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Atomic Energy Law-Atomic Energy Act of 1954- Substantial Legal Restrictions on the Private Development of Nuclear Reactors

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RECENT DECISIONS

ATOMIC ENERGY LAW — ATOMIC ENERGY ACT OF 1954 — SUBSTANTIAL LEGAL RESTRICTIONS ON THE PRIVATE DEVELOPMENT OF NUCLEAR REACTORS — In 1956 the Power Reactor Development Company received a construction permit from the Atomic Energy Commission to build a fast breeder nuclear reactor[1] at Lagoona Beach, thirty miles southwest of Detroit, Michigan. Intervening pursuant to section 189[2] of the Atomic Energy Act of 1954, several unions[3] claimed that the health, safety, and property of their members would be jeopardized by the operation of the reactor. Formal hearings were held before the AEC and a final decision affirming the issuance of a construction permit to PRDC was made by the Commission in 1959.[4] On appeal to the Court of Appeals for the District of Columbia, *held,* grant of construction permit set aside and matter remanded for further proceedings, one judge dissenting. The safety findings required for issuance of a construction permit are identical with those required for issuance of an operating license.[5] Further, the location of a reactor near a large population center was not authorized by the 1954 act.[6] *Electrical Workers v. United States,* 280 F.2d 645 (D.C. Cir. 1960), *cert. granted,* 364 U.S. 889 (1960).

The construction permit to PRDC was issued under section 104(b)[7] of the 1954 act which authorizes the Commission to encourage the construction of power reactors which do not now produce competitive power but whose operation will provide essential information leading to its eventual development. Competitive reactors are authorized under section 103.[8] Sections 182[9] and 185[10] establish a two-stage procedure for implementing sections 103 and 104(b). First, a construction permit must be obtained from the Commission pursuant to section 185. After completion

[1] A fast breeder reactor manufactures more fissionable material than it consumes. See Weinberg, *Breeder Reactors,* Scientific American, Jan. 1960, p. 82.

[2] 68 Stat. 955-56 (1954), 42 U.S.C. 2239 (1958).

[3] The unions involved are the IUE and UAW.

[4] 2 CCH ATOMIC ENERGY L. REP. 17,225-29 (AEC 1959). The initial decision is contained in 2 CCH ATOMIC ENERGY L. REP. 17,225-4 (AEC 1958).

[5] Principal case at 648.

[6] Principal case at 651-52. The court also held that the unions were proper parties in interest and that the Commission's final decision was a final order within the meaning of § 189 and therefore reviewable.

[7] 68 Stat. 937 (1954), 42 U.S.C. § 2134 (1958). A collection of the documents involved in the granting of the construction permit in 1956 is found in the report of the Joint Committee on Atomic Energy, *A Study of AEC Procedures and Organizations in the Licensing of Reactor Facilities,* 85th Cong., 1st Sess. 117-155 (1957). The controversy between the Joint Committee and the AEC which prompted the unions to intervene concerned a controversial report of the Advisory Committee on Reactor Safeguards relating to the safety of PRDC which was kept secret by the AEC until after the construction permit was granted. An amendment to the 1954 act, § 182(b), requires the Advisory Committee's report be made public before any action is taken by the Commission.

[8] 68 Stat. 936 (1954), 42 U.S.C. § 2133 (1958).

[9] 68 Stat. 953 (1954), 42 U.S.C. § 2232 (1958).

[10] 68 Stat. 955 (1954), 42 U.S.C. § 2235 (1958).

of the facility, but before issuance of an operating license, section 182 requires a finding by the Commission that the operation of the facility will not be inimical to the health and safety of the public. Pursuant to its authority under section 161 (i)[11] to issue supplementary regulations, the Commission promulgated section 50.35[12] which permits the Commission to issue a construction permit if it has "reasonable assurance" that the ultimate safety findings required for an operating license under section 182 will be satisfied when construction is completed. The court in the principal case held that "reasonable assurance" is not a sufficient standard of safety, believing the 1954 act to require the same safety findings to be made at the construction permit stage as at the operating license stage. Therefore, the PRDC construction permit issued according to the "reasonable assurance" rule of section 50.35 was considered to have been improperly granted. The practical effect of this holding will be substantial elimination of the time-saving and the technological advantages obtained under section 50.35's dovetailing of construction of nuclear reactors with research and development.

The court relied heavily on a colloquy between Senator Humphrey and Senator Hickenlooper concerning an amendment introduced in the Senate by Senator Humphrey. The amendment would have added to section 185:

> "And no construction permit shall be issued by the Commission until after the completion of the procedures established by section 182 for the consideration of applications for licenses under this act."[13]

In the House, the amendment was introduced by Representative Holifield, the co-author of a separate report on the 1954 act.[14] This report expressed dissatisfaction with the procedural requirements of section 185. Read in the light of the report, the amendment clearly called for nothing more than that the procedural safeguards applied at the construction permit stage be the same as those specifically made applicable to the licensing procedure. However, in the colloquy,[15] Senator Humphrey stated that the purpose of the amendment was to minimize the pressure on the commission for issuance of an operating license after the commission has permitted the reactor to be constructed. This pressure is generated by the heavy expenditures of the applicant in constructing the reactor and the obvious "white elephant"[16] nature of a fully constructed nuclear reactor which may not be operated. If this concern represented the sole congressional intent, the holding of the

[11] 68 Stat. 949 (1954), 42 U.S.C. § 2201 (1958).

[12] 10 C.F.R. § 50.35 (1959).

[13] U.S. ATOMIC ENERGY COMMISSION, 1 LEGISLATIVE HISTORY OF THE ATOMIC ENERGY ACT OF 1954 1168 (1955) (hereinafter cited as LEGISLATIVE HISTORY).

[14] *Id.* at 871.

[15] 3 LEGISLATIVE HISTORY 3759.

[16] In the principal case, the court apparently regarded the proposition that "the economy cannot afford to invest enormous sums in the construction of an atomic reactor that will not be operated" as a policy adopted by Congress on the basis of the colloquy. Principal case at 650. The cost of the PRDC reactor is approximately $45 million.

court follows. However, for purposes of determining congressional intent, it would seem that the statements of Senator Hickenlooper, the manager of the bill in the Senate and a member of the Joint Committee on Atomic Energy, should be entitled to more weight than those of Senator Humphrey. Out of context, some of Senator Hickenlooper's statements, such as "a license and a construction permit are identical," also support the court's decision, but Senator Hickenlooper clearly stated that the provisions of the 1954 act covering judicial review, hearings, and notice to other regulatory bodies at the construction permit stage made the amendment unnecessary. Moreover, Senator Humphrey withdrew the amendment when these provisions were made apparent to him. Since the amendment upon which the discussion was focused was concerned with procedures at the construction permit level, the most reasonable interpretation of Senator Hickenlooper's statements is that he was assuring Senator Humphrey that procedural equivalence was already written into the 1954 act. If it is admitted that Senator Hickenlooper's statements deserve the greater weight in determining congressional intent, then the court was probably wrong in reasoning from the colloquy that Congress intended substantive equivalence of safety findings for issuance of a construction permit and an operating license in addition to procedural equivalence. This does not mean, of course, that Congress did not intend that some substantive restrictions be placed on the issuance of construction permits. The concern with procedural requirements was undoubtedly motivated not only by the desire to protect the rights of applicants, but also by a desire to insure the enforcement of safeguards in the issuing of construction permits. But this does not force the conclusion that such safeguards could not be designed by the expert agency to fit the procedural pattern established by Congress. The overall legislative history contains statements such as President Eisenhower's desire to see the rapid development of private nuclear power,[17] Congress' express purpose "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,"[18] and Congress' directive to the Commission that "in issuing licenses under this subsection, the Commission shall impose the minimum amount of such regulations and terms of licenses as will permit the Commission to fulfill its obligations under this Act."[19] These elements combine to weigh against an implication that Congress intended to insulate the Commission from the kind of pressure which concerned Senator Humphrey at the expense of greatly hindering the participation of private enterprise in the development of the industry. Even if some substantive limitations are implied from the colloquy, because of the practical advantages of the Commission's procedures, it is likely that the rules of the Commission are within the scope of their expert discretion.

[17] 1 LEGISLATIVE HISTORY 50-52.
[18] 68 Stat. 922 (1954), 42 U.S.C. § 2013 (1958).
[19] 68 Stat. 937 (1954), 42 U.S.C. § 2134 (1958).

No section of the statute or any specific legislative history is cited to support the further holding that locating a reactor near a large population center would in itself violate the health and safety provisions of the 1954 act because Congress did not intend large populations to be exposed to the dangers of a reactor burn-up in the absence of "compelling reasons."[20] On the contrary, the legislative history gives some indication that Congress understood that many reactors would be operated near metropolitan centers.[21] Nor is the holding consistent with the basic purpose of the 1954 act to foster progress in atomic power development by encouraging private industrial and utility companies to enter the nuclear industry.[22] Since the cost of transmission is a significant factor in the total cost of producing electricity, it is not economical to locate reactors far from their consumers. This holding of the court, if allowed to stand, will substantially impair the same private development of nuclear power which the 1954 act is intended to stimulate.[23]

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[20] Principal case at 651-52.

[21] 2 LEGISLATIVE HISTORY 2220.

[22] Notes 17-19 *supra*.

[23] Although the court's holding does not distinguish between proven and advanced reactors, it is possible that later decisions will apply the holding in this case only to advanced reactors.