Reg. Files

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Alan S. Rosenthal, Chairman
Michael C. Farrar
Richard S. Salzman

In the Matter of	)	
THE TOLEDO EDISON COMPANY ET AL.	)	Docket No. 50-346A
(Davis-Besse Nuclear Power Station, Unit 1)	)	

Mr. Gerald Charnoff, Washington, D.C., argued the cause for the applicants, The Toledo Edison Company et al.; with him on the brief were Messrs. Wm. Bradford Reynolds, Jay H. Bernstein and Robert E. Zahler, Washington, D.C.

Mrs. Ruth Greenspan Bell, Washington, D.C., argued the cause for the Attorney General of the United States; with her on the brief was Mr. Steven M. Charno.

Mr. David C. Hjelmfelt, Washington, D.C., argued the cause for intervenor, the City of Cleveland; with him on the brief were Messrs. Reuben Goldberg, Washington, D.C., James B. Davis and Robert D. Hart, Cleveland, Ohio.

Mr. Roy P. Lessy, Jr., argued the cause for the Nuclear Regulatory Commission Staff; with him on the brief were Messrs. Joseph Rutberg, Benjamin H. Vogler, and Jack R. Goldberg.

DECISION

April 14, 1976

(ALAB-323)

Opinion of the Board by Mr. Salzman, in which Mr. Rosenthal and Mr. Farrar join.

I

1. Background. When Congress amended section 105c of the Atomic Energy Act in 1970 to require the Commission to

consider the antitrust implications of nuclear power plants before licensing their construction or operation,[1] it included among those amendments a "grandfather clause", section 105c(8), 42 U.S.C. §2135(c)(8). Under that clause, certain applications for construction permits and operating licenses could be granted even though their antitrust review was incomplete (subject to the proviso that if the review later disclosed adverse antitrust consequences, those "grandfathered" permits could be conditioned retroactively to ameliorate them). Section 105c(8) provides:

> With respect to any application for a construction permit on file at the time of enactment into law of this subsection, which permit would be for issuance under section 103, and with respect to any application for an operating license in connection with which a written request for an antitrust review is made as provided for in paragraph (3), the Commission, after consultation with the Attorney General, may, upon determination that such action is necessary in the public interest to avoid unnecessary delay, establish by rule or order periods for Commission notification and receipt of advice differing from those set forth above and may issue a construction permit or operating license in advance of consideration of and findings with respect to the matters covered in this subsection: Provided, That any construction permit or operating license so issued shall contain such conditions as the Commission deems appropriate to assure that any subsequent findings and orders of the Commission with respect to such matters will be given full force and effect.

1/ Section 6 of the Act of December 19, 1970, Pub. Law 91-560, 91st Cong., 2nd Sess., 84 Stat. 1472, 1473, 42 U.S.C. §2135(c).

The application to construct and operate Unit 1 of the Davis-Besse Nuclear Power Station had been filed with the former Atomic Energy Commission in August 1969, well before the cut-off date for grandfather clause eligibility. Construction permit proceedings on the health and safety aspects of the application were duly held before a Commission licensing board and a permit to construct Unit 1 was issued in regular course in March of 1971.[2] The plant is now approaching completion.

2. The proceedings below. A second Licensing Board is currently considering the antitrust ramifications, if any, of licensing Davis-Besse Unit 1. (As we recently explained in Marble Hill, antitrust matters are tried separately from health and safety questions.[3]) Whether the antitrust proceedings in this case will be completed before the nuclear

---

2 / See 4 AEC 571 (1971).

3 / Public Service Company of Indiana (Marble Hill Units 1 and 2), ALAB-316, NRCI-76/3, ___ (March 3, 1976).

facility is ready is problematical.[4] The applicants therefore asked the antitrust board if an operating license for Unit 1 is "grandfathered," i.e., whether section 105c(8) authorizes the plant to be licensed by the Commission before the antitrust review is completed.[5]

The Licensing Board disposed of the applicants' question in a brief memorandum. In its judgment, section 105c(8) is "unambiguous" and allows the Commission to grant license applications in advance of completed antitrust review in two situations only, neither of which applied to the case at bar.

---

4 / As explained in Marble Hill, supra, it is current practice to holding hearings on the antitrust aspects of a construction permit application concurrently with hearings on the health and safety aspects of that application. The application for Davis-Besse Unit 1, however, was among the first subject to pre-licensing review procedures under amended section 105c. Cleveland's petition to intervene in the Davis-Besse proceedings to raise antitrust questions was filed in July 1971; however, the former Atomic Energy Commission did not refer the matter to a licensing board until January 21, 1974, which in turn granted the petition on March 15, 1974. Formal trial of the antitrust issues commenced on December 8, 1975 and is still in progress. The record sheds no light on the reason for the two and one half year delay between the filing of the City's intervention petition and its reference to a licensing board.

5 / No party questioned the antitrust board's authority to consider this issue. We note that, as there were no challenges to the issuance of an operating license for Unit 1 other than on antitrust grounds, no operating license board was needed or convened.

LBP-76-2, NRCI 76/1, 39, 41-42:

> First, [the "grandfather clause"] applies to applications for construction permits on file at the time of enactment into law of that subsection which permits would be for issuance under Section 103. This condition does not apply to the instant proceeding. Second, [section 105c(8)] applies with respect to any application for an operating license in connection with which written request or antitrust review is made as provided for in paragraph 105c(3). At the time of enactment into law of subsection 105c(3), no such application for an operating license was pending. (Footnote omitted, emphasis in original.)

The Board therefore ruled that "the operating license for the Davis-Besse Unit [1] was not 'grandfathered' by the terms of 105c(8)" and referred that ruling for our consideration. Id. at 42-43. We accepted the referral. See 10 C.F.R. §§2.730(f) and 2.785(b).

II

1. According to the applicants, Congress was concerned that the transition to prelicensing antitrust review not delay the licensing of nuclear power plants applied for before such review was mandatory. In their view, the "grandfather clause" was added to preclude the possibility of such delays. That congressional goal would be unattainable, applicants say, unless section 105c(8) is construed to authorize the grant of operating licenses as well as a construction permits prior to the completion of antitrust review in cases like this one, i.e., where the application to

construct the plant was filed before section 105c was amended in 1970. (See App. Tr. 13-14.) The Licensing Board, however, read section 105c(8) to "grandfather" only construction permits and not operating licenses in these circumstances. The applicants ask us to overturn that ruling as inconsistent with the legislative purpose and uncompelled by the statutory language.[6/]

2. On the other hand, the NRC staff, the Department of Justice (representing the Attorney General) and the City of Cleveland all urge affirmance of the Licensing Board's ruling. The staff says "the meaning of [the grandfather clause] is clear on its face," and that, therefore, "resort to the legislative history is unnecessary." (Br. p. 6). In its judgment, to interpret section 105c(8) "so as to include a category not expressly provided for by Congress is in effect a rewriting of the statute which would violate a fundamental principle of statutory construction." (Ibid.) The staff goes on, however, to review the legislative history and concludes that it supports the Licensing Board's decision.

6/ The applicants do not claim that Davis-Besse Unit 1 falls within the second class of plants "grandfathered" by section 105c(8). That class includes only plants for which a section 104b(research and development) construction permit had been granted prior to the passage of 1970 amendments and in connection with which antitrust review had been sought, concededly not this case. (App. Tr. 13.).

The Justice Department agrees with the staff that "the plain language of section 105c(8)" does not provide for the kind of relief requested by the applicant. It also argues that the legislative history confirms this reading of the "grandfather clause" and joins the staff in asserting that the "plain and unambiguous" language of the section precludes the Commission from "carving out" additional exceptions from prelicense review or broadening those exceptions that already exist.

The City of Cleveland concurs in the positions taken by Justice and the staff. It reads the relevant legislative history as establishing Congress' primary interest in pre-licensing antitrust review, and asserts that any exceptions from that review must be clearly justified in the language of the statute. In Cleveland's judgment, the exception sought by the applicant is not justified.

III

1. Section 105c(8) addresses two distinct situations: first, where "any application for a construction permit [was] on file" as of a certain date, and, second, where "any application for an operating license" meets specific conditions. For applications falling within those situations, the section provides that "the Commission * * * may issue a construction permit or operating license in advance" of completing its

antitrust review (emphasis added).[7] Had Congress meant to "grandfather" operating licenses in addition to construction permits in the first situation, it would have been simple enough for the legislature to have used the conjunctive "and" rather than the disjunctive "or" in delineating the Commission's authority to award such licenses prior to antitrust review.

We therefore agree that the Licensing Board gave the best reading to the grandfather clause, if measured by standard English usage and grammar. But even assuming that when so read the provision is "unambiguous" and its meaning "plain," the results of grammatical analysis are the beginning of statutory construction, not the end. It is the obligation of any tribunal called upon to breathe life into the cold words of a statute to do so in a manner which gives effect to the legislative will.[8] The canons of statutory

---

7 / Subject to other requirements in the provision not material for purposes of this discussion.

8 / "The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification. It is a wooden English doctrine of rather recent vintage to which lip service has on occasion been given here, but which since the days of Marshall this court has rejected, especially in practice.

"A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated." (Citations omitted.) United States v. Monia, 317 U.S. 424, 431-32 (1943) (Frankfurter, J., dissenting).

construction are not Commandments; the "plain meaning rule" is "an axiom of experience [not] a rule of law";[9] and "even the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent."[10]

"Of course it is true," as Judge Learned Hand has written, "that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery in the surest guide to their meaning."[11] Because "words are inexact tools at best," modern Supreme Court decisions teach that "there is wisely no rule of law forbidding resort to explanatory legislative history no matter how clear the words may

---

9 / Boston Sand and Gravel Co. v. United States 278 U.S. 41, 48 (1928)(Holmes, J.).

10/ National R.R. Passenger Corp. v. Passenger Ass'n, 414 U.S. 453, 458 (1974).

11/ Cabell v. Markham, 148 F.2d 737, 739 (2nd Cir.), affirmed, 326 U.S. 404 (1945).

appear on superficial examinations."[12/] Accordingly, it is "fundamental that a section of a statute should not be read in isolation from the context of the whole act," and that "in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" Richards v. United States, 369 U.S. 1, 11 (1962) (quoting United States v. Boisdoré's Heirs, 49 U.S.(8 How.)113, 122 (1850) (Taney, Ch. J.)); Philbrook v. Goldgett, 421 U.S.

12/ Harrison v. Northern Trust Co., 317 U.S. 476, 479 (1943). Accord: United States v. American Trucking Association, 310 U.S. 534, 543-44 (1940); Cass v. United States, 417 U.S. 72, 77-79 (1974). The staff cites (inter alia) Caminetti v. United States, 242 U.S. 470 (1917), as contrary authority (Br. p. 5). The majority there interpreted the Mann Act, 36 Stat. 825, which forbade the taking of a woman across state lines for purposes of "prostitution or debauchery, or for any other immoral purpose", to apply to the defendant's trip from Sacramento to Reno with a woman not his wife. Based on the Act's legislative history, the minority dissented on the ground that the statute was meant to reach the "white slave trade", not voluntary sportive ventures such as Mr. Caminetti's. Quaere whether Caminetti would be similarly decided today.

707, 713 (1975).[13]

In short, in construing statutes, "context and purpose outweigh syntax."[14] We therefore turn to an examination of the "grandfather clause" in context, and look into the situation it was meant to redress and at the way in which it was to harmonize with related provisions of the Atomic Energy Act.

13/ See Arthur W. Murphy, Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Construction in the "Modern" Federal Courts, 75 Colum. L. Rev. 1299, 1315-16 (1975). Professor Murphy served for many years as a member of the Atomic Safety and Licensing Board Panel. He observes in his article that

> For the courts to swear off the plain meaning rule would not in and of itself bring about a coherent approach to legislative interpretation, but it would be a start. It should help to remind the courts that no words have a fixed meaning good for all circumstances and time; that, while most situations will be free from doubt, once a 'reasonable conflict of probabilities presents itself, they can no longer pretend that a dictionary is all the guide they need. Abandonment of the plain meaning rule should also force the courts to rationalize the use of legislative history. * * * In many cases [the rule] seems to be used as a heaven-sent excuse not to undertake the tedious 'archeological' inquiry into the bones and potsherds of legislative history so painstakingly marshalled by counsel. Frequently, one can almost hear the sigh of relief accompanying the 'no need to resort' language. But understandable as that reaction is, ignoring relevant history does not solve the problem.

14/ Kansas Gas and Electric Company et al. (Wolf Creek, Unit 1), ALAB-321, NRCI-76/4 ____ (April 7, 1976) (slip opinion p. 32).

2. The problems which Congress sought to put to rest by amending section 105c in 1970 are described in detail in the report of the Joint Committee on Atomic Energy on the proposed amendments.[15/] It is sufficient for our purposes to note that, prior to the passage of those amendments, no power reactor could be licensed for commercial purposes under section 103 of the Act until the Atomic Energy Commission made "a finding in writing" that the proposed facility "has been sufficiently developed to be of practical value for industrial or commercial purposes."[16/] Before 1970, the Commission had declined to make any such finding and had, therefore, licensed all nuclear power plants as "research and development" reactors under section 104b of the Act. This avoided a number of serious problems which would come to the surface upon any finding of "practical value."[17/] Among them were the extent of the Commission's obligation to take the antitrust laws into account in granting commercial licenses and the manner in which it should do so. Under

---

15/ H.R. Rep. No. 91-1470 (also S. Rep. No. 91-1247), 91st Cong., 2nd Sess. (1970) ("Joint Committee Report").

16/ Joint Committee Report, p. 8.

17/ Id. at 13.

section 104b, such considerations were unnecessary; under section 103 they were mandatory. The difficulty lay in the fact that the standards to be applied and the procedures to be followed under section 103 were less than clear.[18/]

The situation was apparently brought to a head in 1969 by the decision of the Court of Appeals for the District of Columbia Circuit in Cities of Statesville v. A.E.C., 441 F.2d 962 (in banc). This was an action by municipal organizations claiming to have been improperly excluded from utility company ventures to construct and operate nuclear power plants. The municipalities asserted that the AEC had erred in denying their petitions to intervene in construction permit proceedings to challenge the utilities' applications on anti-trust grounds. The Commission had denied intervention because it had not yet made a "practical value" determination and was treating all applications for permits to construct nuclear power plants as coming under section 104b. As we noted, anti-trust considerations were irrelevant to the grant or denial of such "research and development" permits.

The municipalities sought to overturn the Commission's rulings in the District of Columbia Circuit. The Court of Appeals, however, upheld the agency's award of construction

---

18/ Id. at 12-13.

permits under section 104b. But, in doing so, it warned the Commission that when the time came to consider operating licenses for the plants, "if the trade [had] shown that these nuclear reactors are competitive in the commercial sense and it is clear that a commercial license is appropriate, then the Commission must consider, under section 105(c), anticipatory antitrust impact." Cities of Statesville, supra, 441 F.2d at 974.[19/]

It became evident in 1969 that the time was fast approaching (if it had not already arrived) when nuclear power plants would have to be recognized as commercially competitive.[20/] Congress elected to deal with this issue itself rather than leave it entirely in the hands of the Commission. To this end the Joint Committee held extensive hearings on the subject of "Prelicensing Antitrust Review of Nuclear Power Plants."[21/] The Committee heard from

---

19/ See also 441 F.2d at 979 (concurring opinion of Judge McGowan), 984 (concurring opinion of Judges Leventhal, Wright and Robinson), and 994 (partial dissent of Chief Judge Bazelon).

20/ "Technology has proceeded, and now it is quite obvious that nuclear power has commercial value, and this seems to have overtaken the present law." Remarks of Representative Hosmer, 116 Cong. Rec. 9447 (daily ed. Sept. 20, 1970); See also Cities of Statesville, supra, 441 F.2d at 992-95 (dissenting opinion of Chief Judge Bazelon).

21/ Hearings before the Joint Committee on Atomic Energy on Prelicensing Antitrust Review of Nuclear Power Plants, 91st Cong., 1st Sess. (Part I, 1969) and 2nd Sess. (Part 2, 1970). (Hereafter cited as "Hearings.")

individuals whose major concern was that needed nuclear power plants not be delayed, as well as from those who feared that without mandatory prelicensing antitrust review the smaller municipal and cooperative utilities would never get their fair share of nuclear-generated power.[22/]

22/ Compare, for example, the testimony of Mr. James H. Campbell, President of the Consumers Power Company, a Michigan utility (opposing antitrust review), with that of Mr. J. O. Tally, Jr., General Counsel, Electric Cities of North Carolina (supporting prelicensing review) at Hearings, Vol. 2., pp. 481 ff. and 515 ff. The Joint Committee Report itself made note of the dichotomy of opinion on this subject (p. 14):

> Of course, the committee is intensely aware that around the subject of prelicensing review and the provisions of subsection 105c., hover opinions and emotions ranging from one extreme to the other pole. At one extremity is the view that no prelicensing antitrust review is either necessary or advisable * * *. Additionally, there are those who point out that it is unreasonable and unwise to inflict on the construction or operation of nuclear power plants and the AEC licensing process any antitrust review mechanism that is not required in connection with other types of generating facilities. At the opposite pole is the view that the licensing process should be used not only to nip in the bud any incipient antitrust situation but also to further such competitive postures, outside of the ambit of the provisions and established policies of the antitrust laws, as the Commission might consider beneficial to the free enterprise system. The Joint Committee does not favor, and the bill does not satisfy, either extreme view.

The legislation which emerged from the Joint Committee -- particularly the amendments to section 105c -- represented a compromise between those competing values. Representative Hosmer, the ranking minority member of the Joint Committee, stressed this fact during the House debates on the measure (116 Cong. Rec. 9446 (Daily ed. Sept. 30, 1970)):

> The committee and its staff spent many hours on the standard and the procedures described in the clarified, revised version of subsection 105(c). The resulting product is a fair, reasonable compromise which the committee unanimously approved. Frankly, I do not like each and every ingredient aspect of subsection 105(c) in the bill, and I do not know a single committee member who does. However, there are many aspects which I do favor, and this, too, represents the opinion of each of my colleagues on the committee. In its totality -- as a package product -- revised subsection 105(c) represents a desirable improvement of the present provisions, and I, together with all the members of the joint committee, support it. (Emphasis added.)

Senator Pastore, Vice Chairman of the Joint Committee, made the same point to the Senate (116 Cong. Rec. 19, 253 (Daily ed. Dec. 2, 1970)):

> The end product, as delineated in H.R. 18679 [the bill embodying the 1970 Atomic Energy Act Amendments], is a carefully perfected compromise by the committee itself; I want to emphasize that it does not represent the position, the preference, or the imput of any of the special pleaders inside or outside of the Government. In the committee's judgment, revised subsection 105c., which the committee carefully put together

> to the satisfaction of all of its members, constitutes a balanced, moderate framework for a reasonable licensing review procedure. (Emphasis added.)

The 1970 amendments were enacted as proposed by the Joint Committee. In brief, they eliminated the need for the Commission to find "practical value" before licensing power reactors under section 103,[23] converted construction permit appliations for power reactors pending under section 104b to section 103 applications (with exceptions not relevant here)[24] and established formal antitrust review procedures involving the participation of both the Attorney General and the Commission.[25]

As we have mentioned, Senator Pastore and Representative Hosmer had alluded to the fact that the 1970 amendments embodied a compromise between those favoring prelicensing

---

23/ Section 102, 42 U.S.C. §2132, which had formerly embodied the requirement that the Commission find "practical value" before licensing commercial reactors under section 103, was amended in the 1970 legislation to delete that requirement. See Joint Committee Report, pp. 13, 26.

24/ Section 102a, 42 U.S.C. §2132(a), was amended to require after December 19, 1970, all licenses for commercial nuclear facilities to be issued under section 103. Sections 102b and 102c embody exceptions to that policy which are not relevant, however, to construction permit applications on file as of that date, the case here.

25/ See Joint Committee Report at pp. 28-31 and Kansas Gas and Electric Company (Wolf Creek Unit 1), ALAB-279, NRCI-75/6, 559 (1975).

review in all cases[26/] and those opposed because fearful of delaying needed power plants. That compromise covered (among other things) the need for and the timing of the antitrust review. In substance, existing and planned nuclear power generating facilities were classified in accordance with the progress they made though the Commission licensing process as of December 19, 1970 (when the 1970 amendments took effect). Those power plants which had previously been given operating licenses under section 104b were treated as having completed the licensing process; they were exempted from any further antitrust review.[27/] A second group was composed of plants still in the planning stage for which no construction permit applications had been filed. For these plants, which had not yet begun the Commission licensing process, completion of antitrust review was made

---

26/ Senator Aiken, one of the main proponents of section 105c, was among those adamant on prelicensing antitrust review. See, Hearings, Vol. 2, pp. 426, 447, 525-26 and 556.

27/ Section 102b, 42 U.S.C. §2132(b), provides that commercial facilities licensed to operate under section 104b before December 19, 1970 remain under that section even if future licenses are to be issued for them. Sections 105c(1), (2) and (3) dictate when antitrust review is required and do not encompass situations where a section 104b operating license was issued before December 19, 1970. The Joint Committee declined to require antitrust review for those reactors because it believed that to do so would impose an unnecessary hardship. Joint Committee Report at 26-27.

a prerequisite for a construction permit.[28] And, if circumstances changed, a further antitrust review would be needed before an operating license could issue.[29]

In the last category were placed those power plants with construction permit applications pending before the Commission at the cutoff date or which had yet to receive operating licenses. With certain exceptions not relevant to the Davis-Besse facility, these applications were also made subject to antitrust review. A facility in this group, however, could complete the particular stage of the licensing process on which it was then embarked and receive -- in advance of that antitrust review -- either a construction permit or an operating license (as the case might be) subject to modification in accordance with the ultimate outcome of that review. As we read the 1970 amendments to section 105c in light of their legislative history, the vehicle designed to reach this result was the "grandfather clause". It fits smoothly into the scheme of the Act for this purpose.

28/ Unless all the parties to the proceeding agreed otherwise. See, Louisiana Power and Light Co. (Waterford Unit 3), CLI-73-7, 6 AEC 48, 50 (1973) and CLI-73-25, 6 AEC 619, 621-22 (1973)

29/ Section 105c(2), 42 U.S.C. §2135(c)(2).

As we noted, the basic premise under section 105c is that where antitrust review is necessary, its completion is a prerequisite to receiving a license for construction or operation.[30/] Section 105c(1) requires antitrust review of facilities covered by section 105c(2) and (3). Section 105c(2) governs, inter alia, any "application for license to construct or operate a utilization * * * facility under section 103," viz., for a reactor intended for commercial or industrial use (as distinguished from one meant for research and development purposes). Section 105c(2) would mandate prelicensing antitrust review of every application for a commercial power reactor were it not for section 105c(8). That clause provides, "[w]ith respect to any application for a construction permit on file [on December 19, 1970] which permit would be for issuance under Section 103", that the Commission "may issue a construction permit * * * in advance of" antitrust review. In short, section 105c(8) "grandfathers" -- i.e., authorizes prior to completion of antitrust review -- the award of construction permits applied for before the new antitrust procedures were instituted.

30/ See Waterford, supra, fn. 27.

Similarly, where an operating license application for what was in effect a commercial power reactor remained to be acted upon after the 1970 cutoff date and antitrust review had earlier been sought and denied for the reasons we explained (see pp. 12-13, supra), new section 105c(3) directed that such antitrust review was nevertheless to be conducted, if requested in writing within a specified period.[31/] Again, completion of that review would have been necessary prior to award of an operating license but for the "grandfather clause." It is free of that prerequisite because section 105c(8) provides that "with respect to any application for an operating license in connection with which a written request for an antitrust review is made as provided for in [section 105c(3)]" the Commission may issue the license "in advance" of that review.

The parties have drawn our attention to many statements the legislative history which speak in glittering generalities either of the imperative need for prelicense review or of the utmost importance of not delaying power plants. Only two items, however, directly address the situation we face here. The first and most persuasive is the Joint Committee Report

---

31/ 42 U.S.C. §2135(c)(3).

itself. It says (at pp. 31-32):

> Paragraph (8) [i.e., section 105c(8)] endeavors to deal sensibly with those applications for a construction permit which, upon the enactment of the bill into law, would have to be converted to applications under section 103. In some cases, there might well be hardships caused by delays due to the new requirement for a potential antitrust review under revised subsection 105c. Paragraph (8) would authorize the Commission, after consultation with the Attorney General, to determine that the public interest would be served by the issuance of a permit containing conditions to assure that the results of a subsequently conducted antitrust review would be given full force and effect. Paragraph (8) similarly applies to applications for an operating license in connection with which a written request for an antitrust review is made as provided for in paragraph (3).

We agree with the staff, the Attorney General and the City that, read against the background structure of the Act itself, the report indicates that the Joint Committee viewed the grandfather clause to cover only the two situations we described and did not actively consider its application to the circumstances at bar, i.e., where, though the pending construction permit application was "grandfathered," antitrust review is still incomplete with the need for an operating license fast ripening. And, as the staff's brief further points out (p. 14), this reading is confirmed by Representative Hosmer in his remarks during the floor debates on the amendments. Mr. Hosmer, addressing himself to section 105c(8) specifically, told the House (116 Cong. Rec. 9446-47

(Daily ed. Sept. 30, 1970)):

> I want to make it perfectly clear that the principle of no impediment and no delay applicable to the transition provisions of this bill applies equally to pending construction permit applications and to pending operating license proceedings. There is need for expedience in both instances. (Emphasis supplied.)

In sum, the structure of the 1970 Atomic Energy Act Amendments and their legislative history confirm that, in Congress' active contemplation at least, the grandfather clause was designed to allow only pending proceedings to achieve fruition unimpeded by the need for antitrust review. Nothing in the legislative history of the Act or in the way the 1970 amendments were drafted suggested any need to "grandfather" both the construction and the operating licensing proceedings for a reactor where the former were pending in 1970. The underlying reason for this is plain. Congress simply expected the antitrust review to proceed simultaneously with the hearing on the construction permit (albeit before different boards) and fully anticipated the former to be completed long before any need might arise to

consider the award of an operating license.[32/]

Thus, the Act makes no express provision for the situation now before us. We turn next, then, to whether such an exception may be implied. If the antitrust review of a nuclear power plant has not been completed, may an operating license nonetheless be granted in circumstances where the construction permit for that plant was, in the language of section 105c(8), "on file at the time of enactment into law of this subsection [in 1970]?"

32/ Joint Committee Report, pp. 15-16:

> The committee expects and will urge the Commission to make every reasonable effort to deal with the potential antitrust feature under subsection 105c. of the bill fully but expeditiously. Clearly, a separate board or boards should be utilized in the implementation of paragraphs (5) and (6) of subsection 105c. The Committee anticipates that all the functions contemplated by these paragraphs would be carried out before the radiological health and safety review and determination process is completed, so that the entire licensing procedure is not further extended in time by reason of the added antitrust review function.

In 1969-70, the time period for the safety review varied from one to two years. See Senator Pastore's remarks in the Senate, 116 Cong. Rec. 19253 (Daily ed. Dec. 2, 1970); testimony of J. Harris Ward, Chairman, Commonwealth Edison Co., Hearings at 392; testimony of Shearon Harris, Chairman and President of Carolina Power & Light Co., Hearings at 491.

IV

1. The applicants agree that there is nothing in the legislative history "to indicate that Congress even considered the possibility that what has transpired in [this] case could arise." (Br. p. 16). They stress, however, that this does not end the matter. Rather, they point out that it is our task, as it would be a court's, "to consider that answer the legislature would have made as to a problem that was neither discussed nor contemplated." (Br. pp. 17-18, citiations omitted). In their judgment, the premium Congress placed on "expeditious antitrust review" to insure prompt availability of low cost nuclear power requires that section 105c(8) be read to "grandfather" the operating license as well as the construction permit for Davis-Besse Unit 1. (Ibid.).

The opposing parties essentially espouse the view of the Board below that to do what applicants suggest "would be to rewrite the statute". As they see it, the legislature specified the two situations under which licenses might be grandfathered and, therefore, "it is not our role to assume that Congress had in mind other unspecified circumstances." LBP-76-2, NRCI-76/1 at 43.

We think the Licensing Board and the parties supporting its decision display too narrow an understanding of the role that the Commission -- or any other agency or court for that matter -- must play if it is to carry out the mandates of

Congress. We agree of course that the adjudicatory role should not usurp the legislative function. But it is impossible to draw a precise line where adjudication stops and legislation starts. "The margin between the necessary and proper judicial function of construing statutes and that of filling gaps so large that doing so becomes essentially legislative, is necessarily one of degree." United States v. Evans, 333 U.S. 483, 486-87 (1948).[33/]

Thus the courts often do effect additions to a statutory pattern where they must in order to effectuate Congress' purpose. For example, in Cox v. Roth, 348 U.S. 207 (1955), the Court held that a seaman could sue the estate of a deceased tortfeaser even though the Jones Act did not explicitly provide for the survival of a claim against an individual.[34/] Another example is Hills v. Whitlock Oil

---

33/ Congress had amended the Immigration Act to make it criminal to "conceal or harbor" an alien; however, they failed to specify the penalty for doing so. In Evans, the government argued that the penalty for bringing in an alien illegally should apply. The Court refused because it found (1) no legislative history to support this construction (the Commissioner-General had repeatedly sought Congress to include this penal wording in the statute without success), and (2) "concealing and harboring" was a lesser offense than "bringing in" an alien. 333 U.S. at 490-93.

34/ The Jones Act extends to seamen the same rights granted to railroad employees by the FELA. The latter contained a provision allowing suit against receivers but not against a deceased individual because railroads, unlike ships, were rarely (if ever) owned by individuals. From this, the Court reasoned that Congress intended the Jones Act similarly to protect the employee's claim against the individual.

Services, 450 F.2d 170 (10th Cir. 1971). There, the court of appeals held that a statute allowing the fee of a United States marshal for the cost involved in the "seizing and levying" of property also included costs due to "execution and judicial sales."[35/] In short, in appropriate circumstances, adjudicators may "[r]esort to the policy of a law * * * to ameliorate its seeming harshness or to qualify its apparent absolutes."[36/]

Just as it has long been accepted as the duty of the courts, when the occasion arises, "to say that however broad the language of the statute may be, [an] act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute,"[37/] so is it a recognized adjudicatory responsibility to determine whether a situation not specifically anticipated by Congress is,

---

35/ Also see SEC v. Capital Gains Research Bureau, 374 U.S. 180, 198 (1963), where the Court held that the omission from the Investment Advisers Act of 1940 of a specific prohibition against nondisclosure, such as is contained in the Securities Act of 1933, did not render the SEC powerless to enjoin nondisclosure under the "fraud or deceit" provision of the 1940 Act.

36/ Cox v. Roth, supra, 348 U.S. at 209; Markham v. Cabell, supra, 326 U.S. at 409.

37/ Church of the Holy Trinity v. United States, 143 U.S. 46, 457, 472 (1892).

nevertheless, within the scope of an enactment.[38] In the recent words of Judge Leventhal:

> As we see it the issue must be viewed as one of legislative intent. And since there is neither express wording or legislative history on the precise issue, the intent must be imputed. The court must seek to discern and reconstruct what the legislature that enacted the statute would have contemplated for the court's action if it could have been able to foresee the precise situation. [39]

2. That we may depart from a literal reading of a statute in order to give it the effect Congress intended is one matter; whether we should do so in this case is another. Here we have legislation which embodies not one but two competing policies: no delay in licensing nuclear plants versus no licenses without antecedent antitrust review. Our perusal of the legislative history does indicate that the former was, as the applicants say, an important congressional consideration. But we cannot agree with them that it was the overriding consideration.

The statute undeniably contemplates that the award of all post-1970 applications for construction permits -- a far larger class than the one into which applicants fall --

---

38/ Burnet v. Guggenheim, 288 U.S. 280, 285 (1933) (Cardozo, J.).

39/ International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 648 (D.C. Cir. 1973). Accord: Montana Power Co. v. FPC, 445 F.2d 739, 746 (D.C. Cir. 1970) (in banc), certiorari denied, 400 U.S. 1013 (1971).

must await the result of prelicensing review. Congress recognized this fact when it provided for separate boards to enable the Commission to consider the health, safety and environmental and the antitrust aspects of applications simultaneously. But, as we noted (supra, pp. 19-20), should the latter proceeding continue beyond the former, no permit may be issued until the antitrust review is over. We think that this indicates a congressional concern to avoid delay, but not at the expense of prior antitrust review except where specified in the Act. We believe our judgment in this respect is confirmed by section 105c(2) of the Act. Under this provision -- also enacted as part of the 1970 Amendments -- even if prelicensing antitrust review was completed at the construction permit stage, an operating license may be withheld pending further such review where the applicant has significantly changed its activities or proposed activities in the interim. See Joint Committee Report at 29.

In short, as the Attorney General stresses -- and as we noted earlier in this opinion (p. 16, supra) -- the legislative history of the 1970 Amendments discloses that they were "a carefully perfected compromise" and

> There is every evidence that section 105c as a whole represents a careful balance of the need for electric power and the Congress' expressed interest in reinforcing, in the context of the Atomic Energy Act, the fundamental economic policies contained in the antitrust laws. 40/

Precisely because this is a situation where Congress was acting with deliberate care to accommodate competing -- and to some extent incompatible -- interests, we must hew carefully to the line which it elected to draw. We can say with confidence only that the case before us was not within Congress' awareness when it amended section 105c in 1970. What the national legislature would have done had it thought the matter is not certain. As the briefs before us demonstrate, a fair case can be made both for and against "grandfathering" the Davis-Besse operating license. But no one can say with any real assurance that Congress would have wanted that license to be granted before its antitrust review was complete. In these circumstances, we must reject

---

40/ Dept. of Justice br. p. 9 (footnote omitted).

the applicants' arguments and affirm the ruling of the Licensing Board.[41/]

3. In ruling against the applicants we are not unmindful of equities on their side. But it is in the nature of disagreements settled by compromise to be ragged at the edges. Lack of neatness, however, is no reason to refuse to give effect to a bargain fairly struck, whether in the legislature or elsewhere. Moreover, it is far from clear that this compromise will not in fact accommodate all the facilities caught in the "transition" to prelicense antitrust review. Only this plant and the Farley facility have received "grandfathered" construction permits but have not obtained operating licenses. Farley, we are given to understand, is still a good way from completion and, as we write,

---

41/ We are aware that our holding means that Davis-Besse Unit 1 may not be licensed before its antitrust review is complete although another provision of the Act, section 105c(6), 42 U.S.C. §2135(c)(6), authorizes the Commission to license nuclear facilities found to cause adverse antitrust consequences after that review is completed. The anomaly is more apparent than real. The legislative history makes it very clear that the Commission was to resort to authority under section 105c(6) sparingly. It was to be invoked only in the exceptional case where the power from the plant is vitally needed and the antitrust impact of its operations cannot be otherwise ameliorated. See, Joint Committee Report, p. 31. See also the remarks of Senators Aiken, Metcalf and Hart in the debates on the 1970 Amendments. 116 Cong. Rec. 19254-57 (Daily ed. Dec. 2, 1970).

the antitrust trial involving that plant is drawing to a close. It also remains possible that the instant proceeding, too, may end before an operating license is needed for Unit 1.

In this bicentennial year we may be pardoned for recalling Edmund Burke's cogent observation that "[a]ll government -- indeed every human enjoyment, every virtue and prudent act -- is founded on compromise and barter." The compromise embodied in section 105c(8) has a virtue often lacking in such accommodations; it comes very close to satisfying the desires of all concerned -- if in fact it does not do so completely. We have no hesitation in deciding that it must be enforced as written. Accordingly, the ruling referred to us by the Licensing Board is affirmed.

It is so ORDERED.

FOR THE ATOMIC SAFETY AND LICENSING
APPEAL BOARD

Margaret E. Du Flo

Margaret E. Du Flo
Secretary to the
Appeal Board