of major portions of the facility from by-product material," the contamination of clothing or employees, and "a potential hazard to the health and safety of employees of the Company and members of their families." \textsuperscript{454}

This AEC action represents a wise exercise of the extensive discretionary power which is conferred upon the agency with respect to licenses once they have been issued.\textsuperscript{455} However, in general, there is some reason

\textsuperscript{449} Section 186a, 42 U.S.C.A. §2236(a); 10 Code Fed. Regs. §§70.61(b), 40.24, 40.40, 30.51(b), 50.100, and 55.40(a) and (b).

\textsuperscript{450} Section 105a, 42 U.S.C.A. §2135(a); 10 Code Fed. Regs. §50.54(g).

\textsuperscript{451} 10 Code Fed. Regs. §55.40(c).

\textsuperscript{452} Sections 65 and 103b, 42 U.S.C.A. §§2095 and 2133(b); 10 Code Fed. Regs. §§70.32(b)(5), 70.51-54, 40.24, 40.29-30, 30.41-44, 110.10-11, 50.34-35, 50.70-71, and 55.41.


\textsuperscript{455} By order dated Feb. 12, 1958, the Commission temporarily suspended without hearing Byproduct Material License No. 42-9000-2 of Radiation Products Company and issued an order for the licensee to show cause why the license should not be sus-
for apprehension over the Commission's wide authority to revoke licenses. This is particularly important because the agency's regulations themselves "do not impose self-restraints upon the exercise of that authority." 456

5. Internal Separation of Functions

Under Section 5(c) of the Administrative Procedure Act, except in cases, among others, of initial licensing, a separation of functions is required in formal adjudication with respect to hearing officers and investigatory and prosecuting officers.457 A hearing officer may not be subject to the direction or jurisdiction of an investigatory or prosecuting officer, nor may such latter type of officer participate or advise in the decision of a case which he has investigated or prosecuted. The principles involved in this salutary provision of the Administrative Procedure Act have been thus summarized:

By internal separation of powers is meant an arrangement within an agency designed to prevent the contamination of judging by other inconsistent functions. The basic objective is to maintain the integrity of, and public confidence in, case adjudication affecting private rights. The agency employee who investigates should play no further role in such proceedings than that of witness. The legal staff members who present

456 Trowbridge. supra note 146 at 859.
457 5 U.S.C.A §1004(c); see Plaine, supra note 77 at 813-14.
evidence on behalf of the agency should not participate in the ultimate decision of the case. The officer who presides at the hearing can exercise his independent judgment on the evidence only if he is insulated against agency and staff influence. The agency members should exercise their judgment on the written record without consultation with those who investigated, prosecuted and heard the case below. These are the fundamental objectives of internal separation of functions vital to the protection of private rights.458

Problems of internal separation have been presented to the Atomic Energy Commission in its first formal licensing proceeding, that involving PRDC.459 One of these related to the role of agency counsel in the proceeding, since the PRDC conditional construction permit had been issued with the active support and encouragement of the Commission itself. The PRDC proceeding involved initial licensing, and the separation of functions ordinarily required by the Administrative Procedure Act was not applicable.460 The Commission complied, to a limited extent, with the spirit of the latter statute by creating a separated legal staff for AEC participation at the hearing level.461 The Commission did not, however, permit the hearing examiner to issue an intermediate or

458 Hoover Commission Legal Task Force Report, supra note 43 at 176-177.
459 Power Reactor Development Company, AEC Dkt. F-16. As the result of the criticism of the Commission's role in this proceeding, the Chairman of the Joint Committee directed its staff to study the problem of insuring "sharper separation of the licensing function within the AEC organization" and invited comments thereon from the AEC itself, Joint Committee Staff Study, supra note 3 at v and 1. See also BNA, Atomic Industry Reporter 2: 413.
460 Section 5(c), 5 U.S.C.A. §1004(c).
461 The separated staff was represented by the Acting General Counsel and two other attorneys of the AEC. Briefs filed by these attorneys stated that they were "submitted by the separated staff established for the purpose of representing AEC as a party to this proceeding" and reflected "only the views of the separated staff" and not those of the Commission itself. See AEC Response to Questionnaire, supra note 77 at 1095; AEC General Manager Fields' letter to Joint Committee Chairman Anderson, Dec. 12, 1956, Joint Committee Staff Study, supra note 3, App. 11B at 178-179, which read, in part: "... [T]he Commission has established a separated staff for the preparation and conduct of the proceeding on behalf of the AEC. ... In the preparation and conduct of the proceeding, the separated staff will not be subject to supervision by persons not on the separated staff. This staff will not participate in advising the Commission with respect to its decision. ... To assure the impartiality of these AEC staff members in advising the Commission, the Commission has directed that such staff members may not discuss with members of the separated staff questions relating to the position to be taken by the separated staff at the proceeding. ... The separated staff will attempt in the public interest to insure that all relevant facts not brought out by the other parties are fully developed at the hearing. ..."
initial decision in the case, thus reserving unto itself all of the judging function.462

The PRDC proceeding brought to public attention an equally important problem with respect to the application of separation of functions to the Atomic Energy Commission itself.463 Prior to December 1957, the Division of Civilian Application of the AEC exercised regulatory functions with respect to licensing and non-regulatory functions with respect to the stimulation of reactor development by private industry.464 That the promotional efforts of the Commission might conflict

462 Joint Committee Staff Study, supra note 3 at 39: "The separation of the 'judging' function in the PRDC case was of a limited nature, however, and only applied to staff advisers, because the Commission did not delegate to the hearing examiner any power to make an initial decision, but retained all 'judging' authority and responsibility itself." The Commission recognizes the importance of maintaining the independence of hearing examiners assigned to it. (1958 Section 202 Hearings, supra note 32 at 87 and 89); see statement by Commissioner Floberg to the Joint Committee, id. at 89-90: "One of the things I am particularly sensitive to is the complete independence of the trial examiners. As long as I have anything to do with this Commission, our trial examiners will be the most independent of any agency in Washington"; see note 404, supra.

463 A less spectacular, but no less important, problem raised by the PRDC proceedings concerned the role to be played by AEC employees and consultants as expert witnesses during the course of the hearing. Since many such persons had played an important part in developing the PRDC project, the evidence of these witnesses was pertinent and important to the making of a complete factual record. During the proceedings, charges were made by the intervenors to the Joint Committee that the AEC had sought to draw "a curtain between nuclear experts [of the AEC] and critics of the Commission" (statement of B. C. Sigal, IUE, AFL-CIO, General Counsel, 1957 Section 202 Hearings, supra note 7 at 470). This situation was claimed to have arisen because of instructions issued to AEC staff members by the Director, Division of Civilian Application, generally cautioning against participation in such proceedings as witnesses unless ordered to appear by subpoena (id. at 471-475). In the Post-Hearing Brief of Intervenors, it was argued that the "Commission denied Intervenors a fair hearing in warning consultants of the Commission that they may be subject to criminal prosecution under conflict of interest laws if they have testified for the parties in this case, other than AEC" (supra note 291 at 22-25). See AEC Response to Questionnaire, supra note 77 at 1096: "... [T]here has been direction to AEC personnel concerning their participation on behalf of parties other than the AEC in proceedings before the agency. AEC employees are directed to provide information and services to parties to a proceeding on the same basis as they would follow with regard to other persons, but are prohibited from consulting on their own time or voluntarily serving as witnesses for any party. AEC employees were for the purposes of the PRDC matter permitted to appear on subpoena by any party to a proceeding. In the matter of PRDC the General Manager did testify upon subpoena by the intervenors."

with its responsibilities in adjudicating applications for construction permits and commercial licenses always was inherent in that agency's organization so long as promotional and adjudicatory functions were grouped at the staff level in one division.\footnote{468}

The most drastic proposal for reorganization of the Commission contemplated the creation of two entirely separate statutory agencies, the one concerned with regulation of private industry and the other with military matters and the promotion and development of atomic energy technology.\footnote{468} The Commission, to date, has opposed this step.\footnote{467} A middle course proposed by the staff of the Joint Committee on Atomic Energy, which would create separate regulatory and promotional divisions within the Commission,\footnote{468} was, in fact, adopted by the Commission in December 1957.\footnote{469} Under this reorganization, a Division of Licensing and Regulation, reporting to the General Manager,\footnote{470} handles all licensing and regulatory functions theretofore assigned to the Divi-

\footnote{466} The intervenors in the PRDC proceeding sought to take advantage of claimed conflicts of interest within the AEC between that agency's promotional responsibilities and those relating to licensing. They moved that the AEC Chairman disqualify himself from considering the case when it reached the Commission because of two public statements made by him concerning the PRDC project. These statements, the intervenors argued, revealed "bias and prejudice in favor of PRDC" (Post-Hearing Brief of Interveners, \textit{supra} note 291 at 25-28. In its Brief, \textit{supra} note 314 at 8, the applicant argued that the position of intervenors "if sustained, would frustrate the administration of the Atomic Energy Act of 1954. It would mean that if, as here, the Chairman or a member of the Commission fulfills his executive obligations to expound congressional and Commission policy and to make recommendations to Congress regarding its effectuation, he \textit{ipso facto} disqualifies himself from performing the adjudicatory duties that the law places upon him."

\footnote{468} Joint Committee Staff Study, \textit{supra} note 3 at 44: "The separated agency would regulate the private atomic energy industry, while the AEC would continue to be responsible for the main operating program, including procurement of raw materials, production of special nuclear materials, manufacture of weapons, and the research and development program. . . . This separation could be achieved by reducing the present number of AEC Commissioners from 5 to 3, and by creating a second commission of 3 members to regulate the atomic industry. . . ."

\footnote{467} AEC Chairman Strauss' letter to Joint Committee Chairman Anderson, Jan. 4, 1957, \textit{id.}, App. 5 at 109; see 46-47.

\footnote{469} Plans for the reorganization were announced by the AEC at the time it published Part 1 of its regulations dealing with the offices and divisions of the Commission; 22 Fed. Reg. 9972 (Dec. 12, 1957). However, these regulations still provided for a Division of Civilian Application, 10 Code Fed. Regs. §1.113. On Dec. 26, 1957, the Commission announced that the Division of Civilian Application had been replaced by the Division of Licensing and Regulation and the Office of Industrial Development; BNA, Atomic Industry Reporter 4: 3.

\footnote{470} Section 24a, 42 U.S.C.A. §2034(a); 10 Code Fed. Regs. §1.107.
sion of Civilian Application. An Office of Industrial Development, reporting to the Assistant General Manager for Research and Industrial Development, was assigned the responsibility for developing over-all Commission policy to encourage and assist private activities in the civilian application of atomic energy.

The greater the internal separation of functions achieved by the agency itself within the spirit and the letter of the Administrative Procedure Act, the less need, and the less pressure, for legislative action creating a separation at the level of the agency or the divisions thereof. In view of the special problems which affect the Atomic Energy Commission and the industry regulated thereby, greater adherence by the AEC to the areas of internal separation marked out by the Congress in the 1946 procedure statute would go far to meet the criticisms leveled at the agency. Should these procedures fail to provide that degree of insulation of the judging from the prosecuting, investigating, and developmental functions which will assure administrative due process and encourage public and Congressional confidence in the atomic energy program, then more drastic action by the legislature may well be favorably considered. Such drastic action, of course, will be invited by the Commission if it fails to meet the standards set by the spirit as well as the letter of the Administrative Procedure Act.

6. Congressional Review of Licensing

Although the Joint Committee on Atomic Energy was given the authority under the Atomic Energy Act of 1946 to sit as a reviewing body in the case of facilities' licenses proposed to be issued by the

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472 Section 24c, 42 U.S.C.A. §2034(c); 10 Code Fed. Regs. §1.110.
473 Joint Committee Staff Study, supra note 3, at 42-43; see id. at 47: "At this stage of the atomic-development program, the arguments against a separate agency are perhaps more persuasive than they will be at a later stage when commercial production of atomic power is achieved and the Government's developmental and promotional assignments are a less prominent part of the Government's overall role [in] atomic-power development. . . . As a longer range view is taken of atomic energy development, however, the strength of the arguments against a separate agency diminish, and tend at some point to be outweighed by the arguments favoring separation. . . ."

474 Such was the case when Congress in 1947 conferred final authority on the General Counsel of the National Labor Relations Board with respect to investigation of unfair labor practices, issuance of complaints thereon, and prosecution of such complaints before the Board, 29 U.S.C.A. §153(d), while the Board continued to exercise the adjudicatory authority of the agency, 29 U.S.C.A. §160.
Atomic Energy Commission, this authority never was exercised. As originally enacted, the Atomic Energy Act of 1954 did not provide for such review, but, by amendment to the appropriations provisions of the statute in 1957, this review has been provided for indirectly.

It is reported that the Chairman of the Joint Committee refused in January 1957 to have a hearing devoted exclusively to the then pending construction permit for Power Reactor Development Co. However, in the hearings which the Committee held thereafter with respect to the development, growth, and state of the atomic energy industry and to authorizing legislation for the AEC budget for fiscal year 1958, the issues involved in the PRDC proceeding were a major source of discussion and controversy. Although the procedure whereby AEC funds were authorized and then appropriated had been the subject of prior adverse comment by some members of Congress, it is clear that the controversy resulting from the proposed construction permit for PRDC brought the matter to a head. The result was a drastic change in the authorizing procedure which may well result in Joint Committee review of all construction permit and licensing proceedings involving in any way financial help from the federal government.

476 By letter dated Jan. 16, 1957, Rep. Ashley (Dem., Ohio) requested Joint Committee Chairman Durham "to make it [the PRDC project] a proper subject of hearings by the Joint Committee on Atomic Energy." The Chairman responded that the question was "not appropriate" for a separate hearing. BNA, Atomic Industry Reporter 3: 46-47.

477 See, e.g., exchange between between Rep. Holifield and counsel for some of the intervenors, 1957 Section 202 Hearings, supra note 7 at 479: "Representative Holifield. So your contention essentially is this; That . . . you are now asking this committee to exercise its jurisdiction and go into this matter [the PRDC proceeding] thoroughly? Mr. Sigal. Yes . . . ."

478 See, e.g., Statement of Walter P. Reuther, President, UAW, AFL-CIO, 1957 Authorizing Legislation Hearings, supra note 7 at 602: "The Atomic Energy Commission will probably wait until this session of the Congress had adjourned and reaffirm their decision taken last year. The only recourse the people of Detroit and Toledo have lies in this Committee. We urge you not to permit the construction of this hazardous fast-breeder reactor. . . . We urge you to disapprove and disallow the authorization sought here until the AEC cancels the construction permit . . . " [Emphasis supplied.] The opposite point of view was expressed by Robert W. Hartwell, Assistant General Manager of PRDC, id. at 634: "Messrs. Reuther and Sigal have asked the subcommittee to sit in judgment on the uncompleted record of the construction permit proceeding. . . . Messrs. Reuther and Sigal obviously want the subcommittee and the Congress to sit as a court of appeal and to do so before all the facts are in. . . ."


Prior to the 1957 amendment to Section 261 of the Atomic Energy Act, the Commission was required to submit the construction portion of its proposed program for the coming fiscal year for review and authorization by the Joint Committee and Congress before appropriations were requested from Congressional appropriations committees. The remainder of the Commission's program, that is, expenditures not involving so-called "bricks and mortar," was submitted directly to the House Ways and Means Committee without prior authorizing legislation initiated by the Joint Committee on Atomic Energy and passed by Congress.\footnote{481}

The original appropriations procedure of the 1954 act was, in the opinion of the Chairman of the House Ways and Means Committee, "inadequate as a framework within which appropriation requests can be adequately considered for atomic electric power." He criticized the practice of the Commission in "arbitrarily" dividing its civilian power reactor program under the first three rounds of invitation into two fiscal categories, one covering physical structures subject to prior Congressional authorization by the Joint Committee and the other covering operating expenses not so subject to such prior authorization. The result, according to the Chairman,

\[\ldots\] has been that for fiscal years 1956, 1957, and 1958 the amount appropriated and requested for the civilian power reactor program totals $236.8 million, of which only $40 million was authorized under authorizing legislation reported out by the joint committee and approved by the Congress. \ldots\footnote{482}

Section 261, as amended in 1957, now requires that appropriations involving any non-military experimental reactor designed to produce more than 10,000 thermal kilowatts of heat or designed to be used in the production of electric power must be authorized by the Joint Committee on Atomic Energy before legislation appropriating the funds

\footnote{481} This departure from the treatment accorded most regulatory agencies by legislation affecting their appropriations was made possible by the former language of Section 261, which automatically authorized to be appropriated "such sums as may be necessary and appropriated to carry out the provisions and purposes of this Act except such as may be necessary for the acquisition or condemnation of any real property or any facility or for plant or facility acquisition, construction, or expansion." Under Section 19 of the 1946 statute, 42 U.S.C. §1819 (1946), "there are hereby authorized to be appropriated such sums as may be necessary and appropriate to carry out the provisions of this Act," without any requirement for authorizing legislation.

therefor can be enacted. Specific authorization also now is required for funds

. . . necessary to carry out cooperative programs with persons for the development and construction of reactors for the demonstration of their use, in whole or in part, in the production of electric power or process heat, or for propulsion, or solely or principally for the commercial provision of byproduct material, irradiation, or other special services, for civilian use, by arrangements (including contracts, agreements, and loans) or amendments thereto, providing for the payment of funds, the rendering of services, and the undertaking of research and development without full reimbursement, . . . by the Commission of any other financial assistance pursuant to such arrangement. . . .

The effect of this legislation is to bring the regulation and development of contractual arrangements between the Commission and private industry and many non-profit research institutions under the additional umbrella of Joint Committee supervision. Thereby, that committee will be placed in a position to review all applications for construction permits or licenses involving financial benefits. Although reform in the procedure for authorizing the appropriation of funds for the Atomic Energy Commission probably was long overdue, the atmosphere in

485 The administration of Section 261a(2), as implemented by Section 111 of each authorization bill, is thus explained by the Joint Committee, H.R. Rep. No. 571, supra note 241 at 9: "Under Section 261a(2) and proposed section 111 of the authorization bill, it is contemplated that the Commission will request each year authorization for a certain amount of funds as a lump sum for use in a program not to exceed another lump sum, larger in amount. The first amount would cover appropriations to be authorized, while the second amount would provide a total limitation on the payments and other considerations which could be made available under the program . . . As each individual agreement is negotiated under that lump sum, the basis of the proposed individual arrangement . . . must be submitted to the Joint Committee, and a period of 45 days must elapse while Congress is in session . . . before the Commission may enter the individual arrangement" (emphasis supplied). The latter requirement is that provided in a uniform Section 111 for authorization bills agreed upon by the Joint Committee, id. at 8, and as enacted in the authorizing legislation for fiscal year 1958, Pub. L. 85-162, 85th Cong., 1st Sess. (1957).
486 This will affect all outstanding construction permits held by persons under the first and second rounds of the civilian power reactor program. See H.R. Rep. No. 571, supra note 241 at 9: "Thus [under Section 261 of the Atomic Energy Act and Section 111 of authorizing legislation] the basis for each arrangement by the AEC with industry under the first, second, third, and all subsequent rounds, will be submitted individually to the Joint Committee before the Commission may proceed to enter into the arrangement. All arrangements heretofore entered into are subject to the authorization and appropriation of funds, unless obligated. . . ."
which this legislative change has been effected was unfortunate. The
new Section 261 was designed in general to increase Congressional con­
trol over the atomic energy program. In particular, it was intended to
give the Joint Committee indirect control over the licensing of the
civilian atomic energy industry both in the production of electrical
energy and in research and development.

It is clear that Commission financial support for many developmental
projects will be required in the future. Under the civilian power reactor
program, this aid has taken the form of waiver of established Com­
mission charges for use of source and special nuclear material, mutually
agreed-upon research and development work in federal laboratories
where such work is not reasonably available elsewhere, and support of
research and development required to advance the technology of the in­
dustry as a whole. To limit this help, or to subject all contracts and
other arrangements concerned therewith to Congressional scrutiny and
possible rejection, therefore constitutes a limitation upon the licensing
authority of the regulatory body involved.

7. Judicial Review

Under Section 14(a) of the McMahon Act of 1946 the provisions
of Section 10 of the Administration Procedure Act were made
applicable to decisions of the Atomic Energy Commission. Under the
Administrative Procedure Act, judicial review of agency action causing
legal wrong to any person is provided, except where “(1) statutes pre­
clude judicial review or (2) agency action is by law committed to
agency discretion.”

The 1946 provision never was implemented by either statutory re­
view procedure or agency regulation. Only two judicial decisions have
been found dealing with Section 14, and they did not construe the
scope of review intended by Congress, except to emphasize the bar to
judicial reconsideration of agency discretion.

The 1954 statute established a more explicit set of provisions for

488 5 U.S.C.A. §1009.
489 Fletcher v. Commission, 192 F. 2d 29, 33 (D.C. Cir. 1951), ceri. den. 342 U.S. 914 (1952) (Court of Appeals can review Commission denial of award for alleged use
of petitioners’ inventions but not denial of “just compensation” for such alleged use,
the remedy therefor being suit in Court of Claims); United Electrical, Radio &
cannot review “executive action committed by law to the discretion of the Atomic
Energy Commission”)
judicial review. Under Section 189b,\textsuperscript{490} judicial review is expressly permitted from final orders entered in proceedings for (1) the granting, suspending, revoking, or amending of any license or construction permit or application to transfer control, (2) the issuance or modification of rules and regulations dealing with the activities of licensees, and (3) the payment of compensation, awards, or royalties.

The area of judicial review may be actually narrower under the Atomic Energy Act of 1954 than under the 1946 atomic energy legislation. It is not impossible that the government would claim that any other final order of the Commission entered in a proceeding not specifically listed in Section 189b is impliedly excluded from judicial review.\textsuperscript{491} Such a position, however, would be contrary to the legislative intent in enacting Section 10 of the Administrative Procedure Act.\textsuperscript{492}

The procedure for invoking review under the Atomic Energy Act of 1954 is provided under a statute enacted by Congress in 1950.\textsuperscript{493} This legislation, after 1954, gave the Federal Courts of Appeals "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, all final orders . . . of the Atomic Energy Commission made reviewable" by Section 189 of the 1954 act.\textsuperscript{494} The restrictive language of this statute as to the reviewable orders of the Commission also creates a likelihood that judicial review of Commission action will be sought to be closely restricted by the government.

8. Indemnity and Public Liability

By amendment in 1957 to the Atomic Energy Act of 1954,\textsuperscript{495} Congress has sought to meet the problems of public liability and property

\textsuperscript{490} 42 U.S.C.A. §2239(b).

\textsuperscript{491} Thus, the Joint Committee report on the 1954 act stated that "Section 189 provides for judicial review of a final order of the Commission entered in certain agency actions" (H.R. Rep. No. 2181, supra note 5 at 29). [Emphasis supplied.] See Joint Committee Staff Study, supra note 3 at 71-75; McGrath v. Zander, 177 F. 2d 649 (D.C. Cir. 1949) (orders of Alien Property Custodian).

\textsuperscript{492} Sen. Doc. No. 248, supra note 43 at 275: "To preclude judicial review under this bill [Administrative Procedure Act] a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review."

\textsuperscript{493} 5 U.S.C.A. §§1031 et seq.

\textsuperscript{494} 5 U.S.C.A. §1032.

damage which might arise from a nuclear accident. As stated by the Joint Committee,

\[\ldots [T]he\ problem\ of\ possible\ liability\ in\ connection\ with\ the\ operation\ of\ reactors\ is\ a\ major\ deterrent\ to\ further\ industrial\ participation\ in\ the\ [civilian\ reactor]\ program.\ While\ the\ [Section]\ 202\ hearings\ held\ in\ 1957\ indicate\ that\ it\ may\ not\ be\ the\ most\ important\ deterrent—that\ appears\ to\ be\ the\ current\ lack\ of\ economic\ incentive—the\ problem\ of\ liability\ has\ become\ a\ major\ roadblock.\]

Although evidence available to date does not indicate that the chances for, and damages resulting from, such an accident are considerable, Congress has shown salutary foresight and ingenuity in developing a system of private insurance and governmental indemnity which is made an integral part of the contracting and licensing controls of the Atomic Energy Commission. The policy underlying the Congressional action, as added to the Atomic Energy Act of 1954 itself, is that

In order to protect the public and to encourage the development of the atomic energy industry, in the interest of the general

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496 H.R. Rep. No. 435, supra note 223 at 1; AEC, Twenty-third Semi-Annual Report 177 (1958): "The remote possibility that privately owned nuclear reactors might have a catastrophic accident created the problem that private organizations building or operating the facilities might incur a public liability larger than could be met either by the financial structure of their organization or by the resources of the insurance industry. . . ." See Hearings on Governmental Indemnity and Reactor Safety Before the Joint Committee on Atomic Energy, 85th Cong., 1st Sess. 147 (1957) (hereafter cited as 1957 Indemnity Hearings): " . . . [I]n a recent poll conducted by the Atomic Industrial Forum, the unresolved liability question was rated second only to the lack of economic incentives as a roadblock to further progress" (testimony of Francis K. McCune, Vice-President, General Electric Co.); Atomic Industrial Forum, Inc., Financial Protection Against Atomic Hazards (1957).

497 H.R. Rep. No. 435, supra note 223, at 3: "Assuming that there were 100 large power reactors operating in the United States, the [Atomic Energy] Commission has found that the most pessimistic of the probabilities involved lead to the estimate that there would be less than 1 chance in 50 million of any person getting killed in any year in a reactor incident as compared to 1 chance in 5,000 for getting killed in an automobile accident. It is also concluded that hypothetical property damages range from a lower limit of about one-half a million dollars to an upper limit, in the worst imaginable case, of $7 billion. This latter figure is largely due to a contamination of land with fission products. . . . There was no disagreement that the probability of major reactor accidents was exceedingly low." See testimony of AEC Chairman Strauss, 1957 Indemnity Hearings, supra note 496 at 11-12; AEC, Twenty-third Semi-Annual Report 177-178 (1958).

498 The principal opposition to the enactment of governmental indemnity legislation was voiced by Rep. Holifield in a vigorous dissent to the Joint Committee report favoring the legislation, H.R. Rep. No. 435, supra 223 at 35-40. In his opinion, the legislation "would provide another Government subsidy to atomic power development with-
welfare and of the common defense and security, the United
States may make funds available for a portion of the damages
suffered by the public from nuclear incidents, and may limit
the liability of those persons liable for such losses.499

The system established by Congress, to be administered by the
Atomic Energy Commission in conjunction with the Joint Committee,
regulates both licensees and contractors of the Commission. Holders of
licenses for the distribution of special nuclear material previously were
required, as a condition of that license, to "hold the United States and
the Commission harmless from any damages resulting from the use or
possession" of such material.600 This requirement has been modified to
the extent that indemnification by the United States and limitation of
liability are available to licensees and contractors501 under new Section
170 of the Atomic Energy Act of 1954.502

Section 170a requires that a person holding a license or construction
permit pursuant to either Section 103 or Section 104 of the act503 must
provide certain financial protection against losses arising from a "nuclear

out any commensurate benefits to taxpayers and power consumers" and "is just another
prop for industries too timid to move ahead without paternalistic Government help"
(id. at 35-36).

499 Section 2i, 42 U.S.C.A. §2012(i). See H.R. Rep. No. 435, supra note 223 at 15:
"The primary concern of the Federal Government is with the protection to the people
who might suffer damages from the new atomic energy industry. Since many of the
reactors which will be built will be producing special nuclear material which is vital
to the defense of the country, it is in the interest of the common defense and security
to see that these companies are protected in their operations by having moneys avail­
able to them for payment of public liability claims and having limitations of liability
proceedings available when those funds are insufficient. Since title to special nuclear
material is in the United States, Congress has special powers and duties with respect
to the use of that material. One of the other constitutional bases for the limitation
of liability program is the bankruptcy power of the United States for it is improbable
that any firm could survive claims against it of $500 million, over and above the insur­
ance which might be available."

500 Section 53e(8), 42 U.S.C.A. §2073(e)(8).


503 In addition, the Commission has the option to require that a licensee for special
nuclear materials (Section 53 of the 1954 act), source materials (Section 63), and
byproduct materials (Section 81) furnish such financial protection, but it "is not ex­
pected that ordinarily the Commission will use the authority given to it with respect
to these latter three types of materials." H.R. Rep. No. 435, supra note 223 at 19.
In its 1958 report to the Joint Committee required to be submitted under Section 170i
of the statute, the AEC stated that it was studying the problem of extending insurance­
indemnity requirements to licensees other than those licensed under Sections 103 or 104,
incident,” 604 and also must enter into an indemnity agreement with the Atomic Energy Commission. 505 Under Section 170b and temporary Commission regulation, 506 financial protection, i.e., the ability to respond in damages for public liability, 507 must be provided in the amount of $150,000 per thousand kilowatts of thermal energy capacity authorized by the applicable license, but in no cases shall the amount of coverage be less than $250,000 for each nuclear reactor. 508

504 A “nuclear incident” is defined in Section 110, 42 U.S.C.A. §2014(o), as “any occurrence within the United States causing bodily injury, sickness, disease, or death, or loss of or damage to property, or for loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material.” See H.R. Rep. No. 435, supra note 223 at 16: “The definition of ‘nuclear incident’ is designed to protect the public against any form of damage arising from the special dangerous properties of the materials used in the atomic energy program. . . . [I]t was not thought that an incident would necessarily have to occur within any relatively short period of time. For instance, the steady exposure to radiation . . . could constitute an incident. . . . The indemnification agreements are intended to cover damages caused by nuclear incidents for which there may be liability no matter when the damage is discovered, i.e., even after the end of the license. . . .”

505 Section 170a also establishes a third type of licensing condition applicable to persons which have immunity against suit, i.e., state-owned educational institutions. Such an institution may be required by the Commission to “shed its immunity,” H.R. Rep. No. 435, supra note 223 at 19-20; see 10 Code Fed. Regs. §140.16. The provision of Section 170a that the AEC “may require, as a further condition of issuing a license, that an applicant waive any immunity from public liability conferred by Federal or State law” has created difficulties for the Commission which are not yet satisfactorily resolved. In its April 1958 report to the Joint Committee, the AEC stated that, with only one exception, federal and state agencies receiving facilities’ licenses from the Commission claimed they could not waive immunity from public liability because of existing statutory or constitutional law. According to the AEC, work was progressing on possible legislation to waive federal immunity from tort liability with respect to claims arising out of nuclear incidents and on a model bill for such waiver by the states up to the amount of insurance carried and the AEC indemnity. BNA, Atomic Industry Reporter 4:115-116. (Ed. Note: By Pub. L. 85-744 (72 Stat. 837), Congress added Section 170k to the Act to exempt nonprofit educational institutions from the requirements of Section 170 and provided for the federal indemnity of $500,000 to apply to public liability in excess of $250,000 arising from a nuclear incident.)

506 10 Code Fed. Regs. §140.11. The temporary regulations were issued Sept. 11, 1957, shortly after enactment of Section 170 of the statute; 22 Fed. Reg. 7223, BNA, Atomic Industry Reporter 227:625. In its report to the Joint Committee in April 1958, the AEC submitted the draft of a proposed permanent regulation with respect to amounts of insurance to be carried by reactors, 10 Code Fed. Regs. §140.11, and stated that it was considering the amendment of other provisions of the temporary regulation, BNA, Atomic Industry Reporter 54:31.


508 AEC licensees under Sections 103 and 104 of the statute were required to submit proof of financial protection to the agency within 30 days after Sept. 26, 1957, 10
Although Section 170b and the Commission's regulations permit financial protection in the form of private contractual indemnities, self insurance, other proof of financial responsibility, or a combination of such measures, it is clear that insurance coverage from private sources is, and will be, the preferred method for complying with the Congressional mandate. Insurance pools established by stock and mutual companies prior to 1957 were believed capable of insuring losses up to $65 million in connection with a single nuclear accident.

Provided a licensee has secured the necessary financial protection, he then is entitled to an agreement of indemnity from the Atomic Energy Commission. In providing for this protection, Section 170c of the Atomic Energy Act of 1954, as amended, provides:

The Commission shall, with respect to licenses issued between August 30, 1954, and August 1, 1967, for which it requires financial protection, agree to indemnify and hold harmless the licensee and other persons indemnified, as their interest may appear, from public liability arising from nuclear incidents which is in excess of the level of financial protection required of the licensee. The aggregate indemnity for all persons in-

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Code Fed. Regs. §140.13(a). Licensees are required to notify the Commission of any material change in proof of financial protection or in other financial information filed with the agency in connection therewith, id., §140.13(c). Where an insurance policy is furnished by the licensee, notice of renewal thereof must be furnished the Commission at least 30 days prior to its expiration date, id., §140.14(b). Under 10 Code Fed. Regs. §140.15(b), failure to provide proof of financial protection is grounds for suspension or revocation of a license. The proposed permanent amendment to 10 Code Fed. Regs. §140.11 would require a minimum of $3,000,000 in financial protection for any nuclear reactor, with a maximum required coverage of $60 millions, the amount of the insurance to be determined by formula based, among other things, on maximum power level, fuel cycle, and population possibly subject to a nuclear accident.

10 Code Fed. Regs. §140.12. Under this regulation, "the licensee shall not substitute one type of financial protection for another type without first obtaining the written approval of the Commission." See H.R. Rep. No. 435, supra note 223 at 20-21. The AEC reported to the Joint Committee, in April 1958, that 12 out of 22 licensees required to submit proof of financial protection submitted insurance policies, and one elected to show adequate resources for self-insurance (BNA, Atomic Industry Reporter 4=II5).

Although the Commission has not yet announced a form of indemnity agreement to be used under Section 170, "The Commission will, in due course, execute and issue agreements of indemnity," such agreements to be effective on the date of the regulations issued under Section 170 (Sept. 26, 1957) or the "effective date of the license authorizing the licensee to operate the nuclear reactor involved, whichever is later" (10 Code Fed. Regs. §140.17(a)). Section 170f and 10 Code Fed. Regs. §140.17(b) establish a fee of $30 per year per thousand kilowatts of thermal capacity authorized for the licensee to be issued an agreement of indemnity.
demnified in connection with each nuclear incident shall not exceed $500,000,000 including the reasonable costs of investigating and settling claims and defending suits for damage. Such a contract of indemnification shall cover public liability arising out of or in connection with licensed activity.\textsuperscript{512}

Under Section 170e, the liability of persons indemnified by the Commission is limited to $500 millions, together with the amount of financial protection required, with respect to any single nuclear incident.\textsuperscript{518} Such limitation may be enforced by a proceeding instituted by the Commission or any person indemnified in the appropriate United States District Court having jurisdiction in bankruptcy over the applicant.\textsuperscript{514}

Under Section 170d of the 1957 amendment to the Atomic Energy Act of 1954, the Commission is authorized

\ldots to treat with its own contractors in the same way it can treat with licensees under the provisions of this bill. \ldots It is hoped that the Commission will adopt a policy of extending indemnity provisions to contractors and subcontractors consistent with that extended to licensees and their suppliers and subcontractors. \ldots

In this subsection, however, the Commission is allotted discretion as to the amount of financial protection which may be

\textsuperscript{512} 42 U.S.C.A. §2210(c). Section 170h further provides that the "agreement of indemnity may contain such terms as the Commission deems appropriate to carry out the purposes of this section," and shall require the person indemnified to cooperate with the Commission and Attorney General of the United States in any proceedings involving payment of the indemnity. With respect to the reasons for establishing a system of governmental indemnity, rather than of insurance, the Joint Committee has stated, H.R. Rep. No. 435, supra note 223 at 9: "A system of indemnification is established rather than an insurance system, since there is no way to establish any actuarial basis for the full protection required. The chance that a reactor will run away is too small and the foreseeable possible damages of the reactor are too great to allow the accumulation of a fund which would be adequate. \ldots [I]f, as the Joint Committee anticipates, there never will be any call on the fund for payments, the funds will have been accumulated to no purpose. Hence, in this instance it seemed wisest to the Joint Committee not to treat this as an insurance problem but to treat it as an indemnification problem. \ldots"

\textsuperscript{518} In its report the Joint Committee recognized that it might be necessary for Congress to increase the amount of the indemnity, or the amount of limitation of liability, "in the light of the particular incident" (H.R. Rep. No. 435, supra note 223 at 21-22).

\textsuperscript{514} Id. at 22-23. Under Section 170i, the Commission is required to make a survey of the incident and report the same to the Joint Committee, as "an aid to the Congress in establishing the causes of a nuclear incident. It is, in part, an aid to the parties in any action where it is unlikely that the public would be able to obtain the full amount of technical information which might be required. \ldots" (H.R. Rep. No. 435, supra note 223 at 24). The AEC also must report to the Joint Committee on April 1 of each year concerning operations under Section 170.
required of its contractors before the $500 million guaranteed indemnity attaches. This authority is to be available for any type of contract which the Commission may enter into, as well as to contracts and projects which the Commission may enter into jointly with other agencies of the Government. . . .

Although the Commission has not issued regulations with respect to the above provisions, persons contracting with a licensee will be afforded protection under the indemnity agreement made by the Commission with such a licensee.

9. Transportation and Transmission

Areas of possible conflict between the Atomic Energy Commission and other federal and state regulatory agencies arise in connection with the transportation of atomic materials and the transmission of electricity produced from nuclear energy. Although these two phases of government regulation are generally unrelated, they have a common characteristic in that the jurisdiction of the AEC is either duplicated or supplemented, and they present possible problems of conflicting jurisdiction.

a. Transportation

Although possession of source, byproduct, and special nuclear materials must be licensed by the Atomic Energy Commission, in the case

515 Id. at 21-22.

516 As a "person indemnified" within the definition of that term in Section 11r of the statute, 42 U.S.C.A. §2014(r); see H.R. Rep. No. 435, supra note 223 at 17. The Joint Committee report also dealt with the problem facing carriers "transporting spent fuel elements from a reactor to a processing plant. If such a company, whether through negligence or otherwise, should have an accident which would spill the radioactive materials into a stream, this bill would afford protection to the public and to the carrier, even though the carrier is not required to be a licensee under the Atomic Energy Act of 1954 . . . ." Where the carrier transports materials and assemblies, such as reactor parts with fuel elements installed therein, it usually does so without any knowledge of the contents of the shipment, which is made by a contractor of the Commission. In such cases, the only recourse of the carrier, to assure protection in the event of a nuclear accident, may be to obtain a contract of carriage directly from the Commission. See 1958 Section 202 Hearings supra note 32 at 274-276.

On January 16, 1958, the AEC announced that it was offering statutory indemnity to "[C]ommission prime contractors and their suppliers engaged in the operation of nuclear reactors or in operation of facilities such as gaseous diffusion plants or chemical separation plants" and "to other contractors engaged in activities involving the risk of occurrence of a substantial nuclear incident" (AEC Press Rel. No. A-9, see BNA, Atomic Industry Reporter 227:629). In May 1958 the AEC indicated to the Joint Committee that the decision not to require private insurance from contractors was being reconsidered; see BNA, Atomic Industry Reporter 4:159.
of persons transporting such materials, the ways and means for effecting such transportation come within the jurisdiction of four other federal agencies. After debate as to whether or not the Interstate Commerce Act was superseded by provisions of the Atomic Energy Act of 1946 with respect to transportation of atomic materials, the Atomic Energy Commission acceded to the claims of the Interstate Commerce Commission for overriding authority in that field. In fact, the Atomic Energy Commission has temporarily relinquished its apparent authority over transportation of atomic materials not only to the Interstate Commerce Commission, but also to the United States Coast Guard, the Civil Aeronautics Board, and the U. S. Post Office Department. This has been accomplished by exempting from Atomic Energy Commission licensing regulation the interstate transportation activity of regulated carriers and the mails. In effect, the AEC has granted a general license to persons subject to the jurisdiction of these four agencies, without actually relinquishing jurisdiction of the subject matter.

The continuing jurisdiction of the Atomic Energy Commission in the field of transportation is demonstrated by that agency's announcement on September 21, 1957, of proposed regulations

... to establish appropriate precautions in connection with the transportation of special nuclear material to prevent accidental conditions of criticality. Requirements to protect against other hazards in the shipment of such materials are prescribed pursuant to other parts [of the AEC's regulations] ... and in regulations of other agencies having jurisdiction over means of transportation. Accordingly, the requirements of this part are in addition to, and not in substitution for, such other requirements.

518 49 Code Fed. Regs. §§71.1-11, 72.1-5, 73.1-430, 74.506-.600, 75.651-659, 76.701-.702, and 77.802-.870.
519 46 Code Fed. Regs. §§146.01-4, 146.25-400.
521 Post Offices Services Circular 2, Pt. 121, 124, and 125 (Dec. 1, 1954); 39 Code Fed. Regs. §15.2(d), which was amended effective May 15, 1958, to limit the amount of radioactivity a package may contain, in addition to the previous limit on the amount of radiation from the surface of the package; 23 Fed. Reg. 2221 (Apr. 4, 1958), BNA, Atomic Industry Reporter 4: 126.
522 10 Code Fed. Regs. §§30.7, 40.62(b), 50.11(d), and 70.12
The Commission has summarized the proposed regulations as follows:

The following proposed rule distinguishes between transportation by licensees [for special nuclear material] and transportation by such unlicensed carriers. Where special nuclear material is to be transported by a licensee, prior Commission approval of proposed shipping procedures must be obtained for all shipments in excess of the quantities of special nuclear material specified. . . . In the case of unlicensed carriers, there normally exists a possibility that a number of small quantities of special nuclear material from different shippers might come into hazardous proximity to each other. For this reason the quantity of special nuclear material which may be delivered to a carrier authorized to transport special nuclear material without a Commission license is set considerably lower . . . except for cases where the licensee who makes the shipment is in a position to, and does, exercise such control over transportation of the shipment as to assure that the total quantity of special nuclear material in the shipment does not exceed the limits specified. . . .\(^{524}\)

Although the regulations of the Interstate Commerce Commission, Coast Guard, Civil Aeronautics Board, and the U. S. Post Office usually do not require the issuance of a license as such, the packaging, marking, and container limitations imposed by these agencies constitute a form of indirect licensing control. Atomic material cannot be transported unless in conformity with these regulations.

There apparently has been no effort to make these licensing requirements uniform even where practicable. More efficient and economical administration of the transportation of atomic material, and consequently a less restrictive burden on the shippers and carriers involved, would result if the Atomic Energy Commission were to work out a uniform system of transportation requirements with the other four agencies involved, even though administration of these requirements were vested in the other agencies.

\(^{524}\) Ibid. Appendix A to the proposed regulation lists the qualities of uranium 235 and 233 and plutonium which a licensee of special nuclear material may deliver to a carrier, without prior specific AEC approval, provided the licensee exercises "such supervision and control over the shipment as to assure that, if said special nuclear material is transported with any other quantity of special nuclear material, the total quantity of special nuclear material does not exceed the limits specified in Appendix A"; proposed 10 Code Fed. Regs. §71.22(a)(2). Appendix B lists the maximum quantity of types of special nuclear material which a licensee may deliver to a carrier unless in accordance with §71.22(a) or with special procedures approved by the Commission in connection with an application for a license for special nuclear material under §71.23.
b. Transmission

Whenever the holder of a commercial atomic energy license transmits electric energy in interstate commerce or sells it at wholesale in such commerce, the Federal Power Commission is obliged to exercise jurisdiction with respect thereto. Such authority is in fact required as a condition of the Atomic Energy Commerce license. 525

The dual jurisdiction thus involved creates the possibility of conflicting regulatory standards. This is particularly true with respect to accounting practices. The accounting standards required to establish financial responsibility under the Atomic Energy Act 526 may well differ from those of the Federal Power Commission for rate-making purposes. Indeed, critics of the present Atomic Energy Act have attacked its Section 103 commercial licensing provisions as lacking the accounting and other financial restrictions imposed by the Federal Power Commission by statute and regulation. 527

Further, a possible conflict in accounting practices may arise in connection with the determination of a "fair price" to be paid by the AEC for the production of special nuclear material in a licensed reactor. Section 56 of the Atomic Energy Act of 1954 528 provides that the agency, in determining such fair price, "may give such weight to the actual cost of producing that [special nuclear] material as the Commission finds to be equitable." Any difference in the methods of computing costs of such material under accounting regulations enforced by the AEC, Federal Power Commission, or a state agency would, of course, be undesirable and possibly result in inequity to the licensee.

525 Atomic Energy Act of 1954, Section 272, U.S.C.A. §2019; see 10 Code Fed. Regs., §50.43(c). Section 271 of the statute further provides that "[n]othing in this Act shall be construed to affect the authority or regulations of any Federal, State, or local agency with respect to the generation, sale, or transmission of electric power" (42 U.S.C.A. §2018).


527 H.R. Rep. No. 2181, supra note 5, at 122-123; Adams, supra note 239 at 168-170. In its report at the end of 1957, the Commission stated (Twenty-third Semi-Annual Report 98-99 (1958)) : "Ascertaining costs for nuclear electric plants has required new applications of accounting principles. The items of capital costs of conventional plants are specified by the Federal Power Commission, for example, but as yet there is no agreement on the components of capital costs for nuclear reactors. During the past year the [Atomic Energy] Commission has studied the accounting problems inherent in power reactor construction and operations, and has developed an accounting basis for use in determining the operating economics of these new plants. . . . The Commission has been working with the Federal Power Commission and the National Association of Railroad and Utility Commissioners on revising classification of accounts to cover production of power through the use of reactors."

528 42 U.S.C.A. §2076.
D. Conclusions

As officials of the Atomic Energy Commission often have observed since passage of the Atomic Energy Act of 1954, a license issued thereunder is not, like a contract, a mere matter of negotiation. Presumably, all requirements of the statute and regulations being satisfied, the applicant for a license will be entitled as a matter of legal right to engage in the activities covered by the 1954 act and his application.

This approach, however, oversimplifies the problem confronting the private organization or business seeking to risk its capital and resources in the development of atomic energy for peacetime uses. A license could be a “gun [without] ... ammunition” if the Commission chose not to make available to the licensee such services as supplying enriched uranium, a matter of negotiation and not of right. Moreover, although an applicant may satisfy the requirements when the license is issued and may negotiate successfully for necessary supplies and services from the Commission, he can never be sure what changes in these requirements, and consequently changes in the terms of the license itself, will be made in the future.

As the McKinney Panel has found, the over-all effect of the restrictions imposed upon Section 103 and 104 licensees “appears to be contrary to the stated objectives of the [1954] Act” and constitutes “an interference by the Federal Government in the right of the private investor to risk his own money, even to go broke, if he chooses to do so.” Further,

The emphasis in the 1954 Act on licensing is sound as a means of establishing equality of treatment of private participants, only if it is recognized that licensing rather than Federal ownership is to be the future course.

So long as regulation of licensing is uniform and without serious changes in policy, the infant atomic energy industry can be reasonably certain of the requirements which must be met. In this respect, the

530 See Brief for Applicant in the PRDC proceeding, supra note 314 at 87.
531 Upton, supra note 207 at 496. The Commission occupies the dual function of licensing regulator and “bargaining agent for the services” needed under a license. This means that the licensee is “dependent upon the Commission’s good will alone and therefore is small consolation to lawyers accustomed to ascertaining their clients’ rights and not merely negotiating their privileges” (id. at 498).
533 Id. at 134.
Commission and its staff, in general, have performed an outstanding public service in establishing a unique system of federal regulation in which the interests of the government and of private industry, not always mutual, must be accommodated. The regulatory procedures established have been in general conformity with both the spirit and the letter of the Federal Administrative Procedure Act, as required by the Atomic Energy Act itself and in the interest of administrative due process.

The infirmities in the present licensing system are due not so much to the officials who administer the Atomic Energy Act of 1954 but to the statute itself, which these officials are bound to follow in promulgating the applicable regulations. The language of that act is so general in many important particulars as to be capable of differing interpretations. For example, "national welfare" as used in the act has been interpreted with two entirely different emphases by proponents and opponents of private enterprise in the atomic field. The one interpretation favors minimum regulation to the extent consistent with national security and public health and safety. The other would require maximum regulation which would place private industry under complete government domination in the licensed activity and thus tend to leave the field for public agencies alone.

The result is that the 1954 act and the regulations issued thereunder contain within their provisions the possibilities for destroying the private participation which the act purports to seek and encourage. Such an event could result from a radical change in Commission membership, with a consequent reversal of current policies. Therefore, in the interests of both the government and private enterprise, the 1954 statute should be re-examined with a view to establishing more definite standards for licensing, particularly with respect to commercial production and utilization facilities. If a reasonably favorable climate of regulation is lacking and especially if a markedly unfavorable attitude is adopted by the AEC and Congress, then it is clear that atomic development will be retarded, and the public will not enjoy the full benefits of this new source of energy.

Re-examination of the antitrust procedures and conflicting jurisdictional problems arising under provisions of the present act and its regu-

584 Stason, Atomic Energy Workshops, supra note 215 at 4: "... [T]here are only the vaguest 'standards' to guide the hand of the Commission. Whether or not licenses shall be issued in the first instance and whether or not they shall be modified or revoked subsequent to issuance, depends almost exclusively upon the uncontrolled discretion of the Commission"
lations also is desirable in the public interest. If industry is to assume the role intended and stated by Congress in developing the field of peacetime atomic energy without huge expenditures of federal funds, then the means for harassment of industry which are potentially present in the act must be modified, consistently with the public interest to encourage the development of a new and useful form of power.

The statutory deficiencies in the Atomic Energy Act of 1954 have assumed added importance in the light of amendments to that statute enacted by Congress during 1957, the cumulative effect of which is to add greatly to the powers of the Joint Committee on Atomic Energy. Indeed, it is not an exaggeration to state

that the Congress, and in particular the Joint Committee on Atomic Energy, has seized control over the civilian atomic power program and has stripped the AEC of a large measure of the responsibility, authority, and discretion which it previously had possessed and which executive agencies normally possess. 535

Under the 1946 statute, the Joint Committee came close to assuming the authority of the Commission itself, with the agency relegated to the role of general manager of the program. This unsatisfactory division of authority was rectified in some degree by the provisions of the 1954 legislation. Yet, with the new powers exercised by the Joint Committee under the 1957 amendments, particularly with respect to detailed control over expenditures by the Commission, the pre-1954 situation may well have been re-established.

Until the respective relationships and authorities of the Congressional Committee and the Commission are definitely established, uniform and consistent administration of the licensing provisions of the Atomic Energy Act of 1954 is not assured, and a program of peaceful utilization of atomic energy may well be inhibited.

IV. ATOMIC ENERGY COMMISSION CONTRACTING 536

Just as the issuance of licenses constitutes the most important aspect of the regulatory functions of the Atomic Energy Commission, so the

535 Green, supra note 480 at 124. See letter from AEC Chairman Strauss to Rep. Cole, Aug. 3, 1957, 103 Cong. Rec. A6319-A6321 (Aug. 5, 1957); Hartwell, supra note 478 at 639: "To encourage the parties in a formal AEC proceeding to try their case not only judicially but also at the same time before Congress is not only in derogation of the administrative and judicial processes provided by law but will in our judgment go far toward destroying efficient and speedy administration of the development of civilian atomic power. . . ."

536 For general background information on government contract problems and pro-
making of contracts provides the major means whereby the Commission administers and operates the atomic energy plant owned in a proprietary capacity by the United States government. Indeed, that plant is the largest single business of its kind in the United States, and probably in the free world. Atomic energy installations and other facilities have an estimated value before depreciation of approximately $7.06 billion.\textsuperscript{587} More than 117,000 persons, including over 6,700 government personnel, are engaged in the operation of existing, and the construction of new, production facilities\textsuperscript{538} under government control. Over one billion dollars was paid out by the Commission during fiscal year 1955 to cost-type contractors and directly to subcontractors.\textsuperscript{589}

Commission contracting powers go further than the mere provision for the construction and operation of the government's atomic energy plant. Under the civilian power reactor program authorized by the Atomic Energy Act of 1954, the Commission's willingness to supply certain services and to contract for research has become an important adjunct to the system of licensing control established under that statute.

The Manhattan Engineer District, predecessor of the Commission, established the policy of operating its facilities through contracts with private business units. This practice was continued by the Commission when it took over the operations of the District on January 1, 1947.\textsuperscript{540}

\begin{thebibliography}{99}
\bibitem{539} Id. at 307-308.
\bibitem{540} AEC, Twenty-third Semi-Annual Report 10 (1958).
\bibitem{589} Id. at 307-308.
\end{thebibliography}
Government operation of production facilities appears to have been conclusively rejected by the Commission. This policy assumes additional importance under the Atomic Energy Act of 1954, whereby Congress sought to encourage a privately owned and operated atomic energy industry through contractual relationships and cooperation between government and business.^{541}

Despite the increasing importance of the role of contracting between the Commission and private business in the development and expansion of atomic energy for both military and industrial uses, the procedural and substantive problems created by this method of administrative control have tended to be overlooked by both government and private interests. This failure is unfortunate, but not surprising, in view of the current lack of development of procedures assuring administrative due process in other fields of government contract endeavor.

A. Contracts in Administrative Law

The current attitude of the Executive Branch of the government and of the courts towards contracts between the government and its citizens stems in large part from the concept that, when entering into a contract, the government exercises a "proprietary" function.^{542} This means that, since the government claims to assume the role of a private person in contractual dealings with private business, the government's actions are not necessarily held to be controlled by, or reviewable with respect to, accepted standards of administrative due process applicable to licensing and other more orthodox regulatory procedures. Moreover, government ownership of special nuclear material under the Atomic Energy Act of

^{541} See BNA, Atomic Industry Reporter 221: i: "Contractor operation of Commission-owned research and production facilities lays the foundation for eventual termination of Government monopoly in this field and for integration of atomic energy development into the private enterprise system which is characteristic of this nation. Under the present atomic energy program as a whole, the Government draws upon the managerial skill of private enterprise, in return for which private enterprise acquires specialized technical knowledge in the field of atomic energy which, under present necessities of information control, is obtainable in no other manner." See also AEC Response to Questionnaire, supra note 77 at 1088: "The operations of AEC are carried out largely by industrial concerns and by private and public institutions under contract with the Commission. . . ." AEC, Twenty-third Semi-Annual Report 138, 161 (1958).

^{542} The closest statutory definition of what constitutes a "proprietary" function is found in Section 4(2) of the Federal Administrative Procedure Act of 1946, 5 U.S.C.A. §1003(2), which refers to "any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts" and which excludes these subjects from the requirements for public rule making.
1954 gives the Commission, if it desires to exercise it, a powerful means of controlling not only contracting but also licensing under claim of exercise of the agency's "proprietary" rights.

A corollary of the doctrine of "proprietary" function is that the private citizen or business dealing contractually with the government has only a privilege, not a right. Persons contracting with the government, as the Supreme Court has stated, are not "compelled or coerced into making the contract" which is considered a "voluntary undertaking on their part." Should this exercise of the "privilege" be curtailed or denied in any way, therefore, neither general nor constitutional law provides an effective remedy for the injured party as a matter of right, except insofar as the courts are empowered to consider cases involving damages arising from breach of contracts.

This concept of the government's "proprietary" functions and, as a corollary, the privilege status of private parties in the field of contracts are reflected in the provisions—or lack of them—with respect to contracting in the Federal Administrative Procedure Act of 1946. Procedures under the Contract Settlement Act of 1944 are specifically exempted from the Administrative Procedure Act. In Section 4(2) of the Administrative Procedure Act the making of rules with respect to contracts, public property, and similar "proprietary" matters is excepted from the salutary requirements of public notice and hearing procedures required of most types of federally issued rules and regulations.

Section 52, 42 U.S.C.A. §2072.

See Schwartz, "A Decade of Administrative Law," 51 Mich. L. Rev. 775, 843 (1953): "The government contractor ... is seen to have only the 'privilege' of dealing with the government. He is placed in a different position from that of the private citizen whose property or personal 'rights' are adversely affected by administrative action." For what a congressional committee has termed "All in all ... a shameful story" of unrestrained administrative over-reaching in the field of government contracts, see Heyer Products Co., Inc. v. United States, 140 F. Supp. 409, 412 (Ct. Cls. 1956).


41 U.S.C.A. §§101 et seq.

Section 2(a), 5 U.S.C.A. §1001(a); see Sen. Doc. No. 248, supra note 43 at 44, 196, 302, 313, where the congressional emphasis is upon the temporary wartime nature of the Contract Settlement Act as justification for the exception.

5 U.S.C.A. §1003(2); see Sen. Doc. No. 248, supra note 43 at 199, 257: "The exception of proprietary matters is included because the principal considerations in most such cases relate to mechanics and interpretations or policy, and it is deemed wise to encourage and facilitate the issuance of rules by dispensing with all mandatory procedural requirements. . . ."
In this connection, the rules of the Atomic Energy Commission with respect to procurement policy 549 and to the procedure of agency's Advisory Board of Contract Appeals 550 were promulgated apparently, without public participation in the rule-making process.

Although the federal government and the courts consistently adhere to the theory that the making and administration of public contracts is not a phase of administrative procedure, 551 it is clear that a "Government contract . . . is but a convenient administrative device for the Government to get its procurement work done and . . . administrative decisions of the Government's officers should be treated no differently from other administrative orders which affect private interests." 552 As is the case in most other federal agencies and departments, however, neither the statutory nor regulatory procedures of the Atomic Energy Commission recognize this obvious and important fact of governmental life.

B. Contracting Authority under Atomic Energy Act of 1946

Provisions of both the Atomic Energy Acts of 1946 and 1954 dealing with the contracting authority of the Atomic Energy Commission were, until 1957, substantially similar. The major difference arose from the implementation of sections of the later statute with respect to the use of electrical power produced by atomic energy, which authority was not sought to be exercised by the Commission under the earlier legislation. However, in 1957, Congress provided for certain special contractual treatment for publicly and cooperatively owned utilities 553 and for Con-

552 Schultz, supra note 536 at 246-47, who adds: "Be that as it may, contract notions are so deeply imbedded in the thinking of judges and businessmen that it would be revolutionary for one to deny their expectation that an individual or corporation contracting with the Government will be fully protected with traditional rights and remedies. . . ." Proposed legislation drafted by the Task Force on Legal Services and Procedure of the Commission on Organization of the Executive Branch of the Government specifically defines "the performance of all proprietary functions such as . . . the execution [or performance] of public contracts in which private rights, claims, or privileges are asserted or affected" as informal adjudication; Administrative Code, Section 202(b), Hoover Commission Legal Task Force Report, supra note 43 at 366.
553 Section 111(a)(1), Pub. L. 85-162, 85th Cong., 1st Sess. (1957); see discussion, infra.
gressional review of contracts involving the expenditure of public funds in connection with private projects.554

Authority to execute contracts was specifically granted the Atomic Energy Commission under the 1946 statute with respect to four major categories of activity. Three of these provisions were extensively used by the agency. The fourth, relating to byproduct power resulting from utilization of atomic energy, proved a deadletter.

Under Section 3(a) of the Atomic Energy Act of 1946,555 the Commission was "authorized and directed to make arrangements (including contracts, agreements, and loans)" for the conduct of research and development activities relating to nuclear processes, the theory and production of atomic energy, and similar matters of primarily scientific importance. Section 4(c)(2) 556 conferred the authority to contract with private industry for the construction and operation of production facilities for fissionable materials. Section 5(a)(5) 557 authorized contracts for the purchase of fissionable materials outside the United States, or of "any interest in facilities for the production of fissionable material or in real property on which such facilities are located." Finally, under Section 5(b)(5) and (6),558 authority was granted the Commission to contract for supplies of source material or for any interest in real property containing source material, and for "exploratory operations, investigations, and inspections" with respect to such material.

In exercising its authority under the above sections, the Commission was permitted to forego competitive bidding by advertising "upon certification . . . that such action is necessary in the interest of the common defense and security, or upon a showing that advertising is not reasonably practicable." 559 The statutory conditions imposed upon contractors under these sections related to health and safety measures, requirements for reports and inspections, and subcontracting only with Commission approval.560


556 42 U.S.C. §1804(c) (2) (1946).


558 42 U.S.C. §1805(b) (5) and (6) (1946).

559 Otherwise required by Section 3709 of the Revised Statutes, 41 U.S.C.A. §5. Under Executive Orders 10216 (Feb. 23, 1951) and 10210 (Feb. 2, 1951), Commission contracts made without competitive bidding had to contain a clause authorizing the Comptroller General to have access to, and to examine, the contractor's books.

560 Section 3(a), 42 U.S.C. §1803(a) (1946), also provided with respect to research
Two sections of the 1946 act related to sales of electrical energy generated in connection with the production of fissionable material. The first of these provisions under Section 7(d) was never utilized, since no commercial licenses which might have resulted in power generation ever were authorized. Under the second statutory provision enacted July 17, 1953, the Commission was authorized, in connection with the construction or operation of its Oak Ridge, Paducah, and Portsmouth installations, to enter into contracts for electric-utility services for periods not exceeding twenty-five years. This authority served as the basis for a similar but expanded provision in the 1954 act.

The Atomic Energy Act of 1946 contained no provisions dealing with the general contracting authority of the Atomic Energy Commission, other than that the agency was empowered to acquire materials, property, equipment, and facilities, and to acquire, purchase, lease and hold real and personal property required to carry out its functions. Procurement regulations, and the statutory authority of, and regulations affecting, the Advisory Board of Contract Appeals under the 1946 act were continued in effect under the Atomic Energy Act of 1954, and will be discussed in connection therewith.

C. Contracting Authority under Atomic Energy Act of 1954

1. Research

Section 31 of the Atomic Energy Act of 1954 is the counterpart of Section 3(a) of the earlier statute. The principal difference in language between the earlier and later provisions lies in the broadened scope of research and development activities under the 1954 act, this being in accordance with the proposed aims of that statute.
Under Section 31 of the present statute, the Commission is authorized and directed to make arrangements, including contracts, for the conduct of research, development, and training activities relating to (1) nuclear processes, (2) the theory and production of atomic energy, (3) utilization of special nuclear material and radioactive material for medical or other purposes, (4) utilization of special nuclear material, atomic energy, and radioactive material and processes entailed in the utilization or production of atomic energy or such material for all other purposes, including industrial uses, the generation of usable energy, and the demonstration of the practical value of utilization or production facilities for industrial or commercial purposes, and (5) protection of health and safety. Where the Commission "finds private facilities or laboratories are inadequate to the purpose," it is authorized to conduct research for private parties in its own facilities for the purposes stated in Section 31. Although Section 169 of the 1954 act prohibits the making of any subsidy to the holder of a license or construction permit under Sections 103 and 104, a payment made by the Commission to a permittee or licensee, pursuant to a contract under Section 31, is specifically permitted by Section 169.

Section 31 contains provisions with respect to contractual conditions assuring health and safety, requiring reporting, and permitting inspection of work done thereunder. As was the case under the Atomic Energy Act of 1946, no such arrangement [under Section 31] shall contain any provisions or conditions which prevent the dissemination of scientific or technical information, except to the extent such dissemination is prohibited by law.

Contracts may be made without public advertising for bids upon Commission certification that such action is necessary in the public interest or upon a showing that advertising is not reasonably practicable.
2. Commission Production Facilities

Contracting authority of the Commission with respect to the production of special nuclear material under the Atomic Energy Act of 1954\(^{578}\) is broader than under the 1946 statute.\(^{579}\) Under Section 41b of the new act, substantially equivalent to Section 4(c)(2) of the Atomic Energy Act of 1946, the Commission may continue former contracts or enter into new contracts for the construction and operation of facilities owned by the Commission for the production of special nuclear material. Such contracts must assure protection against health and safety hazards, must permit inspection by and require reports to the Commission,\(^{580}\) must contain security restrictions,\(^{581}\) and may be negotiated without competitive bidding under certain stated circumstances.\(^{582}\) The Commission also is given authority to acquire production facilities or to acquire real estate for the construction of production facilities for its own needs, again in some cases without regard to public advertising.\(^{583}\)

3. Energy Generated in Production Facilities

An important provision of the 1954 act, as originally enacted, with respect to the production of special nuclear material,\(^{584}\) permitted the Commission "to dispose of usable energy generated in the production facilities or in the experimental utilization facilities owned by the Commission."\(^{585}\) Concerning this statutory provision, the Joint Committee on Atomic Energy has stated:

If the energy is sold to publicly or privately owned utilities or users, the price is to be subject to regulation by the appropriate agency, State or Federal, having jurisdiction. This section will permit the Commission to dispose of that utilizable energy it produces in the course of its own operations, but does not permit the Commission to enter the power-producing business without further congressional authorization to construct or operate such commercial facilities.\(^{586}\)

\(^{578}\) Sections 41-44, 42 U.S.C.A. §§2061-2064.
\(^{579}\) Section 4(c), 42 U.S.C. §1804(c) (1946).
\(^{580}\) Section 41b(1)-(2), 42 U.S.C.A. §2161(b)(1)-(2).
\(^{581}\) Section 1453, 42 U.S.C.A. §2165(a).
\(^{582}\) Section 41b provides that "[a]ny contract . . . may be made [without competitive bidding] . . . upon certification of the Commission that such action is necessary in the interest of the common defense and security or upon a showing by the Commission that advertising is not reasonably practical." See notes 559 and 577, supra.
\(^{583}\) Section 43, 42 U.S.C.A. §2063.
\(^{584}\) Section 44, 42 U.S.C.A. §2064.
\(^{586}\) Ibid.
By a 1957 amendment to the statute, the agency was authorized to sell, or contract for the sale of, certain utilities, including electric power and steam, to purchasers within the Commission-owned communities or in the immediate vicinity thereof, where the Commission determined that such utilities "are not available from another local source and that the sale is in the interest of the national defense or in the public interest." 587

Under the Atomic Energy Act of 1954, preference and priority in the use of Commission-produced power must be given "to public bodies and cooperatives or to privately owned utilities providing electric utility services to high cost areas not being served by public bodies or cooperatives." 588 This provision applies to contracts for the sale of energy derived from government plants the same priorities imposed upon holders of commercial licenses for a utilization or production facility for the generation of commercial power.689

4. Purchase of Special Nuclear and Source Materials

Under the Atomic Energy Act of 1954, the Commission is authorized to contract for the purchase of special nuclear material outside the United States.590 This constitutes a little-known but highly important activity of the Commission in the field of contract authority.591

The purchase of source materials by the Atomic Energy Commission is covered in some detail in the 1954 statute. Under Section 66592 thereof, the agency is authorized to acquire supplies of source material, interests in real property containing such material, or rights of entry into property believed to contain such material. Section 67593 authorizes the Commission to lease lands belonging to the United States for mining or prospecting for source materials in special situations requiring Commission inducement of private efforts in this field.594

589 Sections 103 and 182e, 42 U.S.C.A. §§2133 and 2232(c).
590 Section 55, 42 U.S.C.A. §2075.
591 This is done largely through the Combined Development Agency (CDA), established in 1944 for joint foreign procurement by the United States and the United Kingdom. Formerly a member of CDA, Canada sells uranium to the United States under AEC contracts. Belgium, South Africa, Australia, and Portugal have contracts with CDA. See AEC, twentieth Semi-Annual Report 3-5 (1956); AEC, Twenty-second Semi-Annual Report 4-7 (1957).
594 See H.R. Rep No. 2181, supra note 5 at 17-18: "The Commission has exercised this right in the past based on reservation to the United States of all rights to source
5. Electric Utility Contracts

The Atomic Energy Act of 1954 contains the most controversial section dealing with the contracting authority of the Commission since the agency’s inception in 1947. In 1953 Congress added a subsection to the 1946 statute permitting the Commission to make 25-year contracts for the purchase of electrical power to operate the Oak Ridge, Paducah, and Portsmouth installations, without advertising for bids therefor and with authority to terminate the contracts upon payment of cancellation costs.595 What had been enacted in 1953 as Section 12(d) of the 1946 act was proposed in the same form in the first bill which the Joint Committee reported to Congress as the Atomic Energy Act of 1954.596

In an attack upon the Commission's interpretation of Section 12(d), which was proposed Section 164 of the new act, two members of the Joint Committee claimed that the agency proposed

\[\ldots\] to maintain its present firm contract for TVA power to run the Paducah Plant while contracting for some 600,000 kilowatts of additional power to be delivered by the private utility group to the TVA for service in the Memphis area, several hundred miles away from any atomic-energy installation. In other words, the AEC would become a “power broker,” purchasing power it does not need for an area far removed from its activities. The TVA would be forced into buying the power from the private group through AEC instead of building its own plant to serve the Memphis area.597

\[\text{materials in the public lands. This reservation is contained in the Act. The Commission believes that it needs to have the power to lease expressly granted to it, now that this reservation is no longer carried in the bill.} \ldots \text{ It is the intent of Congress that this leasing power should be invoked only where it is the only means of achieving private development of deposits of source materials in lands belonging to the United States. It is not intended to supplant the mining laws in any normal situation.}^5 \]

595 Section 12(d), 42 U.S.C.A. §2204, Pub. L. 137, 83rd Cong., 1st Sess. (1953). See H.R. Rep. No. 676, 83d Cong., 1st Sess. 3 (1953): “By the arrangements that have been negotiated with the three utility companies [Ohio Valley Electric Co., Electric Energy, Inc., and Tennessee Valley Authority], the Commission is kept out of the utility business, the Congress is relieved of the necessity of appropriating an additional sum of $1 billion this year for power-generating stations for the new gaseous diffusion plants, and in the event of a shutdown in the future, the Government will not be faced with the problem of disposing of a super Muscle Shoals.” In its opinion in Mississippi Valley Generating Company, Holding Company Act Rei. No. 12, 794 (Feb. 9, 1955), the Securities and Exchange Commission indicated that it considered Congress to have passed upon the validity of the MVG contract in enacting Section 164 of the Atomic Energy Act of 1954, CCH Fed. Sec. Law Rep., ¶76,330, p. 79,403.


597 H.R. Rep. No. 2181, supra note 5 at 115. See also dissenting opinion of SEC Commissioner Rowen in Mississippi Valley Generating Company, supra note 595 at
The dissenters further argued that the legislative history of the 1946 act did not substantiate the interpretation placed by a majority of the Commission upon Section 12(d)\(^598\).

As finally enacted,\(^599\) Section 164 contained the questionable device of a Congressional interpretation of authority, rather than an outright grant thereof.\(^600\) Further, the authority retained by the Joint Committee to consider a proposed contract for thirty days created serious problems with respect to the proper division of powers between the Executive and the Legislative Departments and was bound to be the subject of con-

\(^79,411:\) "The MVG plant will not make available to the AEC facilities additional electrical energy not otherwise available. . . . The power to be generated by MVG will be supplied to TVA and will be consumed in the Memphis area. . . ."

\(^598\) H.R. Rep. No. 2181, supra note 5 at 115: "When the Atomic Energy Commission sought and received this authority from the Congress to make long-term contracts, and to pay cancellation charges to the utility groups involved in the event the contracts were terminated, the authority was specifically limited to utility services for the Oak Ridge, Paducah, and Portsmouth installations of the Commission. As the former General Manager, Marion W. Boyer, testified in answer to a question from Congressman Holifield at the time the authorizing legislation was being considered by the committee: ‘In other words, it is limited to the power requirements for those three installations. It is not a wide-open authority.’"

\(^599\) "The Commission is authorized in connection with the construction of the Oak Ridge, Paducah, and Portsmouth installations of the Commission, without regard to section 3679 of the Revised Statutes, as amended, to enter into new contracts, or modify or confirm existing contracts to provide for electric utility services for periods not exceeding twenty-five years, and such contracts shall be subject to termination by the Commission upon payment of cancellation costs as provided in such contracts, and any appropriation presently or hereafter made available to the Commission shall be available for the payment of such cancellation costs. Any such cancellation payments shall be taken into consideration in determination of the rate to be charged in the event the Commission or any other agency of the Federal Government shall purchase electric utility services from the contractor subsequent to the cancellation and during the life of the original contract. The authority of the Commission under this section to enter into new contracts or modify or confirm existing contracts to provide for electric utility services includes, in case such electric utility services are to be furnished to the Commission by the Tennessee Valley Authority, authority to contract with any person to furnish electric utility services to the Tennessee Valley Authority in replacement thereof. Any contract hereafter entered into by the Commission pursuant to this section shall be submitted to the Joint Committee and a period of thirty days shall elapse while Congress is in session (in computing such thirty days, there shall be excluded the days on which either House is not in session because of adjournment for more than three days) before the contract of the Commission shall become effective: Provided, however, That the Joint Committee, after having received the proposed contract, may by resolution in writing, waive the conditions of or all or any portion of such thirty-day period."

\(^600\) Similar problems are created by Sections 51 and 61, 42 U.S.C.A. §§2071 and 2091, requiring submission of expanded definitions of special nuclear material and source material, respectively, for a period of 30 days to the Joint Committee.
flicting interpretation. The procedure provided in Section 164 set the pattern for Congressional review and control of Commission contracts under the Atomic Energy Act of 1954 as amended in 1957. 601

The controversy over the sale of energy by private facilities to TVA in alleged replacement of Commission power needs from TVA, has ended in the Court of Claims. 602 Incidental to the controversy has been the conflicting interpretation of the Joint Committee's authority under Section 164. Two days after the contract between the Commission and Mississippi Valley Generating Company was executed November 11, 1954, the Joint Committee decided to waive the thirty-day waiting period under that section. On December 17, 1954, the Comptroller General approved the contract, whereupon a minority of the Joint Committee maintained that the waiting period could not be waived until a contract, approved by that official and otherwise immediately effective, was presented to Congress. On January 28, 1955, the Joint Committee


602 The early history of the MVG contract is summarized by the SEC in Mississippi Valley Generating Co., supra note 595, at 79, 372-79, 395. On July 11, 1955 the President ordered the AEC's contract with the Mississippi Valley Generating Company to be terminated. At that time the Attorney General stated that a "negotiated settlement" would be effected "and added that he had no idea how much the termination might cost the U.S." (BNA, Atomic Industry Reporter 1:38). On July 29, 1955 the Comptroller General ruled that the Commission had authority to use its funds to pay costs for cancellation of a contract which did not contain any provision therefor and despite the language of Section 164 of the Atomic Energy Act of 1954 (Dec. B-120188). On October 7, 1955 the Commission informed the Joint Committee on Atomic Energy that "negotiations for settlement of cancellation costs are being held in abeyance to determine whether the contract actually exists, because of circumstances surrounding the contract's making. The AEC mentions 'possible conflict of interest and public policy'" (BNA, Atomic Industry Reporter 1:146). Five days later the General Accounting Office stated that it had "recommended a go-slow policy to the Commission in reaching a settlement of the contract . . . that might circumvent the government's right to a court test on the validity of the contract" (id. at 1:159). Finally, in November 1955, the Commission through its General Counsel repudiated the contract for the reason that "there is a substantial question as to whether there were material violations of law and public policy in the inception of the contract which would result in its being held invalid by the courts" (id. at 1:203). The result was the filing on December 13, 1955, of suit by Mississippi Valley Generating Company in the Court of Claims to recover $3,543,778 in cancellation costs from the federal government (id. at 1:219). In its answer filed with the court, the Department of Justice prayed that the action be dismissed because the contract was "in violation of the statutes and laws of the United States and . . . unlawful, null, and void, and contrary to public policy" for the reasons that, among others, the activities of one government adviser "involved a conflict of interest so contrary to public policy as to render the alleged agreement null and void," the agreement violated Section 164 of the Atomic Energy Act of 1954, and the contract had not been before the Joint Committee for 30 days (id. at 2:229-230).
sought to justify rescission of its original waiver of the thirty-day period in these words:

In our view the conditions of section 164 were satisfied regardless of the effect of the resolution of rescission. We do not believe that section 164 requires that contracts submitted to the Joint Committee thereunder be immediately effective upon the granting of waiver or the lapse of the thirty-day waiting period. The purpose of the requirement of section 164 for a waiting period or a waiver was to accord the Congress an opportunity to review the power to make such contracts and to take appropriate legislative action if it so desired. . . . [T]he section does not require the submission to the committee of a contract which is immediately effective in all respects upon the expiration of the waiting period or the granting of a waiver. The contract has been on file with the Joint Committee from November 11, 1954, to the present time. Thus, even if the waiver action of November 13, 1954, should be considered invalid, the prescribed waiting period of thirty days expired on February 4, 1955, the Congress having been in session since January 5, 1955. The effective date of the contract . . . is then either February 4, 1955, or December 17, 1954, depending on the effectiveness of the waiver, but this difference is not material. . . . (emphasis supplied.)

By this statement, the Joint Committee itself has demonstrated the ineptness of the language of Section 164 and the questionable nature of the requirement that contracts be referred to that body for a period of thirty days. The Committee claims that it merely reviews the "power to make such contracts." The fact is that the Committee reviews the contract itself before its execution and implementation, a power which may well affect what would appear to be essentially an executive function.

6. Congressional Review of AEC Contracts

Atomic Energy Commission discretion in the making of certain types of contracts under the civilian power reactor program has been severely curtailed by action of Congress in 1957. These contracts are those under the first, second, and third rounds of the program in which the agency contributes financial support directly or indirectly to reactor demonstration projects.

Congressional action was due, in part, to a decision of the Comptroller

603 BNA, Atomic Industry Reporter 221:821.
604 See text, supra, at note 16.
General with respect to the initial contract made by the Commission under the first round invitations of that program, that with Yankee Atomic Electric Company. Under that contract, dated June 4, 1956, the company was to bear construction costs of a pressurized water type reactor with an initially estimated cost of $34.5 millions, while the Commission was to undertake research and development work of up to $1 million in agency facilities and to underwrite up to $4 million of such work by the company itself. The Commission also agreed to waive its normal charge for the use of special nuclear material to fuel the reactor for a five-year period after the issuance of an agency license, at an estimated loss of revenue to the Commission of $3.3 million. Research and development work under the Yankee contract commenced in June 1956 and will continue through at least 1960.\textsuperscript{605}

In his report to the Joint Committee February 19, 1957, on review of the Yankee Atomic contract\textsuperscript{606} the Comptroller General criticized, among other things, the agreement by the Commission to waive its material use charge for five years,\textsuperscript{607} as permitted under the second round invitation for small reactor plants,\textsuperscript{608} instead of for 2½ years as provided under the first round invitation.\textsuperscript{609} Further, according to the Comptroller General,

\begin{quote}
\ldots AEC announcements provide that material use charges may be waived up to an agreed-upon amount of money. The [Yankee] contract does not comply with this policy to the extent that it does not specify any limitation on the amount of money of the material use charge waiver but, instead, provides that AEC will waive its use charge for all special nuclear material used during the contract period.\textsuperscript{610}
\end{quote}

As a result of this criticism by the Comptroller General and Joint Committee sentiment “to shape the development of nuclear power along the lines of its own preference,”\textsuperscript{611} legislation was enacted by Congress in 1957 which gives, in effect, almost complete legislative control over

\textsuperscript{605} For the text of the contract, see 1957 Section 202 Hearings, \textit{supra} note 7 at 741-752; see statement of AEC General Manager Fields, \textit{id.} at 727-728; AEC, Twenty-third Semi-Annual Report 105 (1958); BNA, Atomic Industry Reporter 2: 187.

\textsuperscript{606} 1957 Section 202 Hearings, \textit{supra} note 7 at 757-768.

\textsuperscript{607} \textit{Id.} at 764.

\textsuperscript{608} AEC Press Rel. No. 953 (Jan. 7, 1957); 1957 Section 202 Hearings, \textit{supra} note 7 at 760.

\textsuperscript{609} Sept. 21, 1955, 2 CCH Atomic Energy Law Reporter, ¶6539; 1957 Section 202 Hearings, \textit{supra} note 7 at 760-1.

\textsuperscript{610} 1957 Section 202 Hearings, \textit{supra} note 7 at 766.

\textsuperscript{611} Green, \textit{supra} note 480 at 124.
Commission contracts involving the expenditure of federal funds for the direct or indirect benefit of the private contracting party. This change in the operation and administration of the United States atomic energy program was effected by amendments to Section 261 of the 1954 statute \(^{612}\) and by provisions of the appropriation act for fiscal year 1958.\(^{613}\)

As amended, Section 261 of the Atomic Energy Act of 1954 permits only the appropriation of funds, without authorizing legislation approved by the Joint Committee and enacted by Congress, for contracts involving non-military reactors designed to produce less than 10,000 thermal kilowatts of heat. Otherwise, the basis for each individual arrangement, including contracts, agreements, or loans, which involves the expenditure of public funds for other than pure research unrelated to a specific project proposed under the civilian power reactor program, must be presented to the Joint Committee for appropriate authorization. This requires specific approval of "each of the seven arrangements contemplated under the first and second rounds of its [the AEC's] program." \(^{614}\)

Section 261 was implemented by Congress in the authorization act for fiscal year 1958 \(^{615}\) to effect the following procedures, thus described by the Joint Committee:

... [B]efore the Commission enters into any arrangement (including contract, agreement or loan) or amendment thereto, the basis of which has not been included in the program justification data previously submitted to the Joint Committee and which involves appropriations ..., the basis for the arrangement or amendment thereto shall be submitted to the Joint Committee, and a period of 45 days shall elapse while Congress is in session....

... [S]uch arrangements or amendment must be entered into in accordance with 'program justification data' submitted in connection with the hearings [before the Joint Committee] and with the 'basis' of the arrangement.... The phrase 'program justification data' was intended to include the scope, policies, and criteria of the various 'rounds' of the Commission's power demonstration program, as explained by the Commission and interpreted by the [Joint] committee at the time of the hearings and outlined in committee reports.

The effect of the requirement with respect to conformance

\(^{615}\) Pub. L. 85-162, supra note 613, §111(a)-(b).
of arrangements with program justification data . . . would be to prevent the Commission from changing its rules and criteria after congressional review during the authorization process. The scope, rules, and criteria of the various rounds of the program could be changed only in connection with resubmission in a subsequent authorization hearing by the Joint Committee.

The contract or arrangement shall also be in accordance with the basis for the arrangement which has been previously submitted to the Joint Committee either during the hearings on the authorizing legislation, or else by the 45-day procedure set forth in the subsection. The Commission must specifically advise the committee when it is submitting a proposal to the Joint Committee as a basis for the proposed contract or arrangement. For example, during the hearings on this bill . . . , the Commission advised the Joint Committee that of the various proposals which it had under consideration, it was submitting only one (Power Reactor Development Co.) for review by the Joint Committee as a basis for a proposed contract or arrangement.616

That the Joint Committee will have the final word with respect to Commission contracts involving research and development for particular projects is demonstrated by the Committee's handling of the Commission's request for funds in connection with the Power Reactor Development Co. (PRDC) project. Under its contract with PRDC, the Commission was to provide pre-construction research and development assistance in AEC facilities up to a maximum of $4,450,000. PRDC and its affiliate, Atomic Power Development Associates (A·PDA) were to pay the remaining cost estimated to be $9 million. The Commission further agreed to waive charges for the use of special nuclear material for five years in an amount aggregating $3,702,600.617 Two hundred and forty-four thousand dollars having been obligated by the Commission in fiscal year 1957 under the PRDC contract, the agency requested an additional $4,206,000 for authorization in fiscal year 1958, with $1,500,000 of this amount to be obligated in that year and the remainder in fiscal years 1959 and 1960.

The Joint Committee rejected both the request for authorization of funds for pre-construction research and for waiver of fuel charges, "since legal proceedings before the AEC to determine the probable safety of the proposed reactor are still pending." 618 The Committee only

617 Id. at 10; AEC Twenty-third Semi-Annual Report 117 (1958).
618 Id. at 19.
approved for authorization "the amount of $1,500,000 . . . [to] be expended for research and development in Commission laboratories to advance the technology of the fast breeder reactor concept," and not for pre-construction research and development in connection specifically with the PRDC project.

Coincident with its establishment of de facto control over AEC contracting involving the expenditure of federal funds, Congress also has spelled out the manner in which the agency is to make contracts with publicly and cooperatively owned utilities. This Congressional action was designed to expand the Commission's second round invitation under the civilian power reactor program.

The so-called "Cooperative Power Reactor Demonstration Program" inaugurated by Congress was legislatively launched in the authorization act for appropriations for fiscal year 1958. This program requires that, in connection with power reactors proposed to be constructed by publicly and cooperatively owned utilities:

1. Arrangements for such projects must be effected by direct negotiations between the Commission and the equipment manufacturer or engineering organization developing, constructing, and designing the nuclear reactor and related facilities.

2. The Commission must contract with such utilities for "the provision of a site and conventional turbogenerating facilities, operation of the entire plant including training of personnel, sale by the Commission of steam [from the reactor complex to the cooperative or publicly owned organization], and other relevant matters."

3. Sale of steam by the Commission under its contract with the utility "shall be at the rate based upon cost or value of comparable steam from present or projected plants at the site area," regardless of the actual cost of producing such steam which probably would exceed that of, and be unable to compete with, fossil fuels in the foreseeable future.

4. Contracts for research and development in connection with these facilities shall be for periods of not more than 10 years.

5. The reactor installation must be dismantled at the end of the contract period in the event the utility is unwilling to purchase it "at a price to reflect appropriate depreciation but not to include construction costs assignable to research and development."  

620 Id., Section 111(a)(1).
621 Sen. Rep. No. 791, supra note 23 at 33. The Comptroller General has approved
The special treatment to be accorded contracts with publicly and cooperatively owned utilities by the Commission, by Congressional direction, stemmed from the feeling of the Joint Committee that

Negotiations by the AEC which would result in jeopardizing the financial integrity of cooperatives and publicly owned organizations would not be warranted on the basis of advancement of the atomic technology. Neither would it be wise to set a contractual pattern on the part of the Government with these small groups and thereby create a precedent for widespread subsidy to large profitmaking private utilities later. 622

The requirements established by Congress create a double standard of contractual relations which places the major financial and operating responsibility for reactor facilities to be operated by publicly or cooperatively owned utilities squarely upon a federal governmental agency. 623

D. Contracting with the AEC

Although the Atomic Energy Act of 1954 did not deal comprehensively with the contracting authority of the Commission, that legislation represented a distinct improvement over the 1946 act. As under the prior statute, the 1954 legislation authorized the Commission to acquire material, property, equipment, and facilities and to purchase, lease, and hold real and personal property, as required in the exercise of its functions. 624 The President is authorized to exempt any action of the Com-

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623 For an initial difficulty experienced by the Commission in negotiating a contract for construction of a reactor under the cooperative program, see AEC, Twenty-third Semi-Annual Report 109 (1958). This involved the proposed construction by Rural Cooperative Power Association of Elk River, Minn., of a 22,000-electric-kilowatt boiling water reactor plant, accepted as a basis for contract negotiations under the second round invitation in April 1956. With the enactment of Pub. L. 85-162, the AEC became responsible for direct negotiations with the selected reactor manufacturer. These negotiations were terminated when the manufacturer notified the Commission that its price for building the reactor, and for accompanying research and development work, would be $10.75 million rather than the $7.93 million ceiling previously agreed upon. Also, on Sept. 20, 1957, the AEC signed a contract with Consumers Public Power District of Columbus, Nebraska, covering construction and operation of a large-scale nuclear power plant at Hallam, Nebraska. This contract, entered as the result of a proposal made under the first round invitation, was signed after the Joint Committee waived the 45-day waiting period established by Pub. Law 85-162.
624 Section 161e and g, 42 U.S.C.A. §2201 (e) and (g); see Section 174, 42 U.S.C.A. §2224.
mission "from the provisions of law relating to contracts whenever he determines that such action is essential in the interest of the common defense and security." 825

The statute deals with several matters which directly govern provisions of a Commission contract with a prime contractor. First, the cost-plus-percentage-of-cost contract is outlawed.626 Second, the contract may not provide "for direct payment or direct reimbursement by the Commission of any Federal income taxes on behalf of any contractor performing such contract for profit." 827 Third, where a contract is negotiated with a domestic concern without advertising, it must contain a provision permitting the Comptroller General to have access to the contractor's books for three years after the final payment is made under the contract by the United States.628 Finally, subcontractors under a prime contract are forbidden unless authorized by the Commission.629

625 Section 162, 42 U.S.C.A. §2202.
626 Section 165a, 42 U.S.C.A. §2205(a); see, to the same effect, 10 Code Fed. Regs. §5.103. This type of contract also is outlawed by the Armed Services Procurement Act of 1947, 41 U.S.C.A. §153(b), and the Federal Property and Administrative Services Act of 1949, 41 U.S.C.A. §254(b). See Risik, supra note 536 at 130; Minsch, supra note 539 at 195.
627 Section 165b, 42 U.S.C.A. §2205(b).
628 Section 166, 42 U.S.C.A. §2206; see AEC Manual, Section 9II1-03II. This requirement applied to Commission contracts prior to 1947 by virtue of Executive orders 10210, 16 Fed. Reg. 1049 (Feb. 6, 1951), and 10216, 16 Fed. Reg. 1815 (Feb. 27, 1951), issued pursuant to the First War Powers Act of 1941, as amended. In contracting with Yankee Atomic Electric Company under the power demonstration reactor program, the Commission agreed, subject to review by the Comptroller General, to amend the examination-of-records' provision to limit its applicability to that portion of the work performed by Yankee which was paid for by the Commission. The Comptroller General ruled that, under the Yankee contract, records relating to all work performed thereunder, and not necessarily reimbursable work, were subject to examination by the General Accounting Office (Dec. B-129114, Oct. 10, 1956). In connection with the AEC's contract with Power Reactor Development Co. (PRDC) the Comptroller General has ruled that, where research and development work by the Commission with appropriated funds would be made under separate contract subject to audit by the General Accounting Office, the prime contract between the agency and PRDC does not violate Section 166 when it fails to include a provision requiring such government audit of accounts in connection with the prime contract (Dec. B-131013, Mar. 22, 1957).
629 Section 41b(1), 42 U.S.C.A. §2061(b)(1). See Minsch, supra note 539 at 194-195. "This somewhat unique statutory restriction on subcontracting is actually but a logical concomitant of the general scheme of the Atomic Energy Act of 1954 (and its predecessor statute) for ensuring, in the interests of the common defense and security and the health and safety of the public, that the AEC will have adequate control over the production and use of special nuclear material." Approximately one-third of the over $1 billion paid by the Commission directly under contracts during fiscal year 1955 went to subcontractors, id. at 190-191.
I. Contracting in General

The negotiation, execution, and administration of a contract with the Atomic Energy Commission does not have the same procedural and substantive safeguards which are afforded the businessman or firm seeking a license from that agency. Absent the assimilation of contract procedures to the requirements of administrative due process, the principal safeguard that the prospective government contractor has is his own sense of caution and care in negotiating the terms of the agreement with the agency or department involved. In spite of the general success of the Atomic Energy Commission's program in satisfactorily administering a contract program involving billions of dollars with little public criticism and litigation, healthy self-interest should never be forgotten by the private businessman or concern in negotiating with the Commission.

Like every other agency and department of the federal government, the interests of the Atomic Energy Commission are paramount in negotiating and administering a contract with a private party. Indeed, the basic procurement policy of the Commission, in its own words, is "that supplies and services be procured by the methods most advantageous to the government." 63° In one of the two reported decisions in which he has reversed a recommendation of the Commission's Advisory Board of Contract Appeals, the AEC General Manager has stated that he was "not convinced the rights of the Government should be relinquished by any action of mine which would not have adequate support in the record." 681

Otherwise stated, "the Government has no paternalistic attitude towards its contractors," and the "contracting officer is going to make the best 'deal' he can for the Government and takes his obligation to protect the Government's interest with seriousness." 682 The General Counsel of the Navy Department has issued this advice in that regard:

I believe there has been a great deal of misunderstanding about the very character of a Government contract. There are some people who apparently have felt that getting a Government contract means "getting in on the gravy"—that you just

630 10 Code Fed. Regs. §§5.21; see, to the same effect, §§5.101 and 5.501.
682 Moss, supra note 536 at 159. He adds: "Many contractors seem to be laboring under the impression that the Government will 'take care of them' regardless of contractual provisions. . . . Nothing is further from the truth. The Government is, in fact, a sharp trader, and its officers are trained in that regard. . . ."
sign up with the Government, and the money begins to roll in. But nothing could be farther from the truth. The Government has a carefully-worked out, meticulous and responsible system of purchasing, designed to provide quality, as well as quantity, which meets the complex and precise requirements of defense and at the very best price. As a result, the so-called 'Government contract' that we hear about has become, not a simple document that can be disposed of with a casual glance; on the contrary, just as the legal requirements and many of the goods which are called for by a Government contract are highly complex, the Government contract has also become complex.

The misconception that the government contracts in other than an attitude of hard bargaining may even be encouraged by the agency or department concerned. The emphasis in attracting would-be bidders for government contracts often is that the entire matter is solely one of "public relations." This approach is used to some extent by the Atomic Energy Commission.

In this connection, it always should be remembered that the government is represented by legal counsel in preparing and negotiating contracts with private persons. This follows logically from the govern-

633 Vom Bauer, supra note 536 at 29 and 31.
634 Moss, supra note 536 at 166.
635 "Counselor, advisers, or agents are not necessary to obtain business from the AEC, its contractors or subcontractors. Such persons cannot obtain AEC business which the reader of 'Selling to AEC' cannot obtain for himself." (AEC, Selling to AEC (1956), reproduced in BNA, Atomic Industry Reporter 221:121). This statement goes beyond the salutary warning needed against use of "five percenters" and "influence peddlers" and encourages the businessman not only to seek business from the Commission but to execute a contract therefor without adequate expert engineering or legal advice.
636 Vom Bauer, supra note 536 at 32: "However, there are some Government contractors who appear to feel that they do not need legal advice. They sometimes enter into contracts with the Government without benefit of counsel, and sometimes afterwards complain bitterly when they find out the exact nature of the rights and obligations which they have unwittingly assumed. True, the Government cannot insist that a contractor be represented by counsel. That is his own personal business. But I may say frankly, speaking personally at least, that in my opinion it is very greatly to the advantage of the Government, as well as to that of the contractor, to have him represented by a lawyer. He should be so represented not only at the outset of the negotiations so that the contractor may understand clearly what he is getting into, but
ment's understandable desire to make the best contract possible from its point of view. The need for adequately protecting his business and legal interests is required of the contractor dealing with the Atomic Energy Commission, particularly with respect to cost contracts for large research and development projects. These so-called "administrative contracts" deal only in the broadest terms with the rights and obligations of the parties.

A contract negotiated by a private contractor with any government department or agency is not one negotiated between, or to be administered by, equals. The traditional concept of the Executive Department also in the course of the performance of the contract, and in cases before the Armed Services Board of Contract Appeals." See Ramey and Erlewine, supra note 551 at 360, n. 8: "In AEC contract negotiations are normally carried on in the field by a 'team' under the leadership of the field manager of operations . . . and with the advice and assistance of the Assistant General Counsel, or other attorney, the Director of Finance and other appropriate staff. . . ."

See Beryllium Corp., AEC ABCA Dkt. No. 6 (Recommendations adopted by General Manager Dec. 19, 1949), BNA, Atomic Industry Reporter 221: 312; "Contractor committed to construction of complete buildings for lump-sum consideration cannot recover from Government amount paid sub-contractor in reimbursement for expenses which, because of Government's need for speed, had been overlooked in computation of price."

The term first was used by the AEC in 1951; AEC, Ninth Semi-Annual Report 52 (1951): "The type of cost contract used to a large extent by the Commission for development work may perhaps best be described as an 'administrative contract.' A main emphasis here, as in many other contracts, is upon cooperation between the Government and the contractor to accomplish the particular task. . . ." The most comprehensive discussion of the "administrative contract" is contained in Ramey and Erlewine, supra note 551 at 354 et seq. According to the authors, an "administrative contract" is merely a "memorandum of understanding," with a "'charter-like' nature," using "a minimum of legal or technical jargon" (id. at 363, 364, 365). In such an agreement, "[t]he parties are not overly concerned with the legal consequences of their relationships in terms of enforcement through litigation, but are careful that the agreement will pass muster with the court of first instance in Government contracts, the General Accounting Office" (id. at 355). Although cooperation between the Commission and its contractors is certainly to be sought, and ordinarily assured, this theory of cooperation to the exclusion of spelling out the legal relationship between the government agency and the private party hardly converts the "administrative contract" into a partnership between the parties. Nor does the "growing use of the regulatory approach [to government contracts, emphasizing a detailed contract between the parties] seriously endanger . . . the cooperative, mutual agreement approach to the administrative contract" or defeat "the very purposes" of government contracting (id. at 371). If any misunderstanding requiring administrative or judicial relief arises under the contract, it is the private party, not the government, which will find the loose language of the administrative contract the doorway to an adverse decision. Unfortunately for the private contractor, the government is not ordinarily forced to use that doorway.
and the courts that no real difference exists between government and private contracts 640 is unrealistic. The doctrine of sovereign immunity gives the government the choice of determining the forum in which disputes and suits with respect to a contract may be determined. Indeed, "the Government, as a contractor, has insisted on and received favorable treatment in its contracting capacity which it would not receive under ordinary principles of private contract law." 641 The contracting officer, who administers the contract and initially determines disputes under, is hardly an unbiased or disinterested party to the proceedings. Finally, the government has the ultimate authority, on behalf of the Atomic Energy Commission, to seize facilities of a manufacturer who refuses or fails to honor a mandatory order "to obtain prompt delivery of any articles or materials the procurement of which has been authorized by the Congress exclusively for the use of . . . the Atomic Energy Commission." 642

2. Types of AEC Contracts 648

The Atomic Energy Commission uses three general types of contracts. The first, the unit-price contract, is used in purchases of supplies, materials, equipment, and other items on which a definite price can be fixed by unit of sale. Purchases of uranium concentrate from uranium processors fall into this category. 644

Construction programs are largely effected through the use of lump-sum contracts. This is also the type of contract used by the Commission in contracting for research by educational and other types of institutions, the latter being required to put up a certain percentage of the cost of the project.

640 E.g., United States v. Wunderlich, 342 U.S. 98, 100, 72 S. Ct. 154 (1951); Martinsburg & P.R. Co. v. March, 114 U.S. 549, 553-554, 5 S. Ct. 1035 (1884); see Schultz, supra note 536 at 218-219, 222-223.
641 Schultz, supra note 536 at 220.
642 Selective Service Act of 1948, 50 U.S.C.A. App. §468(a). The armed services are the only other branch of the federal government with this authority.
643 For excellent discussions of this subject, see BNA, Atomic Industry Reporter 221: 1-7 and 1 CCH Atomic Energy Law Reporter, §§571 ff.
644 See 10 Code Fed. Regs. Pt. 60, providing for purchases by the Commission of uranium at guaranteed minimum prices pursuant to contract (§60.1(d)). In connection with a contract by the Commission for the purchase of four to seven million pounds of high purity magnesium annually over a period of 5 years, the Comptroller General has ruled that the Commission lacks authority to contract beyond one year in the absence of special provision therefor, and that, while "no question will be raised about earlier contracts [by the AEC], the principles [in the decision] will apply in the future" (Dec. B-130815, April 2, 1957); see BNA, Atomic Industry Reporter 3: 133
Finally, there is the cost type contract, in which the government pays for the contractor’s costs plus a negotiated fixed fee. This category of contract has been used for the construction and operation by private business of agency-owned facilities and represents the so-called “administrative contract.” Under this type of agreement, its terms are stated in broad and general terms, the particulars to be developed and agreed upon as the work progresses.

3. AEC Contract Clauses

Like other federal government agencies, the Atomic Energy Commission seeks to standardize clauses contained in the various types of contracts which it makes. This is effected by establishing one series of clauses, the inclusion of which in every contract for over $500 is required, and another series of clauses the inclusion of which is recommended in each type of contract to which applicable.

a. Mandatory Clauses

Mandatory clauses or articles contained in Atomic Energy Commission contracts cover a multitude of public sins which the Congress, by legislation, has seen fit to proscribe. The settlement of disputes also is prescribed in a mandatory contract clause.

In the public policy category of mandatory clauses are the prohibitions against

1. Convict labor;  
2. Contingent fees;

645 See Risik, supra note 536 at 132-133.  
646 See AEC Manual, Section 9111-022: “It is the policy of AEC to use standard contract articles and forms wherever practicable. Uniformity in form and substance of contract articles and forms tend to assure impartial treatment of all contractors, expedites negotiation and contract review, and facilitates contract administration.” Yet the Joint Committee has found that AEC “contract negotiations have developed a set of unrelated and complicated proposed contracts [under the civilian power demonstration reactor program]. Apparently the terms of each proposal have depended upon the request of the proposer, and the AEC has established no across-the-board standards. Accordingly, there is considerable variation between the types of assistance to be provided under the contracts [negotiated or being negotiated under the first, second, and third-round invitations] . . .” (Sen. Rep. No. 791, supra note 23 at 15-16).  
647 AEC Manual, Section 9111-031.  
648 Id., Section 9111-041.  
651 AEC Manual, Section 9111-033.
These clauses, together with the Commission's statements of policy with respect to aiding "small business," represent the government's attempt to implement, at the behest of Congress, prevailing social and economic policies.


658 10 Code Fed. Regs. §§524, 5.69(a)(2)-(4), 5.506. For a discussion of AEC policies with respect to "small business," see BNA Atomic Industry Reporter 2:110; AEC, Twenty-third Semi-Annual Report 303 (1958); Minsch, supra note 539 at 191, n.3 (nearly of the AEC direct payments to subcontractors "went to small business firms"); and Risik, supra note 536 at 134: "This clause is generated by a statement of government policy contained in several pieces of legislation to the effect that small business concerns must receive a fair share of government contracts. The purpose of this clause is laudable; it is not conceivable that our economy could function properly without small business concerns. But, it is difficult to see how a pious prayer such as the utilization-of-small-business-concerns helps the situation. The enforceability of such a covenant is doubtful to say the least, and at worst, a contractor might seek to escape responsibility for the acts of his small business concern subcontractors."

659 Risik, supra note 536 at 133-134, 136: "Several clauses find their way into government contracts which actually have only a remote connection with the basic purpose of a contract. . . . There has been an increasing tendency to use government procurement to implement social and economic policies. . . . The effect of these philosophies is a severe headache to the draftsman of a government contract. Not only does the contract become cluttered with impediment which are not encountered in commercial contracting, but the net result is frequently poor and meaningless craftsmanship. If government contracts could be shorn of these extraneous matters in some way, without necessarily freeing the contract from being subject to such national policies as are deemed by the Congress or an administration to be wise, these
Other mandatory clauses deal with disputes, to be discussed hereafter; assignments of contracts without the permission of the Commission; safety, health, and fire protection; permits and licenses required to be obtained by the contractor from local authorities; security; litigation and claims; required bonds and insurance; and renegotiation of profits. Aside from the disputes clause, particularly important to the contractor are the mandatory clauses which (1) permit the Comptroller General to have access to the contractor's books for three years after a final payment under the contract in question, and (2) require the contractor immediately to notify the Commission whenever "an actual or potential labor dispute is delaying or threatens to delay the performance of the work."

b. Non-Mandatory Clauses

Suggested articles to be contained in Commission contracts cover every type of situation which may be involved in the agency's procurement work. Even though primarily or entirely drafted by the government, contracts would compare favorably with good commercial documents with respect to simplicity of content, length, and quality of draftsmanship.**

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** ADMINISTRATIVE LIMITATIONS 1341

660 AEC Manual, Section 9111-038.
661 Id., Section 9111-039.
662 Id., Section 9111-0310.
663 Id., Section 9111-0312.
664 Id., Section 9111-0319.
665 Id., Section 9111-0320.
666 Id., Section 9111-0321; see Renegotiation Act of 1951, 50 U.S.C.A. App. §§1211 et seq. Under Sections 102(a) and 103(a), 50 U.S.C.A. App. §§1212(a) and 1212(c), all contracts with the Atomic Energy Commission "to the extent of the amounts received or accrued by a contractor or subcontractor" on or after January 1, 1951, are made subject to the renegotiation procedure.
668 AEC Manual, Section 9111-0313. See Mid West Contracting Co., AEC ABCA Dkt. No. 35 (Board's recommendation adopted by General Manager April 29, 1953), BNA, Atomic Industry Reporter 221: 328: "Contract specification's requirement that contractor satisfy himself as to general and local labor conditions which can affect cost under contract bars his recovery of additional costs incurred when he was required to use plumbers instead of pipelayers to install iron water pipes; contractor was obligated by local custom and local union rules to use plumbers, instead of pipelayers, and he could and should have discovered this by reasonable inquiry required of him under contract specification; less than total observance of union jurisdictional boundaries in installing subdivision water lines does not relieve contractor of obligation to use plumbers since he was engaged in overall large federal construction where many other trades and unions were employed."
669 AEC Manual, Sections 9111-04 through 096.
ment, such clauses tend to be strictly construed against the contractor and in favor of the government.\textsuperscript{670}

E. Settlement of Contract Disputes at Administrative Level

Controversies arising under government contracts traditionally have been sought to be settled by the use of a disputes clause inserted in the contract itself at the insistence of the public agency. In addition, many agencies like the Atomic Energy Commission have appointed a semi-independent body generally known as a Board of Contract Appeals to review decisions of the contracting officer, with or without that decision being binding on the head of the agency. A third method of contract dispute settlement at the administrative level relates to the authority of the Comptroller General.

\textbf{1. The Disputes Clause} \textsuperscript{671}

The government has used two types of disputes clauses which empower the contracting officer, as the government’s representative, to settle all controversies arising under the contract, such decision to be final and conclusive, subject only to administrative review. The first, the “all disputes” clause, permits the contracting officer to decide all questions of law and fact.\textsuperscript{672} The second, and more common,\textsuperscript{673} type is the “facts disputes” clause, which leaves to the contracting officer’s final determination only questions of fact.

The Atomic Energy Commission has adopted the “facts dispute” clause.\textsuperscript{674} This clause provides:

\begin{quote}
Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Con-
\end{quote}

\textsuperscript{670} See Frank Belluscio \& Sons, Inc., AEC ABCA Dkt. No. 4 (Board’s recommendations adopted by General Manager Nov. 16, 1950), BNA, Atomic Industry Reporter 221:311-312, strictly construing a “changes” article.

\textsuperscript{671} For a general discussion of this type of contract provision, used in some form or another in government contracts since after the Civil War, see Joy, supra note 536 at 13-17; Schultz, supra note 536 at 219-220.


\textsuperscript{673} Generally, Article 15 of the contract, see Shea, supra note 536 at 356; Joy, supra note 536 at 11.

\textsuperscript{674} AEC Manual, Section 9111-034. 10 Code Fed. Regs. §3.1 specifically provides that such a clause may be included in subcontracts, a practice which is not commonly found in the contract appeals procedure of other agencies, see Cuneo, “Disputes Between Subcontractors and Prime Contractors Under Government Contracts, 16 Fed. Bar J. 246, 253 (1956).
tracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the contractor. Within 30 days from the date of receipt of such copy, the contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Commission, and the decision of the Commission shall, unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence, be final and conclusive: Provided, That if no such appeal to the Commission is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

This clause contains five component parts with respect to procedure at the administrative level. First, the contracting officer has sole authority to decide "a question of fact arising under this contract" on which mutual agreement is not reached with the private contractor. This provision is detailed in the Commission's rules to require the contracting officer to issue, and to serve upon the contractor, a "decision" consisting of a statement of his decision, specific findings of fact thereon, and a copy of the rules governing appeals to the agency's Advisory Board of Contract Appeals.

Second, the clause gives the contractor thirty days from the date of receipt of a "decision" by the contracting officer to file his appeal with the Commission, that is, the Advisory Board of Contract Appeals.

675 10 Code Fed. Regs. §3.10. In the Board's view, specific findings of fact are "... important. ... Not only do such Findings formulate the issues for appeal ... but they evidence a vital part of the mental processes essential to any decision. Until the formal Findings of Fact have been completed, any purported decision (no matter how designated) is tentative by the very nature of human thinking. The ultimate decision must rest on, and be supported by, the Findings of Fact, and absent such Findings, there is no decision ..." (Frontier Drilling Co., AEC ABCA Dkt. No. 74 (Board's recommendations adopted by General Manager July 1, 1955), BNA, Atomic Industry Reporter 221:374).

Third, if no appeal is taken, the decision of the contracting officer is "final and conclusive." Fourth, the Commission must afford procedure for the contractor to be given a hearing before it, which has been done through the Advisory Board of Contract Appeals. Fifth, the contractor must proceed "diligently" with the work during the pendency of the dispute.

The government often has taken the position that the procedure established by the disputes clause represents a true form of arbitration consistent with principles of arbitration applicable to private contracts. The facts, however, do not support this claim. The contracting officer is hardly an impartial third party, completely disinterested in the result of the settlement of the dispute, in spite of the AEC Board's praiseworthy efforts to improve the status of the contracting officer in contract appeals procedure. The contracting officer's job is to keep the contract moving, with maximum benefit to the government, and the disputes clause procedure provides a "relatively inexpensive and rapid method of settling controversies." The disputes clause may afford some measure of due process in the settlement of controversies arising under a contract while it is being carried out, but it is not a true agreement to arbitrate because the decision is made by a representative of the Government. The bargaining power of the Government is

677 Joy, supra note 536 at 11, 13; Anderson, supra note 536 at 220.

678 See, e.g., Review of Finality Clauses in Government Contracts, Hearings before House Judiciary Committee on H.R. 1839 et al., 83d Cong., 1st and 2d Sess. 24 (1954), in which the representative of the American Bar Association stated, in part: "Such a contracting officer may not intend to do any wrong; unwittingly, he is just not impartial. . ." Other commentators are less charitable, see, e.g., Schultz, supra note 536 at 224.

679 See Otis Williams & Co., AEC ABCA Dkt. No. 88 (Board's recommendations adopted by General Counsel Nov. 8, 1956), BNA, Atomic Industry Reporter 221: 388: "Contracting officers have many duties in connection with the execution of, and performance under, both prime and subcontracts. In most of these, they act purely as agencies of the Commission as a party to a contractual arrangement. But when a contracting officer proceeds under the 'disputes articles' of a prime or a subcontract, to decide a dispute, he then acts in a quasi-judicial capacity, obligated to proceed impartially, and without favoritism either to the subcontractor, to the contractor or to the Commission. Once he has rendered his decision, his judicial connection with the dispute ceases. . . . If the dispute was under a prime contract, he reverts to his status as an agent of the Commission and appears, in that capacity, as appellee. . . . [W]hen the dispute reaches this Board, appearances by counsel are on behalf of the proper parties, and a purported appearance for the contracting officer in his judicial capacity is as impossible and as improper as would be the appearance in an appellate court by counsel for the trial judge. . . ."

680 Joy, supra note 536 at 20.
very great since many contractors depend upon Government contracts for their very existence, and are thus in no position to force their demands upon the Government. As a result, the disputes clause is heavily in favor of the Government.  

2. Advisory Board of Contract Appeals

Chartered in April, 1948, the Advisory Board of Contract Appeals of the Atomic Energy Commission represents a salutary, although incomplete, attempt by that agency to assure a measure of due process in the consideration of disputes appealed to the Commission from the contracting officer. Authority for the creation of the Board stems from Section 12(a) of the 1946 Act and Section 161a of the 1954 Act authorizing the Commission to “establish advisory boards to advise with and make recommendations to the Commission . . . administration.”

This type of intra-agency review procedure also has been used effectively in other agencies of the government. Some of these boards follow the pattern of the Atomic Energy Commission Advisory Board, the decisions of which are merely recommendations. Others follow the pattern of the Armed Services Board of Contract Appeals, the decisions of which are binding on the agency involved.

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681 Shea, supra note 536 at 356.
682 42 U.S.C. §1812(a) (1946); 42 U.S.C.A. §2201(a). The general administration of advisory boards to the Commission, including the Advisory Board of Contract Appeals, is provided for in 10 Code Fed. Regs. Pt. 7, adopted Sept. 1, 1955, in “the midst of a growing controversy over what has been termed in press reports as ‘big business domination’ of the drive to develop industrial uses of atomic energy” (BNA., Atomic Industry Reporter 1:107). For a discussion of the antitrust problems arising with respect to AEC advisory boards, see Jacobs and Melchior, supra note 350 at 531-533. (Ed. Note: On February 3, 1959, 10 C.F.R., Part 3 of the AEC’s Rule was amended to place the hearing of contract appeals under the agency’s hearing examiner, 22 Fed. Reg. 726.)
683 General Services Administration Board of Review, established March 7, 1950; Veterans' Administration Construction Appeals Board and Supply Contract Appeals Board, established April 8, 1949, and March 12, 1954, respectively.
684 Department of Interior Board of Contract Appeals, established December 29, 1954; Contract Disputes Board for Commodity Credit Corp., established April 4, 1946; and Army Corps of Engineers Claims and Appeals Board, established August 9, 1946. Army overseas commands also have Boards of Contract Appeal with jurisdiction of claims up to $50,000, see Joy, supra note 536 at 17.
685 Established May 1, 1949, and merging the former War Department and Navy Department Boards of Contract Appeals created August 24, 1942, and December 1, 1944, respectively. See Cuneo, supra note 536 at 376: “The charter of the Board also states that ‘when an appeal is taken pursuant to a disputes clause in a contract which limits appeals to disputes concerning questions of fact, the Board may nevertheless in its discretion hear, consider, and decide all questions of law necessary for the complete adjudication of the issue,’ and unless the contract provides otherwise,
a. Jurisdiction

Although obviously exercising considerable influence on the Atomic Energy Commission with respect to contract disputes, the Commission Advisory Board of Contract Appeals is exactly what its title signifies—an advisory body. Its decisions are merely recommendations to the General Manager, who, in every reported case but two through 1957, has approved such recommendations. As the Board itself has stated, it is only "the creature of the Commission, and it has only such power as the Commission has chosen to confer." 686

The Boards' jurisdiction primarily is established by the scope of the disputes clause itself and by Commission regulation. Thus, the Board is limited by that clause to settling controversies which arise "under the contract." It does not have jurisdiction over questions of general law connected with, but not directly arising under, the contract, nor can it deal with controversies after the contract is completed. 688 Further, the Commission's regulations stipulate that

The General Manager of the Commission is the designated representative to decide finally all appeals arising under the "disputes articles" of commission contracts and subcontracts. The Commission has established an Advisory Board of Contract Appeals to assist the General Manager in his discharge of this responsibility by hearing the appeal and recommending to the General Manager appropriate disposition of the appeal. . . . 689

If it appears that a claim for unliquidated damages is involved in the appeal, 'the Board shall, insofar as the evidence permits, make findings of fact with respect to such claim without expressing an opinion on the questions of liability.' . . . The wisdom of the Secretaries in giving the Armed Services Board administrative authority not set forth in the contract was recognized by the Court of Claims in McWilliams Dredging Company, 118 Ct. Cl. 1, 16 (1950). The court likened the Board as the representative of the Secretary, to an owner who would reverse his representative if he were wrong, not because the contract gave him the authority to make a final decision, but because it would be the natural and fair way for an owner to act. The courts have said that mistakes should be corrected within the agency whenever possible. Edmund J. Rappoli Company, Inc., 98 Ct. Cl. 499 (1943)."


688 Ibid.

In construing the above grants of power, the Board has severely limited its authority. Thus it has held that

... [T]he rules do not establish the Board as an advisor at large to the General Manager. Its advice can be sought, and given, only where the appeal falls within the first sentence of Section 3.1, namely a dispute arising under a contract or subcontract. . . .

... Finally, the Board's jurisdiction is limited by the language of the particular disputes clause involved. Section 3.2 of the Rules provides for an appeal only where it arises "under the disputes article" of the contract involved. Absent a disputes article, the Board has no power to pass on any issue. . . .

In exercising its limited jurisdiction, the Board also is governed by the provisions of Public Law 356 enacted by Congress May 11, 1954. This statute, which is fundamental law in the field of Government contracts, provides:

No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: Provided, however, that any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

In construing the operation of the above provisions upon contract appeals within the Atomic Energy Commission, the Advisory Board has stated:

It will be noted that this statute does not operate to deprive "any administrative official, representative or board" of jurisdiction over questions of law. It says, and means, only that whereas (under Section 1 of the same statute) decisions on questions of fact are final (absent the qualifications set out in the proviso to that section), decisions on questions of law are subject to judicial redetermination. But it is impossible for

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690 Frontier Drilling Co., supra note 675.
Contracting Officers or their superiors to pass on claims without reaching decisions on matters of law. Nor can this Board fulfill its advisory function without similar action, if a dispute involving such issues is otherwise properly before it. (Emphasis supplied.)

The "proper" presentation of legal issues to the Advisory Board, however, poses the problem, heretofore unsatisfactorily resolved, of how to differentiate between questions of fact and questions of law. This problem arises most acutely in judicial review of administrative decisions. It also has arisen in the field of contract law because of the understandable desire of procurement agencies to insulate themselves from judicial intervention in the exercise of a so-called "proprietary" function.

The problem is not academic for contractors with the Atomic Energy Commission. It is almost impossible for the contractor to decide when the contracting officer, under the "disputes" clause, has decided a question of fact which, unless appealed to the Advisory Board within thirty days, will be binding upon him in any administrative or judicial proceeding involving the contract. The safest course for the contractor to take is to appeal within the prescribed time.

692 Frontier Drilling Co., supra note 675.
693 See Schwartz, supra note 544 at 854-857; Hoover Commission Legal Task Force Report, supra note 43 at 216-217: "... [I]t is seldom that any issue on judicial review of administrative action is purely a question of law, see Dobson v. Commissioner, 320 U.S. 489, 500-501 (1943). In almost every case the question of law depends in part upon the facts." As the foregoing report points out, the ultimate point in this judicial and legislative fetish of trying to distinguish facts from the law was reached in National Labor Relations Board v. Hearst Publications, 322 U.S. 111 (1941). In this decision the Supreme Court, in sustaining a decision of the Board that newsboys were "employees" of a newspaper under the Wagner Act (question of law) based upon the facts of the situation, "applied a restrictive review of fact issues rather than a broad review of legal questions." The judiciary's attitude in this chronic problem of court review is praiseworthy, because it is based on a healthy desire to prevent encroachment by the courts upon the authority of the Executive Branch. However, the insistence of the latter upon this restrictive scope of review is a part of the policy of administrative agencies to limit any judicial review of their decisions. One solution is to require courts, by legislation, to apply the law to the facts in all cases, see Section 207(g) of proposed Administrative Code, Hoover Commission Legal Task Force Report, supra note 43 at 374: "The reviewing court shall determine all relevant questions of law and interpret any constitutional and statutory provisions involved, and it shall apply such determination to the facts duly found or established, whether or not such court is the trier of the facts. . . ."

694 Etheridge, supra note 536 at 556; Moss, supra note 536, at 163; Joy, supra note 536 at 20-21; Schultz, supra note 536 at 246.
695 Etheridge, supra note 536 at 556-557; Cuneo, supra note 536 at 377: "Another difficulty is to determine whether the dispute is factual or legal. The uncertainty of
The problem again arises at the Advisory Board level. Under its charter, the latter considers the "appeal . . . de novo, and independent findings of fact will be made, although the findings of fact of the contracting officer may be adopted by the Board in whole or in part." 698 This type of review, of course, is not a true trial de novo in which the findings of fact of an administrative body would not be entitled to any legislative or judicial conclusiveness.699

The Advisory Board has endeavored to clarify the distinction between reviewable questions of fact, to which may be allied issues of law, and non-reviewable issues of law standing alone. It has held itself without jurisdiction to interpret a contract lacking a disputes clause.698 However, the Board will make "some preliminary rulings" on legal issues where necessary to determine its own jurisdiction or "to put a factual dispute in its proper setting." 699 As a practical matter, like other intra-agency contract review boards, the Advisory Board of the Atomic Energy Commission probably will hear and decide an appeal from an initial determination of a contracting officer as an issue of fact to which issues of law are incidental.

b. Nature of Proceeding

On paper, the conduct of hearings by the Advisory Board appears to be highly informal and possesses none of the attributes of formal

...Whenever there is any doubt as to what should be done, the wise course to follow is to appeal. In most cases the effort and cost involved are negligible."

698 to Code Fed. Regs. §3.22.

697 For a statutory equivalent of this quasi-de novo administrative review, see 49 U.S.C.A. §16(2) and 7 U.S.C.A. §210, providing for review of reparations' orders of the Interstate Commerce Commission and Department of Agriculture. "Such restriction on the scope of review is inconsistent with a complete retrial of the facts under a trial de novo" (Hoover Commission Legal Task Force Report, supra note 43 at 219).

698 Frontier Drilling Co., supra note 675.

699 The Board held, in part, ibid.: "While, under such an ['facts disputes'] article, the Board can—and frequently must—make some preliminary rulings on legal issues where necessary either to determine (as here) jurisdictional questions, or to put a factual dispute in its proper setting, it is clear that the Board cannot pass on an appeal which raises only legal issues. . . . The present dispute raises only a question as to the interpretation of the contract. By long settled rule, the interpretation of contract clauses, although a dispute under a contract, is a dispute over issues of law. It follows that the Board has no jurisdiction. . . ." But see Retenbach Engineering Co., AEC ABCA Dkt. No. 11 (Board's recommendations adopted by General Manager May 29, 1951), BNA, Atomic Industry Reporter 221:313: "Dispute over whether contract gave Government or contractor responsibility for rerouting traffic around construction site is question of fact determinable by Board under contract's disputes clause."
adjudication\textsuperscript{700} or of an adversary proceeding. Such hearings, by rule, are required to "be informal, with no fixed form of procedure."\textsuperscript{701} These are no formal rules of evidence,\textsuperscript{702} and parties may be represented "by any authorized person."\textsuperscript{703}

Although neither the Atomic Energy Commission nor its Advisory Board of Contract Appeals ever has publicly taken the position with respect to contract review proceedings, there exists some sentiment that such proceedings are in the nature of an airing of grievances or of a friendly discussion.\textsuperscript{704} The substance of contract appeals procedure and the issues at stake repudiate this characterization. So does the government's own position in the proceedings by always being represented by legal counsel. In fact as well as in theory, a proceeding before the Advisory Board of Contract Appeals of the Atomic Energy Commission is litigation in the substantial sense and clearly quasi-judicial.\textsuperscript{705} Indeed, a prominent and long-time member of contract review boards in the Department of Defense has stated:

\begin{quote}
Hearings before the Board have been described as being informal. This does not mean that they are of a roundtable discussion or conference variety. The procedure and atmosphere more closely resemble a court trial without a jury.\textsuperscript{708}
\end{quote}

\textsuperscript{700} Under Section 2(d) of the Administrative Procedure Act, 5 U.S.C.A. §1001(d), made applicable to Commission proceedings by Section 181 of the 1954 Atomic Energy Act, adjudication is the formulation of any agency order which finally disposes of any matter other than by rule making. "Formal" adjudication is that which is "required by statute to be determined on the record after opportunity for an agency hearing" (Section 5, 5 U.S.C.A. §1004).

\textsuperscript{701} 10 Code Fed. Regs. §3.23.

\textsuperscript{702} Id., §3.23(d) : "Testimony and evidence may be submitted without regard to the formal rules of evidence. . . ."

\textsuperscript{703} Id., §3.23(g).

\textsuperscript{704} See, e.g., Moss, supra note 536 at 166, n. 26: "For example, one member of the ASBCA [Armed Service Board of Contract Appeals] argues openly that the Board's primary function is to provide contractors with a place to air their grievances, regardless of the validity thereof: a sort of wailing wall so to speak." This view coincides with the misconception that Government contracting is largely a matter of public relations.

\textsuperscript{705} Vom Baur, supra note 536 at 32-33; Moss, supra note 536, at 163-164; see Plaine, supra note 1 at 78: "... [P]ossibly the relationship between the AEC and the contractors [under so-called reimbursement-type 'administrative contracts'] could be considered, on analysis, as a branch of 'administrative law.'" It also can be argued that Pub. L. 356 requires a hearing on the record within the meaning of Section 5 of the Administrative Procedure Act and that such a right to a formal hearing is required by the Constitution, even without the provisions of Pub. L. 356; see United States v. Blair, 321 U.S. 730, 734-737, 64 S. Ct. 820 (1944); United States v. Jos. A. Holpuch Co., 328 U.S. 234, 238-241, 66 S. Ct. 1000 (1946); Morgan v. U.S., 298 U.S. 468, 477-482, 56 S. Ct. 906 (1936).

\textsuperscript{708} Cuneo, supra note 536 at 435.
3. Comptroller General

In addition to an appeal from the initial determination of a contracting officer to the Advisory Board of Contract Appeals, an Atomic Energy Commission contractor has another means of administrative review in the General Accounting Office, headed by the Comptroller General.\textsuperscript{707}

This procedure has been well summarized, as follows:

The GAO, while not a party to the contract, may enter the picture whenever vouchers are presented to it by an administrative agency for "direct settlement" with a contractor, or whenever a disbursing officer or head of an administrative agency requests an advance decision. The GAO also enters the picture when a contractor makes a claim against the United States where payment has been denied. It can deny payment or demand payment back; if the latter is refused, it can collect directly from any other governmental funds that may be due a contractor, and failing that method, it may request that the Attorney General sue on behalf of the United States in the appropriate court. It can also pay claims denied by the contracting agency, and a contractor dissatisfied with a decision of a contracting officer or board of contract appeals has a second opportunity for administrative review. Unlike the departmental review, however, this GAO review is optional and is not a prerequisite to filing a court action. . . .

From the point of view of the contractor the administrative review procedure of the GAO is not too dissimilar from departmental review. If anything, it is more informal. The statutes under which the GAO is authorized to settle and adjust claims by and against the United States prescribe no definite form of procedure for the presentation and settlement of claims, leaving it entirely to the Comptroller General. Moreover, as an arm of Congress the GAO would appear to be excluded from the requirements of the Administrative Procedure Act, under Section 2(a). On the other hand, there may be some advantage to arguing a case to accountants, rather than lawyers, where the issue is cost accounting; there may also be psychological satisfaction in dealing with an office closer to the source of payment. And, of course, if the amount is worth fighting about, it is nice to have a second chance before resort to the courts.\textsuperscript{708}

This administrative forum offers the advantage to the contractor of securing a determination of both his legal rights and the factual ques-

\textsuperscript{707} Pursuant to Section 305 of the Budget and Accounting Act of 1921, 31 U.S.C.A. §74.

\textsuperscript{708} Schultz, \textit{supra} note 536 at 230-232. See Joy, \textit{supra} note 536 at 41.
tions under the contract, without being limited on further judicial re-
view to the restrictions of Public Law 356. Where both the contractor
and agency submit a dispute to the Comptroller General, it may not later
be redetermined by a board of contract appeals. Should the agency
unilaterally submit the dispute to the Comptroller General, the con-
tractor does not lose his rights to administrative and judicial review
under the disputes clause and, indeed, may immediately bring suit in the
courts on the grounds that the agency, by its actions, has waived the
procedure provided under that clause. 709

F. Judicial Review of Contract Disputes

1. Exhaustion of Administrative Remedies

Except where the Atomic Energy Commission voluntarily might
waive the requirements of the disputes clause, the contractor is required
to exhaust his administrative—or, more properly, contractual—remedies
before he may proceed in court. 710 This means that a dispute arising
under the contract must be disposed of, first, at the contracting officer
level; second, at the Advisory Board level; and, third, at the Gen-
eral Manager level, all in accordance with the regulations of the
Commission.

This exhaustion of remedies at the various administrative levels does
not mean that the agency can delay its decision indefinitely, thus keep-
ing the contractor out of the courts. Two years between the time of
filing of a notice of an appeal of a contracting officer’s decision and the
date of a final decision by the agency has been held by the courts to be
reasonable, but it appears that any further delay would be treated as a
breach of the contract by the government which immediately would be
actionable. 711

2. Judicial Forums Available

Two judicial forums are available to the contractor once the adminis-
trative proceeding stage has been passed. These are the Court of Claims
and the Federal District Courts.

Both of these tribunals have jurisdiction over suits involving “any
claim against the United States . . . founded upon any express or im-

709 Brooks-Callaway Co. v. U.S., 97 Ct. Cl. 689, 704 (1942); H.P. Andrews Paper

710 Cuneo, supra note 536 at 377; Joy, supra note 536 at 21-22; Etheridge, supra
note 536 at 558-559; see Schwartz, supra note 544 at 831.

711 Southeastern Oil Florida v. U.S., 115 F. Supp. 198, 201 (Ct. Cl. 1953); Wessel,
plied contract with the United States; or . . . for liquidated or unliquidated damages in cases not sounding in tort." However, the amount in suit is limited in the District Courts to $10,000. No such limitation is imposed by Congress on the jurisdiction of the Court of Claims.

The practical efficacy of submitting contract appeals to the courts is subject to some question, in view of the cost and time involved and the possibility that the government will fight the case to the Supreme Court if necessary. Indeed, one such contractor, who travelled the road to the Supreme Court via the Court of Claims and lost, thereafter told a Congressional committee:

Contractors are reluctant to go into the Court of Claims unless they are grossly wronged. It is a costly and time-consuming process to litigate a dispute under a Government contract. It is usually in their best interest to accept a decision and go about their established business. . . .

As a result of the Supreme Court's decision in that case, United States v. Wunderlich, the burden on the contractor to overturn an adverse decision by a contracting officer became almost impossible to meet.

3. Scope of Judicial Review

Prior to the Wunderlich decision in 1951, the courts clearly had established the rule that the decision of the contracting officer would not be disturbed unless it involved "fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment." In Wunderlich, which involved a "facts dispute" clause similar to that used by the Atomic Energy Commission, a majority of the Supreme Court narrowed the scope of review to allegations and proof of actual fraud, that is

. . . conscious wrongdoing, an intention to cheat or be dishonest. . . . If the standard of fraud that we adhere to is too limited, that is a matter for Congress.

113 Schultz, supra note 536 at 249-250, who recommends that the $10,000 limitation imposed in the district courts by the Tucker Act of 1887 is now unrealistic and should be raised to at least $100,000.
114 G. P. Leonard, Vice-President of Wunderlich Contracting Co., petitioner in United States v. Wunderlich, supra note 640, in a statement to the House Judiciary Committee on July 30, 1953, Hearings on H.R. 1839 et al., supra note 678 at 10.
115 Supra note 640.
117 342 U.S. 98, 100. 72 S.Ct. 154 (1951). Three justices (Douglas, Reed, and Jack-
Matter for Congress that decision did become. The standard imposed thereby was recognized as "a departure from the previously settled law" and "a clear invitation to injustice." After prolonged hearings, Congress in May 1954 enacted Public Law 356.

The latter statute overrules the decision in Wunderlich. As noted previously, the legislation reinstates the pre-1951 scope of contract review by providing that the final decision by the contracting agency, in cases where there is a disputes clause, "shall, unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence, be final and conclusive." This language is incorporated in the disputes clause used by the Atomic Energy Commission. The Commission clause also conforms to the statutory requirement that the decision of any administrative officer cannot be final with respect to questions of law.

Not only did Public Law 356 restore a rule of law which gave the contractor some semblance of contractual due process, it also added the requirement of substantial evidence to underlie the agency decision. This means that, for such a decision to be sustained, it must be supported in the record on review by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." The new evidentiary standard represents a definite reform in contract review procedure, since theretofore the decision of the contracting officer or agency could be sustained by a court on a mere preponderance of the evidence. The provision clearly was designed to bring into this field of judicial review at least one of the salutary standards required by the Administrative Procedure Act.

Further, Public Law 356 has been construed vigorously dissented, stating in part, 342 U.S. 101: "But the rule we announce has wide application and a devastating effect. It makes a tyrant out of every contracting officer. He is granted the power of a tyrant even though he is stubborn, perverse or capricious. He is allowed the power of a tyrant though he is incompetent or negligent. He has the power of life and death over a private business even though his decision is grossly erroneous. Power granted is seldom neglected." See Palace Corp. v. U.S., 110 F. Supp. 476, 478 (Ct. Cl. 1953), literally interpreting the Wunderlich rule.

The new evidentiary standard represents a definite reform in contract review procedure, since theretofore the decision of the contracting officer or agency could be sustained by a court on a mere preponderance of the evidence. The provision clearly was designed to bring into this field of judicial review at least one of the salutary standards required by the Administrative Procedure Act.

References:

718 Etheridge, supra note 536 at 567; see Cuneo, supra note 536 at 374; Joy, supra note 536 at 18; Schultz, supra note 536 at 221-224.
720 AEC Manual, Section 9111-034.
721 Section 10(e)(B)(5), 5 U.S.C.A. §1009(e)(B)(5) ("... the reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions...", supra note 536 at 358-359; Schwartz, supra note 544 at 852-853.)
to permit consideration by a reviewing court of evidence outside the so-called "administrative record" considered by the deciding officer of the contracting agency.\textsuperscript{723}

G. Conclusions

Except with respect to the controversy involving Mississippi Valley Generating Company, the contract policies and procedures of the Atomic Energy Commission have not of themselves evoked substantial adverse comment or criticism. Indeed, the agency appears to have done an outstanding job in establishing and operating a multi-billion dollar atomic energy plant in the United States.

This does not mean, however, that the contract procedures of the Commission cannot be improved. Such improvement only can be effected when the Commission and contractors alike recognize procurement as a form of administrative procedure and dispel the present theory

found to be . . . unsupported by substantial evidence. . . ."\textsuperscript{723}"

H.R. Rep. No. 1380, supra note 719 at 4-5. For decisions construing the provisions of Public Law 356, see Allied Contractors, Inc. v. U.S., 124 F. Supp. 366 (Ct. Cl. 1954) (contractor need not take appeal from contracting officer's decision on question of law); Atlantic Carriers v. U.S., 131 F. Supp. 1, 5 (D.N.Y. 1955) (dismissing libel in admiralty for government breach of charter party by returning ship in damaged condition, the court holding: "A question of 'law' is not a 'claim' of which the court acquires immediate jurisdiction before the administrative fact-finding process is completed. Questions of law usually arise only after the disputed questions of fact relegated to administrative determination have been resolved. If a claim arising under a disputes clause involves solely questions of law, then immediate jurisdiction may properly be held to be present"); United States v. Lennox Metal Mfg. Co., 131 F. Supp. 717, 732-733 (D.N.Y. 1954), affirmed 225 F. 2d 302, 318-319 (2d Cir. 1955) (holding substantial evidence rule of Administrative Procedure Act and dissents in Wunderlich case enacted into contract law by Public Law 356); Wagner Whirler and Derrick Corp. v. U.S., 121 F. Supp. 664 (Ct. Cl. 1954) (overruling decision of contracting officer for lack of substantial evidence therefor in record).

\textsuperscript{723} Volentine and Littleton v. U.S., 145 F. Supp. 952, 954 (Ct. Cl. 1956): "There is logic in the Government's position. But we do not adopt it. It would require two trials in many cases involving this question. The first trial would include the presentation of the 'administrative record' and its study to determine whether, on the basis of what was in it, the administrative decision was tolerable. But the so-called 'administrative record' is in many cases a mythical entity. There is no statutory provision for these administrative decisions or for any procedure in making them. The head of the department may make the decision on appeal personally or may entrust anyone else to make it for him. Whoever makes it has no power to put witnesses under oath or to compel the attendance of witnesses or the production of documents. There may or may not be a transcript of the oral testimony. The deciding officer may, and even in the departments maintaining the most formal procedures, does, search out and consult other documents which, it occurs to him, would be enlightening, and without regard to the presence of the claimant."
that the contracting function of the government is exactly analogous to
that of a private party. Congressional authority to, in effect, review
certain types of Commission contracts presents a new and complicating
factor in the relations between private industry and the federal agency.

Within the Commission itself, the Advisory Board of Contract Ap­
peals should be reconstituted as a true intra-agency review body, with
final—not advisory—authority to pass upon the initial determinations
of contracting officers. The success of, and general public confidence in,
the Armed Services Board of Contract Appeals which has authority to
bind the Secretary of Defense, points the way towards a similar devel­
opment within the Atomic Energy Commission.

The fiction that the Board only makes findings of fact, and reaches
conclusions of law incidental thereto, also should be laid to rest. This
can be done by amending the Rules of Procedure of the Board. There
exists no sound reason why the Board cannot consider mere questions
of law, which consideration, of course, would be reviewable in the
courts as at present. Such a step would benefit both the agency and
contractors. The latter would be encouraged to confine the settlement
of all disputes arising under or in relation to a contract within the
intra-agency review framework, without any resort to the courts.

Any Commission or industry misconception that a proceeding before
the Board is merely a forum to air grievances also should be dispelled.
Form and theory to the contrary, such a proceeding is a quasi-judicial
hearing in which adverse interests litigate. The present emphasis of the
Commission's regulations on informality and lack of evidentiary rules
is misleading and detrimental to the interests of both the government
and the contractor.

Time and effort are expended by both sides in a proceeding which
could be shortened by greater formality and regard for the rules of
evidence. The often repeated argument that informality simplifies ad­
ministrative proceedings is not borne out by the facts. Informality
lengthens the record and permits the introduction of arguments com­
pletely unrelated to the subject matter of the proceeding. More im­
portant, however, the contractor choosing to take his case to the courts
must do so with a record which is difficult for the latter to review in
many cases because of disregard for the rules of evidence at the agency
level. In this, the contractor probably is the chief sufferer since he is
seeking to reverse an agency decision.\footnote{724 Even those who favor
the "administrative contract" admit that "judicial enforce­
ment of total performance by either party would be difficult" (Ramey and Erlewine,
\textit{supra} note 551 at 354; see Moss. \textit{supra} note 536 at 160-161)}

\footnote{724 Even those who favor the "administrative contract" admit that "judicial enforce­
ment of total performance by either party would be difficult" (Ramey and Erlewine,
\textit{supra} note 551 at 354; see Moss. \textit{supra} note 536 at 160-161)}
rule used by the courts since 1954 to review contract decisions would seem to require that the record be made by practical and reasonable use of the rules of evidence.

Finally, and most important, the contractor must realize the nature of the transaction in which he engages when he contracts with the government. The fine print on the back of a government contract form is just as binding as the clauses of a contract prepared on typing paper. Despite the government’s insistence at times on speed in negotiating and executing the contract, the private party should approach the transaction with the same care and caution which he would use in other legal matters affecting his business.