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The Energy Reorganization Act Of 1974: More Power To The People?

The Atomic Energy Commission (AEC) was statutorily abolished by the Energy Reorganization Act of 1974.¹ The purpose of this article is to examine the criticism which motivated the AEC's abolition, and to consider whether, in fact, the Energy Reorganization Act has created a successor agency which will truly be a guardian of the public interest.

INTRODUCTION

In 1946, Congress passed the first Atomic Energy Act,² creating the first Atomic Energy Commission.³ Written at the very outset of the atomic era, the Act envisaged that the production and use of fissionable nuclear materials would be a United States Government monopoly. Private industry was prohibited from both ownership and possession of nuclear materials and reactors.⁴

By 1954, however, the realities surrounding the use of atomic energy had changed. The horror of the atomic bomb had diminished, and extraordinary scientific and technological advances indicated the economic feasibility of nuclear power as a significant peace-time energy source.⁵ The congressional goal consequently became atomic power at competitive prices, an end thought to be more easily and efficiently pursued with the help of private enterprise. The Atomic Energy Act of 1954⁶ was thus formulated, contemplating cooperation between the Government and private utilities as the key to optimum progress and economy.⁷

Under the 1954 Act, the new Atomic Energy Commission could license the possession and utilization of potent nuclear materials as well as the ownership of nuclear reactors by private utilities.⁸ Despite this reliance on private industry, there was still the realization

1. 42 U.S.C.A. §§ 5801 *et seq.* (Supp. I, 1975).

2. Act of Aug. 1, 1946, ch. 724, 60 Stat. 755.

3. *Id.* § 2, at 756.

4. *Id.* § 5, at 760. Regarding this monopoly, one commentator noted: "... [a] surprisingly unanimous Congress saw no place for private ownership and activity in the production and use of atomic energy, however strictly regulated." Palfrey, *Atomic Energy: A New Experiment in Government-Industry Relations*, 56 COLUM. L. REV. 367, 370 (1956).

5. Adams, *Atomic Energy: The Congressional Abandonment of Competition*, 55 COLUM. L. REV. 158 (1955). Mr. Adams further observed that more than twenty other nations had begun atomic energy programs by 1954. Some of these nations were "actively experimenting with the construction of atomic plants for generating electricity." *Id.* at 159.

6. 42 U.S.C. §§ 2011 *et seq.* (1970).

7. H.R. REP. NO. 2181, 83d Cong., 2d Sess. 3 (1954).

8. 42 U.S.C. § 2061(b) (1970). The United States, however, retained title to all nuclear materials. *Id.* § 2061(a) (1970).

that the potentially hazardous nature of atomic energy made continued federal agency control an unequivocal necessity. Consequently, the Act provided that the AEC would remain responsible for insuring that the regulation of privately produced nuclear power was accomplished in a manner commensurate with the need "to protect the health and safety of the public."⁹

THE ATOMIC ENERGY COMMISSION

The 1954 Act created an administrative agency¹⁰ dedicated to both the promotion and control of atomic energy.¹¹ Promotionally, the Atomic Energy Commission was permitted to engage in such activities as contracting for research and development studies relating to the theory and production of atomic energy.¹² It was also authorized and directed to conduct similar research within its own facilities.¹³

In furtherance of its regulatory duties, the Commission was empowered to license private utility companies to construct and operate nuclear power plants.¹⁴ This licensing involved two distinct stages. The first was the construction permit process, which was to be initiated upon the utility's filing of an application, accompanied by both a Preliminary Safety Analysis Report¹⁵ and an Environmental Report.¹⁶ For approximately the next year, the AEC's regulatory staff¹⁷ and its Advisory Committee on Reactor Safeguards¹⁸ would evaluate the application.¹⁹ After this preliminary examination, a general notice of hearing was to be published in the *Federal*

9. 42 U.S.C. § 2012(e) (1970); see 42 U.S.C. §§ 2013(d), 2133(d), 2232(a) (1970).

10. 42 U.S.C. § 2031 (1970).

11. *Id.* § 2011 (1970). The statute provides:

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 . . . ; and (b) the *development, use, and control* of atomic energy shall be directed so as to promote world peace

Id. (emphasis added). See also 42 U.S.C. § 2013 (1970).

12. 42 U.S.C. § 2051(a) (1970).

13. *Id.* § 2052 (1970).

14. *Id.* §§ 2131, 2133 (1970).

15. 10 C.F.R. § 50.34(a) (1975).

16. 10 C.F.R. §§ 50.30(f), 51.20 (1975).

17. Through the Division of Reactor Licensing pursuant to 10 C.F.R. §§ 1.120 and 2.102(a) (1975).

18. 42 U.S.C. § 2039 (1970). This was a body of up to 15 experts drawn from without the government to advise the AEC on "the hazards of proposed or existing reactor facilities and the adequacy of proposed reactor safety standards. . . ." *Id.*

19. 10 C.F.R. § 2.102 (1975). Pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* (1970), an Environmental Impact Statement was then prepared. 10 C.F.R. §§ 51.1 *et seq.* (1975).

*Register*²⁰ announcing a mandatory public hearing before a three-member Atomic Safety and Licensing Board (ASLB)²¹ where interested parties could intervene.²²

The second stage was the operating license process. Unlike the procedure associated with construction permit issuance, a hearing at this juncture was not mandatory; it would be held only at the request of an intervenor who could establish the requisite "affected interest."²³ If no such request was made, the AEC was free to issue a license upon its own determination that the plant should be licensed.²⁴ Where a hearing was requested and granted, an ASLB would preside and the hearing would proceed in much the same fashion as the construction permit adjudication.²⁵ Depending upon how the ASLB resolved the matters in controversy, the AEC's Director of Regulation issued, denied, or appropriately conditioned the operating license.²⁶

Despite this licensing procedure, which seemingly attempted to achieve neutral decision making while encouraging citizen participation, the AEC could not deny its administrative role as concurrent promoter and regulator of atomic energy.²⁷ As such, it gradually fell prey to the accusation frequently hurled at other regulatory agencies²⁸—that the regulated had indeed become the regulators,

20. 42 U.S.C. § 2239(a) (1970), 10 C.F.R. § 2.104 (1975).

21. 42 U.S.C. § 2241 (1970), 10 C.F.R. § 2.721 (1975). Each ASLB was comprised of three members, one attorney "qualified in the conduct of administrative proceedings," and two individuals who "have such technical or other qualifications as the Commission deems appropriate" 42 U.S.C. § 2241(a) (1970).

22. 42 U.S.C. § 2239(a) (1970). Such intervention was to be allowed to "any person whose interest may be affected by the proceeding" *Id.* See text accompanying notes 39 through 42 *infra*. Furthermore, before issuing a construction permit, the Commission had to find that "there [was] a reasonable assurance that . . . the proposed facility [could be] constructed and operated at the proposed location without undue risk to the health and safety of the public." 10 C.F.R. § 50.35(a) (1975).

23. 42 U.S.C. § 2239(a) (1970), 10 C.F.R. § 2.105 (1975). The AEC had to give 30 days notice of its intent to issue the operating license, unless it determined that the license involved "no significant hazards" 42 U.S.C. § 2239(a) (1970).

24. S. EBBIN & R. KASPER, *CITIZEN GROUPS AND THE NUCLEAR POWER CONTROVERSY* 54 (1974) [hereinafter cited as EBBIN AND KASPER]. The extensive factors involved in this decision may be found at 10 C.F.R. § 2.104 (1975).

25. *Id.* The ASLB which presided at the operating license hearing was generally composed of different individuals than those who sat at the construction permit hearings. *Id.*

26. *Id.* at 55. See 10 C.F.R. § 50.57 (1975).

27. See note 11 *supra* and accompanying text.

28. For well-documented examples of other administrative agencies similarly criticized, see Lazarus and Onek, *The Regulators and the People*, 57 VA. L. REV. 1069 (1971) [hereinafter cited as Lazarus and Onek]. Judicial accusations may be found in such decisions as *Office of Communication of United Church of Christ v. Federal Communications Commission*, 359 F.2d 994, 1003-04 (D.C. Cir. 1966), and *Moss v. Civil Aeronautics Board*, 430 F.2d 891, 893 (D.C. Cir. 1970). Justice Douglas' dissent in a case concerning the United

that the public interest was no longer being protected since the AEC had become "captured" by the very industry it had been designed to control.²⁹

A plethora of legal commentators emphasized the incompatibility of the dual roles of promoter and regulator,³⁰ questioning whether the administrative agency committed to the acceleration of nuclear power could simultaneously enforce the necessarily stringent conditions of use imposed by its own regulations.³¹ Many of these critics conceded that, at least organizationally, the licensing and regulatory functions of the AEC were indeed separated from its operational and promotional activities.³² Yet, it was also recognized that the five-member Commission still maintained ultimate control over all phases of both regulation and development;³³ and that the many close ties between these individuals and the scientific community could not easily be ignored.³⁴

THE CITIZEN RESPONSE

The Intervenor's Emergence

Concern as to the Atomic Energy Commission's ability to consci-

States Forest Service provides a sample of the typical skepticism directed toward the regulatory ability of many of the administrative agencies:

The federal agencies of which I speak are not venal or corrupt. But they are notoriously under the control of powerful interests who manipulate them through advisory committees, or friendly working relations, or who have that natural affinity with the agency which in time develops between the regulator and the regulated.

Sierra Club v. Morton, 405 U.S. 727, 745-46 (1972).

29. Interestingly, this conflict had been forecast as early as 1956, when it was noted that, in passing the Atomic Energy Act of 1954, "Congress tried to have its cake and eat it, too The Commission will be constantly buffeted by conflicting considerations." Palfrey, *Atomic Energy: A New Experiment in Government-Industry Relations*, 56 COLUM. L. REV. 367, 390 (1956).

30. To explore fully the extent and consequences of this dual mission is beyond the scope of this article. For an excellent analysis of the alleged AEC conflict of interest see Jacks, *The Public and the Peaceful Atom: Participation in the AEC Regulatory Proceedings*, 52 TEXAS L. REV. 466 (1974) [hereinafter cited as Jacks].

31. Green, *Safety Determinations in Nuclear Power Licensing: A Critical View*, 43 NOTRE DAME LAW. 633 (1968) [hereinafter cited as Green].

32. Thus, there was no organizational connection between the regulatory staff and the research staff. In addition, the Atomic Safety and Licensing Board's members were drawn entirely from outside the Commission's employees. *Id.* at 649.

33. *Id.*

34. This relationship has been described as a "complex web of shared values, friendships and consultantships." Tarlock, Tippy and Francis, *Environmental Regulation of Power Plant Siting: Existing and Proposed Institutions*, 45 S. CAL. L. REV. 502, 523 n.91 (1972). Another critic observed: "Perhaps it is possible for the commissioners to maintain an Olympian detachment from the position of their employees, associates, and friends, but it has not yet been demonstrated." Coggin, *The Environmentalist's View of AEC's "Judicial" Function: A Reply to Messrs. Doub et al.*, 15 ATOMIC ENERGY L. J. 176, 188 (1973) [hereinafter cited as Coggin].

entiously regulate in light of this alleged dual mandate was not restricted to a small core of legal and scientific experts. Rather, through intensified educational efforts by various public interest groups,³⁵ as well as continued publicity in daily periodicals,³⁶ private citizens began to take active interest in the AEC's operations. Increasing numbers of individuals went beyond the traditional correspondence with congressmen, and attempted to participate in the actual nuclear licensing proceedings. By becoming intervenors, these citizens organized in an attempt to "un-capture" the Atomic Energy Commission.

The Atomic Energy Act of 1954³⁷ empowered the Commission to disseminate scientific and technical information, "so as to provide that free interchange of ideas and criticism which is essential to scientific and industrial progress and public understanding"³⁸ In addition, the Act gave the citizen intervenor status as a full party in the licensing procedure. After establishing his interest in the proceedings³⁹ and specifying the issues upon which he would focus,⁴⁰ the intervenor was permitted to offer evidence, cross-examine witnesses, obtain discovery⁴¹ and otherwise participate in the proceeding to the same extent as the AEC staff and the utility-applicant.⁴²

The dangers of nuclear power,⁴³ as well as the Commission's man-

35. Such entities included the Friends of the Earth and the Sierra Club.

36. "An operator's mistake at the Oyster Creek nuclear power plant near Atlantic City last month shut it down for 11 days and caused an internal leak of 50,000 gallons of poisonous radioactive water, according to utility officials." N.Y. Times, Jan. 27, 1973, at 64, col. 8. The Times also reported that Consolidated Edison's Indian Point Plant had been shut down by an accident in November, 1972: "Con Edison engineers have said privately since the accident that the company was trying to play down the accident so as not to build up opposition to nuclear plants at a time when the utility is counting on them in the energy shortage." N.Y. Times, Dec. 2, 1973, at 1, col. 4.

37. 42 U.S.C. §§ 2011 *et seq.* (1970).

38. *Id.* § 2161(b) (1970).

39. *Id.* § 2239(a) (1970). A careful reading of the legislative history of the Atomic Energy Act tends to indicate that this section was regarded as a vehicle for the contesting of licenses on economic—not safety, health or environmental—grounds. Green, *Public Participation in Nuclear Power Plant Licensing: The Great Delusion*, 15 WM. & MARY L. REV. 503, 510-11 (1974).

40. 10 C.F.R. § 2.714 (1975).

41. For a discussion of the AEC tendency to have restricted the availability of information during discovery, see Cherry, *The Use of Discovery Procedures by Intervenor in Nuclear Power Licensing Cases*, 13 ATOMIC ENERGY L. J. 260 (1971).

42. Jacks, *supra* note 30, at 484-86. As will be discussed, however, these participation rights may have been no more than an empty shell.

43. These feared hazards included nuclear plant design defects resulting in "nuclear accidents," radioactive waste disposal problems, radiation exposure and sabotage. It is beyond the scope of this article to examine the validity of these apprehensions. It is important to recognize, however, the existence of these fears which were instrumental in motivating citizen action. Steven Ebbin and Raphael Kasper conducted a year-long study of the role of the citizen in the nuclear power controversy. Most members of the groups they observed were

datory construction permit hearings,⁴⁴ made the AEC's proceedings particularly attractive to the intervenor.⁴⁵ At first, the Commission's major concern was to alleviate widespread and seemingly irrational fears about atomic energy, and it was not antipathetic toward the intervenor's participation.⁴⁶ Yet, the AEC soon realized that the basic motivation behind the intervention was the belief that the Commission was simply not doing its job; that because of its dual regulatory-promotional mandate,⁴⁷ advocacy from outside the Commission was essential to protect the public.⁴⁸

To safety advocates and environmentalists, the intervenor was seen as a vital (and often the sole) adversary, one who would tenaciously ask questions and insist upon sufficient technical assurances of the adequacy of the AEC's reviews.⁴⁹ Additionally, intervention forced the AEC staff and the private utilities to articulate the bases for their opinions, serving the function of a safety check.⁵⁰

Although there were occasional charges of harmful dilatory tactics directed at the intervenor,⁵¹ studies indicated that many factors other than intervenor opposition were responsible for increasing licensing delays.⁵² Even when his participation was deemed to be a

neither "anti-technology freaks" nor "weirdos." EBBIN AND KASPER, *supra* note 24, at 17-18. Their associations with nuclear power had been shaped by such events as the detonation of atomic bombs at Hiroshima and Nagasaki, the Cold War years of the 1950's and the 1962 Cuban Missile Crisis. *Id.*

44. See notes 15 through 22 *supra* and accompanying text.

45. Jacks, *supra* note 30, at 484-86. Ebbin and Kasper observed a further *raison d'être* for the intervenor, characterizing his participation as the result of a profound distrust of experts, established interests and government decision makers. EBBIN AND KASPER, *supra* note 24, at 189.

46. Jacks, *supra* note 30, at 490.

47. See text accompanying notes 27 through 34 *supra*.

48. At least one nuclear proponent, however, expressed apparently sincere surprise at this anti-Commission sentiment:

One would have thought, however, the carefully controlled chain reaction of nuclear fission . . . deeply encased in nuclear reactors with massive surrounding containment . . . would be low on the totem pole of life and death issues that could generate deep antagonisms and bitter debate.

Palfrey, *Energy and the Environment: The Special Case of Nuclear Power*, 74 COLUM. L. REV. 1375, 1376 (1974) [hereinafter cited as Palfrey].

49. Jacks, *supra* note 30, at 466.

50. *Id.* at 500-06. Problems such as criteria governing reactor cooling systems and radioactive release levels had been exposed by intervenor groups, as had numerous issues relating to compliance with the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.* (1970). EBBIN AND KASPER, *supra* note 24, at 9.

51. See text accompanying note 130 *infra*.

52. Several years ago the Federal Power Commission conducted a survey of the factors responsible for schedule setbacks in 28 nuclear plants which were planned to become operational in 1973. Legal challenges ranked seventh out of the ten chosen factors, accounting for nine Plant/Months of delay. Poor productivity of labor ranked first with 84 Plant/Months, followed by late delivery of major equipment with 68 Plant/Months. Doub, *Meeting the*

retarding factor, the intervenor submitted that the tactic of delay was often the only course left open in a system where he had little other influence on the decision making process.⁵³

The Intervenor's Impediments

In fact, the intervenor saw the entire licensing process as a "stacked deck."⁵⁴ The primary motivation for this attitude was the belief that by the time of the public hearing, the AEC's regulatory staff had already extensively reviewed the utility's application, resolved potential problems and reached, minimally, an informal conclusion that the permit or license should be granted. This made the Commission appear to be an ally of the applicant, rather than its regulator.⁵⁵ Denials for permits and licenses were rare,⁵⁶ adding further strength to the intervenor's contention of "fait accompli,"⁵⁷ as well as augmenting distrust of government and the feeling of powerlessness with respect to its actions.⁵⁸

Although an adjudicatory function may have been theoretically possible at these licensing hearings, a further problem plagued the intervenor: the utility's financial and technological strength. Thus, in contrast to the underfunded and scientifically ignorant citizen

Challenge to Nuclear Energy Head-On, 15 ATOMIC ENERGY L. J. 238, 245-48 (1974). In addition, the AEC regulatory staff seldom received fully completed applications, with the result that months might be needed to resolve various deficiencies prior to initiating formal consideration. Case and Schoenbrod, *Electricity or the Environment: A Study of Public Regulation Without Public Control*, 61 CALIF. L. REV. 961 (1973) [hereinafter cited as Case and Schoenbrod]. Such facts appeared to substantiate those intervenor advocates who claimed the intervenor to be the "culprit and scapegoat" for licensing delays. Coggins, *supra* note 34, at 190.

53. EBBIN AND KASPER, *supra* note 24, at 5. Coggins added:

[I]t might well be argued that delay alone . . . is an acceptable tactic as a matter of fundamental fairness. Since the element of impartiality is so markedly lacking, the hearing is more of a political than judicial affair Only through use of [obstructive delaying tactics], their only effective weapon, can the demands of the intervenors receive any true consideration

Coggins, *supra* note 34, at 192.

54. Ellis and Johnston, *Licensing of Nuclear Power Plants by the Atomic Energy Commission*, 13 ATOMIC ENERGY L. J. 101, 129 (1971) [hereinafter cited as Ellis and Johnston].

55. EBBIN AND KASPER, *supra* note 24, at 235, 251. Furthermore, by the time the public hearing occurred, the utility had already invested substantial sums for land, equipment and plant design in reliance on this tacit agency green light. Case and Schoenbrod, *supra* note 52, at 984. This would especially be the case at the advanced stage of an operating license hearing. Green, *Public Participation in Nuclear Power Plant Licensing: The Great Delusion*, 15 WM. & MARY L. REV. 503, 521 (1974).

56. Ellis and Johnston, *supra* note 54, at 129.

57. See 120 CONG. REC. S15051 (daily ed. Aug. 15, 1974) (remarks of Senator Metcalf). This hearing process was also referred to as a "hollow ritual" and a "public relations gimmick." Case and Schoenbrod, *supra* note 52, at 979, 984.

58. Ellis and Johnston, *supra* note 54, at 130.

group, stood a monopolistic utility fortified by skilled counsel, established scientific experts and relatively unlimited resources.⁵⁹

The lack of adequate funds was the most obvious deficiency. The financial commitment necessary to oppose the construction of a nuclear power plant was enormous,⁶⁰ encompassing such costs as fees for attorneys and technical experts. The usual small contributions from local residents were hardly sufficient to cover these expenses.⁶¹

Perhaps even more critical than this financial impotence was the intervenor's lack of sufficient technical expertise. The Commission was one of the most technically oriented of the regulatory agencies in the federal government. Essentially every substantive action taken by the AEC was explained in highly technical terms.⁶² Consequently, to contribute meaningfully to plant licensing proceedings, the intervenor required either a very sophisticated understanding of the complex technical issues involved,⁶³ or the assistance of an expert to explain these intricacies and to testify on his behalf.⁶⁴

What the intervenor encountered instead was a virtual conspiracy of silence. Nearly every nuclear expert was employed by either private industry or the Atomic Energy Commission itself.⁶⁵ Fear of loss of employment, as well as termination of consultantship contracts and research grants, created an understandable hesitancy on the expert's part to assist the intervenor.⁶⁶ Therefore, those scientific and engineering experts who were available to the intervenor tended to be either inexperienced graduate students or individuals drawn from disciplines peripheral to those involved in nuclear energy.⁶⁷

59. Coggins, *supra* note 34, at 187-88. On the utility "team" the intervenor typically found "the huge complex of dependent trade associations, economic interest groups, public relations media, the scientific, engineering and technical resources of the AEC, its national laboratories and sponsored research, and the AEC's Congressional protectors." Like, *Multi-Media Confrontation—The Environmentalists' Strategy for a "No-Win" Agency Proceeding*, 13 ATOMIC ENERGY L. J. 1, 1-2 (1971) [hereinafter cited as Like].

60. Ebbin and Kasper suggest \$100,000 as an average figure. EBBIN AND KASPER, *supra* note 24, at 194. Utilities may budget from \$500,000 to \$1,000,000 to present their case. 120 CONG. REC. S15053 (daily ed. Aug. 15, 1974) (remarks of Senator Ribicoff).

61. EBBIN AND KASPER, *supra* note 24, at 194. It was urged that such funding problems were a primary cause of the delay for which intervenors had been deemed responsible since financial shortages required requests for more time to meet procedural requirements. EBBIN AND KASPER, *supra* note 24, at 195.

62. Roisman, *Suing for Safety*, 10 TRIAL 13 (1974).

63. Jacks, *supra* note 30, at 500.

64. Green, *supra* note 31, at 653. In *Union of Concerned Scientists v. Atomic Energy Commission*, 499 F.2d 1069, 1094 (D.C. Cir. 1974), the District of Columbia Circuit conceded the subject matter ranged "far beyond the normal ken of judges."

65. Case and Schoenbrod, *supra* note 52, at 995-96.

66. Like, *supra* note 59, at 4-5.

67. EBBIN AND KASPER, *supra* note 24, at 16. Coggins adds "mavericks" and "conscience-

The intervenor's lack of adequate technical and financial strength, and the fact that the outcome of the public hearing was largely predetermined, precluded a meaningful license adjudication process. Many who sympathized with the intervenor thus viewed him as a biblical David fighting bravely, albeit unsuccessfully, against the collective Goliath of the AEC/utility.⁶⁸ Although a number of the battles were well-fought, the intervenor experienced few victories at the administrative level.⁶⁹ In frustrated defeat, the intervenor turned to the courts.⁷⁰

THE JUDICIAL RESPONSE

The first contested nuclear licensing case began in 1956, when the construction permit for the Fermi fast breeder reactor near Detroit, Michigan was granted over the objections of an intervening labor union.⁷¹ An appeal was ultimately taken to the United States Supreme Court which, five years later, held that the Atomic Energy Commission had proceeded properly in issuing a provisional construction permit, although the Commission's definitive finding of operational safety was not to occur until the operating license stage.⁷² The Court insisted that the AEC's statutory interpretations be given proper respect, expressing a judicial deference which was to earmark nearly all subsequent judicial resolutions of challenges

ridden academics" to the group. Coggins, *supra* note 34, at 187. The level of scientific and technical advice which these individuals did provide has been assessed as "marginally adequate, if that." EBBIN AND KASPER, *supra* note 24, at 205.

68. See *Hearings on S. 2135 and S. 2744 Before the Subcomm. on Reorganization, Research, and International Organizations of the Comm. on Government Operations*, 93d Cong., 2d Sess. 227 (1974) (testimony of Harold Green) [hereinafter cited as *Hearings on S. 2135 and S. 2744*]. One legal observer had argued the David and Goliath analogy to be inapposite, "because David had a chance." Coggins, *supra* note 34, at 187.

69. I saw a board that was so evidently close minded and annoyed at the intervention and annoyed at the intervenor's lawyer so as to not even give the physical appearances of judiciousness

These proceedings . . . were not judicious, they were not fair, and they were not evenhanded nor were there even the obvious trappings of that. The outcome, at least to us as disinterested observers, seemed preordained and the board seemed to be going through the motions.

Hearings on S. 2135 and S. 2744, supra note 68, at 230-31 (testimony of Steven Ebbin).

70. Though appeals from the Atomic Safety and Licensing Board could have been taken by the Commission, it had delegated its full appellate authority to a three-member Atomic Safety and Licensing Appeal Board, pursuant to 10 C.F.R. § 2.785 (1975). Thereafter, judicial review in the federal courts of appeal was permitted under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* (1970) and the Hobbs Act, 28 U.S.C. §§ 2341 *et seq.* (1970). See generally Jacks, *supra* note 30, at 479-89.

71. See EBBIN AND KASPER, *supra* note 24, at 9-10.

72. *Power Reactor Development Co. v. International Union of Electricians*, 367 U.S. 396 (1961).

to Commission rulings.⁷³

Consequently, federal courts were reluctant to overturn AEC determinations. They emphasized the relatively narrow scope of review of all agency action, attaching great weight to the highly complex nature of nuclear power. While some cases emphasized the AEC's "uniqueness" and "flexibility,"⁷⁴ others lauded the Commission's "highest degree of care, caution and expertise."⁷⁵

The 1971 environmental victory in *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*⁷⁶ seemed to signal a greater willingness by the judiciary to scrutinize AEC action. In that case, the District of Columbia Circuit held that the Commission's rules failed to comply with the National Environmental Policy Act of 1969 (NEPA).⁷⁷ Moreover, Judge Wright unabashedly criticized the AEC's "crabbed interpretation" which made a "mockery of the Act."⁷⁸ He pointed out the AEC's "thoroughgoing reluctance to meet the NEPA procedural obligations,"⁷⁹ as well as the "shocking" time lag between NEPA's effective date and AEC compliance.⁸⁰

The Second Circuit's decision in *Morningside Renewal Council v. Atomic Energy Commission*,⁸¹ however, soon tempered any safety and environmental intervenor hopes which *Calvert Cliffs'* may have nurtured. Finding "substantial evidence" in the record compiled by the Atomic Safety and Licensing Board, and confident that the

73. The Court stated: "We see no reason why we should not accord to the Commission's interpretation of its own regulation and governing statute that respect which is customarily given to a practical administrative construction of a disputed provision." *Id.* at 408. Justice Douglas questioned the postponement of the definitive safety finding, noting that:

[W]hen millions have been invested, the momentum is on the side of the applicant, not on the side of the public. The momentum is not only generated by the desire to salvage an investment. No agency wants to be the architect of a "white elephant."

Id. at 417. (Douglas, J., dissenting). Although the Fermi reactor's operating license was subsequently granted, the reactor was decommissioned several years ago, following a series of mishaps. EBBIN AND KASPER, *supra* note 24, at 10.

74. See *Siegel v. Atomic Energy Commission*, 400 F.2d 778, 783 (D.C. Cir. 1968), which held that the AEC had not exceeded the scope of its authority by excluding certain latent dangers from its inquiry into the merits of a license application.

75. *Crowther v. Seaborg*, 415 F.2d 437, 439 (10th Cir. 1969) which held that the AEC's refusal to issue a preliminary injunction restraining the detonation of underground nuclear devices was not error as a matter of law, nor abuse of discretion.

76. 449 F.2d 1109 (D.C. Cir. 1971).

77. 42 U.S.C. §§ 4321 *et seq.* (1970).

78. 449 F.2d at 1117.

79. *Id.* at 1119.

80. *Id.* See also *Izaak Walton League of America v. Schlesinger*, 337 F. Supp. 287 (D.D.C. 1971) where a preliminary injunction was granted restraining the AEC from issuing an interim operating license until a NEPA Environmental Impact Statement had been prepared and distributed by the Commission.

81. 482 F.2d 234 (2d Cir. 1973), *cert. denied*, 417 U.S. 951 (1974).

Atomic Safety and Licensing Appeal Board had "carefully considered all aspects of the issues involved,"⁸² the court affirmed the granting of a contested operating license. Only the dissent of Judge Oakes expressed any doubts as to the soundness of the Commission's determination.⁸³

In the meantime, however, the United States District Court for the District of Columbia was the scene of a new challenge to the Atomic Energy Commission. In January of 1972, six environmental organizations filed a lawsuit attacking the constitutionality of the Atomic Energy Act of 1954⁸⁴ which gave the AEC its authority to simultaneously promote and regulate the nuclear industry.⁸⁵ The groups maintained that this dual obligation violated their due process rights by depriving them of a fair and impartial hearing in individual licensing proceedings. The complaint sought declaratory and injunctive relief, and prayed that the Commission be split into separate licensing and development components, with further licensing activities prohibited until that separation was accomplished.⁸⁶ A direct constitutional challenge to the Atomic Energy

82. *Id.* at 238.

83. Judge Oakes stated: "I continue to express concern that the AEC is charged with the dual duty of passing on licenses on the one hand but promoting the use of atomic power on the other." *Id.* at 240-41. See also *Carolina Environmental Study Group v. United States*, 510 F.2d 796 (D.C. Cir. 1975). In response to the contention of the Commission's promotional bias, the court indicated the "possibility of such a conflict," but concluded that the record failed to indicate that "such a conflict occurred or blinded the AEC's judgment herein." *Id.* at 801.

Most recently, the Court of Appeals for the Seventh Circuit, in the landmark decision of *Porter County Chapter of the Izaak Walton League v. Atomic Energy Commission*, 515 F.2d 513 (7th Cir. 1975), held that the AEC had violated provisions of its own regulations prior to issuance of a construction permit for the Bailly (Indiana) nuclear power plant. It consequently required the utility-applicant to fill in the existing excavation site where the power plant had been planned. *Id.* at 530. The court expressed its fear that the Commission had "tended to become somewhat lax" in its regulatory duties and cited Judge Oakes' dissent in *Morningside* as to the AEC's dual mandate. *Id.* at 522. Nevertheless, the court emphasized the fact that its criticism was directed at an abolished agency, intimating that the Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801 *et seq.* (Supp. I, 1975), had resolved any Commission competence problems which might have existed. *Id.*

On the utility's petition for certiorari, the United States Supreme Court reversed. Adopting the deferential approach taken years earlier in *Power Reactor Development Co. v. International Union of Electricians*, 367 U.S. 396 (1961), the Court held that the "Court of Appeals erred in rejecting the Agency's interpretation of its own regulations." *Northern Indiana Public Service Company v. Porter County Chapter of the Izaak Walton League of America*, 96 S. Ct. 172 (1975).

84. 42 U.S.C. §§ 2011 *et seq.* (1970).

85. N.Y. Times, Jan. 7, 1972, at 4, col. 3.

86. This preliminary information is described by the court in *Conservation Society of Southern Vermont v. Atomic Energy Commission*, 1 CCH ATOM. EN. L. REP. 3596 (D.D.C. April 17, 1975). The court eventually granted the defendants' motion to dismiss on the ground that the Energy Reorganization Act of 1974 had mooted the plaintiffs' action. *Id.*

Commission's conflicting responsibilities had been launched in the hope that the judicial branch would "un-capture" the AEC.

THE ENERGY CRISIS

During the course of this litigation the United States' imminent energy crisis become apparent. The American public had awakened to the probable inability of this country's fossil fuels to continue to provide sufficient energy for its needs. Although conservation would undoubtedly ease this depletion to a certain extent, greater reliance upon alternative energy sources appeared inevitable.⁸⁷ Nuclear power, considered by its proponents to be "clean" in that it does not pour large quantities of smoke and fumes into the atmosphere,⁸⁸ as well as economically feasible, was seen as a panacea.⁸⁹

Thus, instead of an attempt to delay the licensing process in order to give more attention to safety and environmental factors, increased pressure to build more nuclear power plants—and build them more quickly—seemed destined. A derivative result appeared to be overworked AEC staff, incapable of maintaining the necessarily high level of agency conscientiousness.⁹⁰

The 93rd Congress was consequently faced with a dilemma. On the one hand was an administrative agency plagued with a regulatory-developmental role conflict. On the other was the United States' dwindling fossil fuel supply, with little sign of relief coming from Middle Eastern producers.

THE CONGRESSIONAL RESPONSE—THE ENERGY REORGANIZATION ACT OF 1974

Congress' solution to both these problems was the Energy Reorganization Act of 1974.⁹¹ These amendments to the Atomic Energy Act of 1954⁹² statutorily abolished the Atomic Energy Commission.⁹³ In its place, two new administrative agencies have been created: the Energy Research and Development Administration (ERDA), to develop and promote energy sources; and the Nuclear Regulatory Commission (NRC), to independently regulate the burgeoning nuclear industry.⁹⁴

87. Jacks, *supra* note 30, at 479.

88. "As if the periodic releases of radiation at operating nuclear plants is more acceptable because radioactive emissions are invisible to the human eye." *Hearings on S. 2135 and S. 2744, supra* note 68, at 192 (testimony of Steven Ebbin).

89. Green, *supra* note 31, at 633.

90. Jacks, *supra* note 30, at 479.

91. 42 U.S.C.A. §§ 5801 *et seq.* (Supp. I, 1975).

92. 42 U.S.C. §§ 2011 *et seq.* (1970).

93. 42 U.S.C.A. § 5814(a) (Supp. I, 1975).

94. S. REP. NO. 93-980, 93d Cong., 2d Sess. 2 (1974) [hereinafter cited as S. REP. NO. 93-980].

All of the non-regulatory functions of the old Atomic Energy Commission were transferred to ERDA to consolidate the federal government's fragmented and uncoordinated research and development efforts. Extensive technical staff and the national laboratories were transferred from the AEC, along with additional research and development programs from the Department of Interior and the National Science Foundation. ERDA's primary mission is to develop the technology necessary to enable the United States to attain energy self-sufficiency by 1984.⁹⁵ All energy sources—fossil, solar, geothermal and nuclear—are to be explored and developed.⁹⁶

The NRC inherited all of the licensing and related regulatory functions of the Atomic Energy Commission. In contrast to ERDA's developmental-promotional goals, the Nuclear Regulatory Commission's avowed purpose is to ensure safety and security in the nuclear industry. Although patterned after the AEC's former regulatory division, the NRC possesses a revised internal organization which its advocates insist will assure a neutral and technically sound regulatory process.⁹⁷

Within NRC there will be an Office of Nuclear Material Safety and Safeguards⁹⁸ which will oversee the processing, transportation and handling of nuclear materials.⁹⁹ The Office of Nuclear Regula-

980]. For an analysis of the planned division of responsibilities between the two agencies, see H. REP. NO. 93-707, 93d Cong., 1st Sess. 25-28 (1973) [hereinafter cited as H. REP. NO. 93-707].

95. S. REP. NO. 93-980, *supra* note 94, at 1. "This is the most important piece of energy legislation to come out of Congress because it establishes the organizations needed to end our dependence on foreign oil." 120 CONG. REC. S18721 (daily ed. Oct. 10, 1974) (remarks of Senator Ribicoff).

96. 42 U.S.C.A. § 5813(2) (Supp. I, 1975). Despite this statutory assurance, representatives of environmental and citizen intervenor groups have expressed concern regarding the possibility of a pro-nuclear bias in ERDA:

The proposed Energy Research and Development Administration will be overwhelmingly staffed by Atomic Energy Commission personnel, despite the addition of some employees from Interior and other agencies. There are no safeguards in the legislation to assure that overfunding of nuclear energy at the expense of fossil fuels, solar and geothermal will not continue.

Hearings on S. 2744 Before the Subcomm. on Reorganization, Research and International Organizations of the Comm. on Government Operations, 93d Cong., 1st Sess. 248-49 (1973) (testimony of Marc Messing) [hereinafter cited as *Hearings on S. 2744*]. Also of note is the testimony of Sheldon Kinsel, Conservation Liaison with the National Wildlife Federation: "We do not believe the country can afford the kind of narrow and myopic approach to energy [research and development] demonstrated by the AEC and probably by ERDA as it is outlined" *Hearings on H. R. 6602 and Related Bills Before the Subcomm. on the Environment of the Comm. on Interior and Insular Affairs*, 93d Cong., 1st & 2d Sess. 521 (1973).

97. S. REP. NO. 93-980, *supra* note 94, at 2.

98. 42 U.S.C.A. § 5844 (Supp. I, 1975).

99. *Id.* This includes the provision and maintenance of safeguards against threats, thefts

tory Research¹⁰⁰ will, independently of ERDA, perform research related solely to NRC's licensing and regulatory functions.¹⁰¹ In addition, an Office of Nuclear Reactor Regulation¹⁰² has been created to license and regulate the activities of all existing and proposed nuclear facilities.¹⁰³

Further significant changes in agency structure are created by the new amendments. Section 206¹⁰⁴ mandates that the responsible officers of licensed utilities notify the Nuclear Regulatory Commission upon obtaining any information reasonably indicating either non-compliance with nuclear safety regulations or the existence of a defect which could create a substantial safety hazard.¹⁰⁵ Section 208¹⁰⁶ requires NRC to submit a quarterly report to Congress, listing any abnormal occurrences associated with any licensed or regulated facility.¹⁰⁷ Within 15 days of its receiving such information, NRC must make it available to the public.¹⁰⁸

Moreover, in the attempt to assure NRC nonpartisanship, the Energy Reorganization Act requires that no more than three members of the Nuclear Regulatory Commission be affiliated with the same political party.¹⁰⁹ This is intended to remedy the anomalous situation of the AEC being the only federal regulatory agency not requiring bipartisanship or fair representation of interest as a condition for membership.¹¹⁰

and sabotage of licensed facilities and nuclear materials. *Id.* § 5844(b)(1) (Supp. I, 1975).

100. *Id.* § 5845 (Supp. I, 1975).

101. *Id.* This independent research capability was seen as an important step in modifying the formerly heavy safety and research reliance of the AEC's regulatory branch on the promotion-development side. 120 CONG. REC. S18727 (daily ed. Oct. 10, 1974) (remarks of Senator Ribicoff).

102. 42 U.S.C.A. § 5843 (Supp. I, 1975).

103. *Id.*

104. *Id.* § 5846 (Supp. I, 1975).

105. *Id.* § 5846(a) (Supp. I, 1975). Civil penalties may be incurred by any person who "knowingly and consciously" fails to provide the required notice. *Id.* § 5846(b) (Supp. I, 1975).

106. *Id.* § 5848 (Supp. I, 1975).

107. *Id.* An "abnormal occurrence," as defined by this section, is "an unscheduled incident or event which the Commission determines is significant from the standpoint of public health or safety" *Id.* Each report to Congress must contain the following: (1) the date and place of each occurrence; (2) the nature and probable consequence of each occurrence; (3) the cause or causes of each; and (4) any action taken to prevent reoccurrence. *Id.*

108. *Id.* This public dissemination is to be as ". . . wide . . . as reasonably possible," and must include both the cause(s) of the abnormal occurrence and any preventative action subsequently taken. *Id.*

109. *Id.* § 5841(b)(2) (Supp. I, 1975).

110. S. REP. NO. 93-980, *supra* note 94, at 56. Interestingly, at the date of the Energy Reorganization Act's passage, all five of the Atomic Energy Commissioners were Republicans. *Id.*

In addition to this bipartisanship provision, the original Senate bill had included a technical qualifications requirement for the new Commissioners. This was subsequently deleted by

Thus, the new Act presumably provided the framework within which the safe and environmentally sound operation of the nation's nuclear reactor program could be continued. By having only the Nuclear Regulatory Commission perform the licensing functions, objectivity in the regulation of reactors would be guaranteed and the cries of "captured agency" silenced.

Nonetheless, many environmental and safety advocates who have criticized the AEC's structure still may not be appeased. The reasons for this continued dissatisfaction are important in that they raise the question of whether the Energy Reorganization Act of 1974 is anything more than an elaborate organizational restructuring designed merely to mollify nuclear power opponents.¹¹¹

First, it should be noted that nothing in the new amendments alters the former AEC licensing procedures, whereby the utility-applicant resolved all AEC objections through prehearing negotiations with the regulatory staff.¹¹² The only change in this regard is that the responsible NRC entity is now the "Office of Nuclear Reactor Regulation."¹¹³ This means that, as before, by the time the intervenor becomes a party to the proceedings, the conclusion as to the granting of the construction permit or operating license has been predetermined.¹¹⁴

Moreover, no provision for financial or technical support for the intervenor in the new Commission's proceedings is found anywhere in the Energy Reorganization Act. The significance of this absence increases with the examination of two proposed Senate amendments which were not incorporated into the Act's final version.

Senate Amendment 1791, sponsored by Senator Kennedy, would have enabled the payment of reasonable costs and fees¹¹⁵ to inter-

the House conferees, who nonetheless claimed no intent to de-emphasize the importance of technically qualified members. They apparently believed, however, that the President should not be required to adhere to such a restriction in making these appointments. H. REP. NO. 93-1445, 93d Cong., 2d Sess. 32 (1974) [hereinafter cited as H. REP. NO. 93-1445]. This seems especially curious since the Atomic Energy Act of 1954 had required that, in submitting any nomination to the Senate for Atomic Energy Commission members, the President at least had to "set forth the experience and qualifications of the nominee." 42 U.S.C. § 2032(a) (1970). No such directions appear in the Energy Reorganization Act.

111. See Palfrey, *supra* note 48, at 1404-05.

112. See text accompanying notes 54 through 58 *supra*.

113. 42 U.S.C.A. § 5843 (Supp. I, 1975).

114. See text accompanying notes 54 through 58 *supra*.

115. These costs would include such items as attorney's fees, expert witness costs and travel expenses. 120 CONG. REC. S15053 (daily ed. Aug. 15, 1974). There had been a perfunctory debate between Senators Kennedy and Pastore as to the inclusion of attorney's fees, the latter fearing that such a provision would "generate ambulance chasers, people who just go out for the sake of being paid by the Government." *Id.* at S15052. Apparently upon the assurance of Senator Percy that "the Commission has full discretion in determining whom to fund" Senator Pastore withdrew his objection. *Id.* at S15053.

venors in nuclear licensing hearings.¹¹⁶ The financing would be available to parties who demonstrated a financial need, and established that their participation had helped, or was reasonably likely to help, develop facts, issues and arguments relevant to the regulatory proceedings.¹¹⁷ The Nuclear Regulatory Commission would prescribe a maximum amount to be allocated to each proceeding, and decide when such funding was to be provided.¹¹⁸

Substantial evidence of the necessity of this financing had been clearly demonstrated during the committee hearings. Figures confirming the tremendous cost involved in a meaningful intervention had been presented.¹¹⁹ Instances were documented where the inability to afford the costs of legal counsel and technical studies had forced citizen groups to withdraw from past hearings.¹²⁰ Yet, the House conferees insisted upon the amendment's deletion.¹²¹

The most significant amendment eliminated in the final version of the Act was Amendment 1787,¹²² sponsored by Senator Metcalf.¹²³ This provision would have allowed any party¹²⁴ to a licensing pro-

116. The full text of this amendment may be found at 120 CONG. REC. S18729 (daily ed. Oct. 10, 1974). One commentator describes this amendment as an example of the "handiwork of the nuclear critics, who, by 1974, seemed less interested in ensuring the safety of nuclear power than in obstructing it in every possible way." Palfrey, *supra* note 48, at 1404-05.

117. 120 CONG. REC. S14754 (daily ed. Aug. 13, 1974) (remarks of Senator Kennedy).

118. *Id.*

119. See, e.g., *Hearings on S. 2135 and S. 2744, supra* note 68, at 194 (testimony of Steven Ebbin).

120. Nine such situations were supplied by Senator Kennedy at 120 CONG. REC. S14755, 14756 (daily ed. Aug. 13, 1974). See also *Citizens for a Safe Environment v. Atomic Energy Commission*, 489 F.2d 1018 (3d Cir. 1974), where environmental intervenors in a licensing proceeding sought judicial review of an AEC order denying their motion for financial and technical assistance. They had requested \$30,000 for legal fees, technical experts and witnesses. The Commission claimed lack of statutory and regulatory authority to authorize such funds. 489 F.2d at 1020. The Third Circuit claimed such a Commission denial was not a "final order" and thus not reviewable pursuant to 28 U.S.C. § 2342(4) (1970).

121. The deletion of this amendment, insisted the conferees, was not intended to express the opinion that the parties were not entitled to reimbursement. Rather, it was noted that there were then several cases on the subject pending before the AEC and that it would thus be best to withhold congressional action until the issue had been definitely resolved by the Commission. H. REP. NO. 93-1445, *supra* note 110, at 37.

122. The full text of this amendment may be found at 120 CONG. REC. S14753 (daily ed. Aug. 13, 1974).

123. Senator Metcalf sponsored several other amendments designed to fortify the intervenor's position. His Amendment 1788 would have amended the Freedom of Information Act, 5 U.S.C. § 552 (1970), to authorize public disclosure of NRC records which included such things as inter-agency memoranda and trade secrets relating to safety. The full text of this provision may be found at 120 CONG. REC. S15034 (daily ed. Aug. 15, 1974). Another Metcalf amendment creating an Office of Public Counsel is discussed in note 140 *infra*.

124. For the general criteria relevant to becoming a "party" in licensing proceedings, see text accompanying notes 39 and 40 *supra*.

ceeding to obtain special studies and technical assistance¹²⁵ where necessary for an adequate presentation of his case. Such studies and assistance would have been paid for initially by the Nuclear Regulatory Commission. The right to seek reimbursement from a financially capable party was retained however. Although the decision to order the studies and assistance would have been NRC's, the requesting intervenor would have had the opportunity to appeal to the Atomic Safety and Licensing Appeal Board.¹²⁶

Had this amendment been enacted, a substantial barrier to intervenor participation would have been removed. By allowing both private technical staff and NRC's own reactor safety experts, without fear of reprisals for disclosing information adverse to the Commission's position,¹²⁷ to consult and advise citizens, public articulation would have been significantly facilitated. By enabling the intervenor to avail himself of the scientific and technical skills necessary to present the strongest possible case, the adversary process essential to effective reactor regulation could have been achieved¹²⁸ without unduly complicating or retarding the Commission's hearing process.¹²⁹ Again, the House insisted upon the amendment's deletion, claiming that it "raised serious policy problems and carried the possibility of heavy administrative burdens and costs to the Commission as well as inordinate delays in administrative proceedings."¹³⁰

125. For the purposes of this amendment, "technical assistance" meant:

- (1) the furnishing of a witness for an appearance in any proceeding, or giving testimony by deposition, affidavit, or other appropriate means;
- (2) the furnishing of advice, consultation, or information to assist a party in understanding technical literature or issues, to analyze and evaluate documentary materials, and to otherwise aid a party in technical preparation of its presentation in the proceedings.

120 CONG. REC. S14753 (daily ed. Aug. 13, 1974).

126. 120 CONG. REC. S15048 (daily ed. Aug. 15, 1974) (remarks of Senator Percy).

127. See text accompanying notes 65 and 66 *supra*, and Jacks, *supra* note 30, at 482-86.

128. 120 CONG. REC. S18747 (daily ed. Oct. 10, 1974) (letter to Senator Ribicoff from Lee White, former member of the Federal Power Commission). Mr. White, significantly, added: "Frequently, good representation can mean shorter representation." *Id.* See also Jacks, *supra* note 30, at 482:

Moreover, to the extent that the staff can provide members of the public with technical assistance, the intervenor is less likely to waste time raising minor issues.

129. See 120 CONG. REC. S14751 (daily ed. Aug. 13, 1974) (remarks of Senator Metcalf).

130. 120 CONG. REC. H10266 (daily ed. Oct. 9, 1974) (remarks of Congressman Holifield).

Mr. Holifield added:

As the Members well know, we have too many delays now in handling licensing applications for the construction and operation of nuclear plants. Such applications take from eight to ten years. We need to reduce, not add to, the delay factors, so that this nation can get on with the job of providing the energy so important to its welfare.

Id. But see note 52 and accompanying text *supra*.

The Senate supporters, although unconvinced of the existence of this negative aspect of Amendment 1787,¹³¹ were unable to persuade the House to enter into meaningful compromise. The Senate conferees apparently believed that the overriding national interest in swift passage of the bill prior to Congress' scheduled recess precluded them from more adamantly insisting upon House concession.¹³² The result was quick passage by the Senate on October 10, 1974.¹³³ On February 11, 1975,¹³⁴ the Energy Reorganization Act of 1974¹³⁵ became law, thus insuring that the intervenor's participation would remain ineffective.

ALTERNATIVES

The failure of the Energy Reorganization Act to provide for intervenor assistance does not foreclose the implementation of other alternatives. First, the Nuclear Regulatory Commission itself could incorporate into its regulations a requirement that applicants for construction permits and operating licenses be assessed a minimum fee to absorb the costs of citizen intervention. Such an assessment would be but a small percentage of the utility's total construction costs.¹³⁶

In addition, a new policy of full candor could be initiated by the Commission. This would place both the risks and benefits of nuclear power before the public, thus diminishing public distrust of the agency.¹³⁷ As part of this policy, the Nuclear Regulatory Commission could permit and encourage experts from its own staff to meet

131. 120 CONG. REC. S18722 (daily ed. Oct. 10, 1974) (remarks of Senator Percy).

132. *Id.* at S18721, S18722 (remarks of Senator Ribicoff). Senator Metcalf was less easily appeased, however:

Mr. President, I have refused to sign the conference report on this bill . . . because the House conferees refused to negotiate any reasonable protection for the public to be adequately informed and represented in the regulation of nuclear power. And because the Senate conferees gave in without a fight.

The right of a citizen to petition his government for a redress of grievances is a very precious part of our Constitution. Unfortunately, in the haste of making and promoting government policy, that right sometimes is forgotten, or worse, it is deliberately ignored.

Id. at S18723.

133. House passage had been October 9, 1974.

134. The effective date provision of 42 U.S.C.A. § 5801 (Supp. I, 1975) provides that the Act take effect 120 days after the President's signature, "or on such earlier date as the President may prescribe and publish in the Federal Register."

135. 42 U.S.C.A. §§ 5801 *et seq.* (Supp. I, 1975).

136. EBBIN AND KASPER, *supra* note 24, at 195. The authors claim this to be the proposal of an unidentified (for obvious reasons) prominent attorney for utilities, who suggested the figure of \$100,000. This attorney felt such funding would eliminate procedural delay and thus benefit the utility as well as the intervenor. *Id.*

137. Green, *Public Participation in Nuclear Power Plant Licensing: The Great Delusion*, 15 WM. & MARY L. REV. 503, 520-21 (1974).

with intervenors, and to testify for them if necessary. Thus a significant source of knowledgeable opinion would be made available to citizen groups at a minimal cost.¹³⁸

New congressional action is also feasible. Even assuming the inability to provide the direct financial and technical assistance set forth in the Kennedy and Metcalf amendments,¹³⁹ the creation of an independent Office of Public Counsel remains a viable alternative. This entity would fully litigate all licensing proceedings on behalf of the public, assuring an adequately funded and knowledgeable intervenor for every Commission proceeding.¹⁴⁰

A further legislative possibility would be the formation of independent assessment centers, which would analyze the impact of technology on the environment. These centers would operate independently of the Nuclear Regulatory Commission and be supported by congressional appropriations and state contributions.¹⁴¹

THE FUTURE

Absent the effectuation of any of these alternatives, it is difficult to determine whether the separation of the promotional and regulatory functions established by the Energy Reorganization Act will, in fact, bring the required agency scrupulousness into the nuclear facility licensing process. There have been no changes made regarding the utility/Commission negotiations which virtually determine the granting of the permit or license prior to public hearing.¹⁴² Nor was technical, financial or any other type of assistance provided to buttress the intervenor's meager resources.¹⁴³

The appropriate question thus seems to be whether the creation of the Nuclear Regulatory Commission amounts to anything more than the re-shuffling of boxes on an organizational chart¹⁴⁴—whether the former AEC regulatory division has simply been renamed and allowed to continue its functions without significant revision.¹⁴⁵

138. Case and Schoenbrod, *supra* note 52, at 996 and Jacks, *supra* note 30, at 523.

139. See notes 115 through 130 and accompanying text *supra*.

140. Jacks, *supra* note 30, at 524. An amendment providing a similar public advocate was offered by Senator Metcalf, although it was never adopted by the Senate. The text of this provision may be found at 120 CONG. REC. S14753 (daily ed. Aug. 13, 1974). In support of the establishment of such an office, the Senator pointed to the success of public counsels in such federal agencies as the Federal Communications Commission and the Civil Aeronautics Board. *Id.* at S14752.

141. EBBIN AND KASPER, *supra* note 24, at 273-76. These centers would make no decisions, but would provide information to both the public and the decision makers about the known and potential impacts of technology. *Id.* at 275.

142. See text accompanying notes 54 through 58 *supra*.

143. See text accompanying notes 59 through 67 *supra*.

144. See Lazarus and Onek, *supra* note 28, at 1071.

145. *Hearings on S. 2744*, *supra* note 96, at 216-20 (testimony of Daniel Ford).

Admittedly, even the mere establishment of an agency which exclusively performs the licensing and related regulatory functions of nuclear plant operation may placate, to some extent, AEC's former critics.¹⁴⁶ This may have the effect of insuring that future nuclear power debates are founded upon policy issues more realistic than the supposed duality problems of the AEC.¹⁴⁷ A fundamental restoration of public confidence in the new Commission's proceedings may consequently be possible.¹⁴⁸ While this is certainly a positive result, it is not enough.

The congressional response to the citizen intervenor fails to perceive two important truths about nuclear power plant licensing. First, it ignores the fact that, beyond attempting resolution of technical issues, the Commission's hearings serve the concurrent purpose of permitting meaningful public input into the decision making process.¹⁴⁹ Such an opportunity affirms the citizen's hope that he indeed has a voice in the operation of his government in an area of intense public concern.

Furthermore, the new amendments neglect to recognize that the adversary process is essential to nuclear regulation. The critical safety, health and environmental hazards involved dictate that advocacy of all viewpoints be equally strong.¹⁵⁰ Implicit in all the workings of administrative adjudication is the assumption that the agency does not, by itself, embody the public interest. Rather, the public interest is the embodiment of all relevant points of view.¹⁵¹ When lack of funds and knowledge cause the intervenor to falter as an advocate, the decision-making process must concomitantly suffer.

It is still too soon to determine exactly how the formation of the Nuclear Regulatory Commission will ultimately affect the intervenor. Though separated from the promotional Energy and Research Development Administration, the NRC's members and staff will be largely drawn from the Atomic Energy Commission¹⁵² and

146. "Politically, it had the obvious asset of helping to defuse the nuclear power critics." Palfrey, *supra* note 48, at 1404.

147. See H. REP. NO. 93-707, *supra* note 94, at 4.

148. Jacks and Raff, *The Bureaucracy of Power*, 10 TRIAL 28, 30 (1974):

In a time when the citizenry's faith in its government is at an ebb, it is more desirable than ever that those who participate in federal agency proceedings not feel as if the institution is, by its very constitution, biased.

149. EBBIN AND KASPER, *supra* note 24, at 143-44.

150. 120 CONG. REC. S18747 (daily ed. Oct. 10, 1974) (letter to Senator Ribicoff from Lee White).

151. See *Hearings on S. 2135 and S. 2744*, *supra* note 68, at 194 (testimony of Steven Ebbin).

152. In October of 1974, President Ford appointed William Anders to head the Nuclear Regulatory Commission. Mr. Anders had been a member of the Atomic Energy Commission

will continue to work closely with its advisory committees and regulatory staff.¹⁵³ NRC will still appoint hearing examiners, board members and other adjudicators¹⁵⁴ who will oversee hearings that are essentially cosmetic devices.¹⁵⁵ The democratic process, as well as the health and safety of the public, may be the ultimate victim.¹⁵⁶

CONCLUSION

The abolition of the Atomic Energy Commission, coupled with the concurrent creation of the Energy and Research Development Administration and the Nuclear Regulatory Commission, was undoubtedly a meritorious first step toward protecting the American people and their environment. It is not, however, by itself, sufficient.

Without providing a meaningful opportunity for the intervenor to participate in the new Commission's licensing hearings, no true adversary licensing process can occur. The Nuclear Regulatory Commission's conclusions will continue to remain largely unchallenged, while the public which assumes the disquieting risks of atomic energy must persist in its struggle to attain a voice in the licensing process without the financial and technical assistance it requires.

LOUISE CAROL GROSS

since 1973, and had played a major role in promoting the use of the new plutonium-fueled reactor. N.Y. TIMES, Oct. 30, 1974, at 35, col.5.

153. 120 CONG. REC. S14751 (daily ed. Aug. 13, 1974) (remarks of Senator Metcalf).

154. *Id.*

155. Green, *Public Participation in Nuclear Power Plant Licensing: The Great Delusion*, 15 WM. & MARY L. REV. 503, 517 (1974).

156. I will argue, though, that quick, and perhaps ill-considered responses at the expense of democratic processes and citizen participation in decisionmaking will not solve the energy crisis, but will rather have a serious impact on democratic institutions and perpetuate the problem of governance with which this Nation is confronted.

Hearings on S. 2135 and S. 2744, supra note 68, at 190 (testimony of Steven Ebbin).

We have invited, in recent years, greater citizen participation in governmental processes and now that invitation is being rescinded. And we are telling the people to return for more democracy at a more convenient time. Democracy is, evidently, in the view of some, simply inadequate to meet national emergencies, real or invented.

Id. at 194.